SECRETARY OF LABOR, Complainant, v. MAYFLOWER VEHICLE SYSTEMS, INC., Respondent.	OSHRC Docket No. 99-1319

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

Mayflower Vehicle Systems, Inc. ("Mayflower") manufactures truck parts at its plant in Shadyside, Ohio. On June 20, 1999, one of Mayflower's "team leaders" was seriously injured when one of his hands was partially amputated by an "OBI 200" mechanical power press. Shortly after the accident, Bruce Bigham, a safety specialist with the Occupational Safety and Health Administration ("OSHA"), inspected the press. As a result, on June 28, 1999, OSHA issued a citation alleging serious violations of three mechanical power press standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (the "Act"). The Secretary later withdrew two of the items. After a hearing, Administrative Law Judge Michael H. Schoenfeld affirmed the remaining item–Citation 1, Item 2–and reclassified it as *de minimis*. The Secretary petitioned for review, and review was granted on the sole issue of whether the judge erred in reclassifying the violation as *de minimis*.[1] For the following reasons, we find that the violation was not *de minimis,* affirm it as serious, and

[1]Mayflower filed a Conditional Cross-Petition for Discretionary Review, arguing that the Commission should also consider "pre-accident misconduct . . . which [led] or contributed to" the injury. This evidence was rejected by the judge, and the issue was not directed for review.

assess a penalty of $2000.

I. Whether the Judge Erred in Reclassifying the Violation of 29 C.F.R. § 1910.217(c)(3)(vii)(*d*) as *De Minimis.*

The mechanical power press involved in the accident, the OBI 200, was used to stamp, among other things, bumpers for 18-wheel trucks out of large pieces of metal. It was used intermittently, at frequencies varying from "every other day" to "at least every month." The press was activated with a "palm button station," a two-hand control device mounted on a "T-stand." An "extendable arm" was generally used to affix the stand to one of the following: the frame of the press; a table that was generally kept next to the press to hold materials; the "bolster plate" that held the die in the press; or some other object. Mayflower's "rule of thumb" was to have the stand bolted 36 inches from the point of operation during a job,[2] but the record shows that this was not always done. Item 2, as amended, alleges a serious violation of 29 C.F.R. § 1910.217(c)(3)(vii)(*d*)[3] because "[o]n and prior to June 23, 1999, in the OBI Department, the two[-]hand control for the Verson No[.] 7 ½ mechanical power press (Serial No. 5640) was not secured to prevent the operator or other employees from moving the controls."

The judge affirmed a violation, finding that "the two-hand control stand for the OBI 200 press was not consistently bolted in place during the operation [and] that employees

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[2]The "safety distance" that must be maintained between the controls and the point of operation is governed by a formula stated in 29 C.F.R. § 1910.217(c)(3)(vii)(*c*), which was not cited here. Estimates of the actual required safety distance for the OBI 200 varied from just under 15 inches to 18 inches, based on Mayflower's data.

[3]The cited standard provides:

> **§ 1910.217 Mechanical Power Presses**
> . . .
> (c) *Safeguarding the point of operation.*
> . . .
> (3) *Point of operation devices* . . . (vii) . . . (*d*) Two hand controls shall be fixed in position so that only a supervisor or safety engineer is capable of relocating the controls.

other than supervisors and safety engineers could relocate the stand" by unscrewing a bolt by hand or with a commonplace wrench. While acknowledging that any employee, supervisory or not, could move the control stand "too near to the press which could have resulted in an injury," he reasoned that "[o]n the other hand, any employee could . . . move the control stand farther away which, although a violation of the standard, would not have created a hazard." As a result, the judge concluded that Mayflower's noncompliance "was *de minimis* because standing alone, it did not necessarily result in a safety hazard."

We disagree. Section 9(a) of the Act indicates that violations are *de minimis* when they "have no direct or immediate relationship to safety or health." 29 U.S.C. § 658(a). "A violation should be classified as *de minimis* when there is technical noncompliance with a standard but the violation has such a negligible relationship to the safety or health of employees that it is not appropriate to order abatement or assess a penalty." *See Whiting-Turner Contracting Co.,* 13 BNA OSHC 2155, 2156, 1987-90 CCH OSHD ¶ 28,501, p. 37,771 (No. 87-1238, 1989). We find no basis in the record for concluding that Mayflower's failure to comply with the cited standard had a negligible relationship to safety. The standard requires that the controls be fixed in position so that only a supervisor or safety engineer is capable of relocating them. It supplements the requirement of section 1910.217(c)(3)(i)(*e*) and (iii)(*e*) that two-hand controls be separated from the point of operation by a certain calculated distance. Moving the controls too close to the press' point of operation would clearly expose the machine's operator to the hazard posed by the point of operation.[4] The standard operates to reduce that possibility. We therefore find that the judge erred in classifying the violation as *de minimis*.

Mayflower's duty to comply with the standard and ensure that "only a supervisor or

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[4]We see no basis for inferring, as the judge apparently did, that the Secretary's withdrawal of the other mechanical power press citations amounted to a concession that the point of operation posed no hazard. *See Seibel Modern Mfg. & Welding Corp.,* 15 BNA OSHC 1218, 1223-24, 1991-93 CCH OSHD ¶ 29,442, pp. 39,679-81 (No. 88-821, 1991) (and cases cited therein).

safety engineer is capable of relocating the controls" is not affected by whether employees might make correct safety decisions that enhance safety, such as moving the stand farther away. Indeed, the standard is similar to a number of other standards that require oversight or inspection by certain classes of people before work takes place. *See DiGioia Bros. Excavating, Inc.,* 17 BNA OSHC 1181, 1184, 1993-95 CCH OSHD ¶ 30,751, p. 42,723-3 (No. 92-3024, 1995) (serious violation where the lack of adequate inspections by a competent person posed the same hazard as failing to adequately protect employees in an excavation from cave-ins); *Aviation Constructors, Inc.,* 18 BNA OSHC 1917, 1918, 1921-22, 1999 CCH OSHD ¶ 31,933, pp. 47,374, 47,378-79 (No. 96-0593, 1999) (willful violation where the employer's excavation protection system was not approved by a registered professional engineer); *cf. Archer-Western Contractors Ltd.,* 15 BNA OSHC 1013, 1016 & n.5, 1991-93 CCH OSHD ¶ 29,317, pp. 39,376 n. 5, 39,377 (No. 87-1067, 1991) (willful violation where, *inter alia,* employer assigned no "qualified engineers competent in this field" to determine whether a crane was capable of lifting a particular load), *aff'd,* 978 F.2d 744 (D.C. Cir. 1992).

Furthermore, we find that the violation was serious as alleged.[5] Under Commission precedent, a violation is serious if, in the event of an accident, there is a "substantial probability that the result would be death or serious physical harm." *George C. Christopher & Sons, Inc.,* 10 BNA OSHC 1436, 1446, 1982 CCH OSHD ¶ 25,956, p. 32,533 (No. 76-647, 1982). A serious violation only requires proof that the harm "could have occurred." *Dec-Tam Corp.,* 15 BNA OSHC 2072, 2077, 1991-93 CCH OSHD ¶ 29,942, p. 40,918 (No. 88-523, 1993). Here, if a stand was not properly fixed in position and an employee moved the stand close enough to the point of operation to contact it, the result of any such contact,

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[5]Mayflower cites two unreviewed judges' decisions affirming violations under the cited standard as *de minimis* and one affirming a violation as nonserious. Unreviewed judges' decisions do not constitute precedent binding upon the Commission. *See Leone Constr. Co.,* 3 BNA OSHC 1979, 1981, 1975-76 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976).

as the Secretary's witnesses testified, could be crushing or amputation. These potential injuries clearly fall within the meaning of "serious physical harm."

II. Penalty

Section 17(j) of the Act mandates that the Commission give "due consideration . . . to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). "The gravity of a particular violation depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id.*

Safety specialist Bigham testified that in calculating the proposed penalty of $5000, he considered the severity and probability of an injury as well as the employer's good faith, history, and size. He did not explain, however, how he balanced the factors. Because the judge found the violation to be *de minimis,* he did not assess a penalty. The Secretary requests that the $5000 penalty she proposed be assessed.

In our view, the evidence shows that the gravity of the violation is moderately low. The alleged violation involved only one press that was not used every day. The likelihood of injury was further diminished by the fact that Mayflower's team leaders frequently inspected the presses at the beginning of each shift. The record contains no specific evidence on the size of Mayflower's business. In regard to good faith, we note that Mayflower provided the two-hand controls to be used with the press, maintained a written safety program requiring that the controls be fixed in place, and used a rule of thumb in an attempt to keep the controls 36 inches from the point of operation which, according to the evidence presented here, was greater than the required safety distance for this press. In regard to history, we note that the record contains evidence of a 1999 violation, at a sister plant, of the cited standard, that was ultimately settled as nonserious with no penalty. On balance,

therefore, we find that a penalty of $2000 is appropriate.

III. Order

For the reasons set forth above, we affirm the violation of 29 C.F.R. § 1910.217(c)(3)(vii)(*d*) as serious and assess a penalty of $2000.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Date: September 5, 2001

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,

v. OSHRC DOCKET NO. 99-1319

MAYFLOWER VEHICLE SYSTEMS, INC.
Respondent,

USWA LOCAL NO. 9419,
Authorized Employee
Representative.

Appearances:

Anthony M. Stevenson, Esquire
Office of the Solicitor
U.S. Department of Labor
Cleveland, Ohio
For the Complainant

Ricklin Brown, Esquire
Bowles Rices McDavid Graff & Love, PLLC
Charleston, West Virginia
For the Respondent

Charles J. Robinson, Jr.
USAW Local No. 9419
St. Clairsville, Ohio
For the Authorized Employee Representative

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). On June 23, 1999, the Occupational Safety and Health Administration ("OSHA") visited Respondent's work site in Shadyside, Ohio. As a result of

the inspection, OSHA issued a citation to Respondent on June 28, 1999, alleging serious violations of the mechanical power press standards appearing in Title 29 of the Code of Federal Regulations ("C.F.R."). Respondent timely contested the citations. Following the filing of a complaint and answer, and pursuant to a notice of hearing, the case came on to be heard in Wheeling, West Virginia. Both parties have filed post-hearing briefs.[6]

Jurisdiction

It is undisputed that at all relevant times Respondent has been an employer engaged in the manufacture of truck parts. In addition, Respondent admits it handles goods or materials which have moved in interstate commerce. I find as fact Respondent was engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and the subject matter.

Facts

Respondent utilizes a machine called the Vernon OBI 200 press. The OBI 200 presses have two-hand controls mounted on moveable stands that, according to company policy, are to be bolted in place a safe distance from the point of operation; when a press is not in use, however, its control stand is unbolted and moved out of the way.[7] (Tr. 66, 270-71). The stand can be bolted in place to the press itself or to other locations, including totes, conveyors, racks or the bolster plate. (Tr. 25, 52, 63-65, 252-53, 258-60). In addition, the stand can be relocated by any employee by simply unscrewing the bolt by hand or using a commonplace tool such as a wrench. (Tr. 24, 51-52, 60-61, 78-79, 82, 275, 334-35).

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[6]Before the hearing, the Secretary vacated Item 1 of the citation, leaving only Item 2 at issue.

[7]Respondent's policy is to have a safety distance of 36 inches from the machine during operation. (Tr. 30-31, 34, 36).

On June 20, 1999, an employee who was operating an OBI 200 press had his hand partially amputated.[8] OSHA inspected the machine three days later pursuant to a formal complaint.

Discussion

Item 2 of Citation 1 alleges a serious violation of a machine guarding standard, specifically, 29 C.F.R. § 1910.217(c)(3)(vii)(d), which provides that "[t]wo hand controls shall be fixed in position so that only a supervisor or safety engineer is capable of relocating the controls." In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) noncompliance with the terms of the standard, (3) employee exposure or access to the hazard created by the noncompliance, and (4) that the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). I find that the cited standard applies and conclude that Respondent failed to comply with the standard's terms for the following reasons.

As set out above, the standard requires two-hand controls to be fixed in place so that only supervisors or safety engineers can relocate the controls. Respondent asserts that the two-hand control stand on the OBI 200 press was fixed in place during press operation. This, however, does not satisfy the terms of the standard, which expressly requires that two-hand controls be fixed in place *so that only a supervisor or safety engineer is capable of relocating the controls*. In any case, the evidence of record establishes not only that the two-hand control stand for the OBI 200 press was not consistently bolted in place during operation but also that employees other than supervisors and safety engineers could relocate the stand. One former employee testified that sometimes the press control stands were bolted in place during operation and that sometimes they were not and that, as to some presses, there was nowhere to bolt the stands. (Tr. 92-95). Another witness, a team leader, testified that the two-hand

[8]This particular OBI 200 press was used approximately once a month. (Tr. 41).

control stand for the cited press was never bolted in place and that before the accident there was nowhere to do so.[9] (Tr. 354-55).

Witnesses also testified that even when control stands were bolted in place, supervisors and safety engineers were not the only individuals who could relocate them. (Tr. 52, 78, 127, 334-35). In fact, the same former employee indicated above specifically testified that it was the press operator's responsibility to bolt the stand in place, although it was not always possible to do so, and that supervisors did not check the control stands regularly. (Tr. 89, 94-95). In addition, a group leader testified that he would "check" the stands and tell employees to re-bolt them if they were too close to the presses. (Tr. 50-51, 57-58). The record demonstrates that employees other than supervisors or safety engineers could relocate a press control stand simply by twisting off the bolt or bolts securing the stand by hand or by using a common tool, such as a wrench, to unbolt the stand. (Tr. 32, 52, 82, 95, 166, 171-75, 275). The record also demonstrates there was no mechanism in place to prevent employees from moving the press control stands, and the plant electrical engineer testified that there was nothing to impede an employee's ability to do so. (Tr. 24, 79). Respondent does not dispute these facts, and I therefore find that Respondent violated the terms of the standard.

The record shows that employees had access to the cited condition. Contrary to Respondent's assertion that employees had not actually operated the subject press or moved its control stand within the relevant time frame, Commission precedent does not require actual employee exposure to the cited condition. Rather, the Secretary need show only that employees had access to an area of potential danger based on reasonable predictability. The question of exposure is a factual one "to be determined by considering the zones of danger created by the hazard, employee work activities, their means of ingress-egress, and their comfort activities." *Dic-Underhill, a Joint-Venture*, 4 BNA OSHC 1489, 1490 (No. 3042, 1976). The question is whether, the employees, within reasonable predictability, were within

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[9]A team leader is an union employee, whereas a group leader is a non-union employee of the company. (Tr. 99, 103, 224). Group leaders supervise team leaders and other employees. (Tr. 40, 264-65). Although it is disputed whether team leaders are supervisors, it is undisputed that group leaders are supervisors. *See* footnote 7, *infra*.

the zone of danger created by the violative condition. *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1263 (4th Cir. 1974); *Adams Steel Erection*, 12 BNA OSHC 1393, 1399 (No. 84-3586, 1985). The Commission has held, however, that another guarding standard, 29 C.F.R. § 1910.212(a)(1), requires more than proof that employees could possibly come into contact with the unguarded machinery. There, the Commission held that the Secretary had to show that employees were exposed to the hazard "as a result of the manner in which the machine functions and the way it is operated." *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No.89-0553, 1992).

Although the cited press was not operated every day, Respondent's employees had access to the hazard within the relevant time period, it is undisputed that the press was regularly operated at least once a month. (Tr. 41). Furthermore, the CO testified that he was informed that the press had also been operated three weeks prior to the accident. (Tr. 112). Thus, there is substantial evidence that the machine was operated under conditions which violated the cited standard's requirements. Even if each operation was conducted with the hand buttons placed at least 36 inches from the point of operation, nonetheless, it was done while the controls were able to be moved by persons other than those authorized by the standard. Based on the foregoing evidence and inferences reasonably arising from that evidence, I find that employee access to the violative condition was reasonably predictable.[10]

The record reveals that Respondent had knowledge of the violative condition or could have had knowledge of the condition through the exercise of reasonable diligence. The cited press was in plain view on the plant floor where other, similar machines were located, and a group leader was on the floor of the plant overseeing the manufacturing operations. (Tr. 263-65). Respondent's safety engineer also toured the floor "spot checking" for safety violations several times a day, every day. (Tr. 232-33). The evidence thus demonstrates that

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[10]Even if the subject press was not operated regularly at least once a month, I would still find that employees had access to the hazard because the press and its control stand were located on the plant floor where employees had ready access to them on a daily basis. (Tr. 270-71).

Respondent had knowledge of the violative condition or could have had knowledge of it with the exercise of reasonable diligence.[11]

Respondent urges the accident was a result of an isolated incident of employee misconduct because the employee was operating the press without authorization. However, I need not resolve whether the employee operated the press without authorization. Although the accident triggered the OSHA inspection, my finding of a violation in this case is not based on the accident but on the witness testimony establishing that employees other than supervisors or safety engineers had relocated the control stand.[12] In any case, to prove the affirmative defense of unpreventable employee misconduct, the employer must show that (1) it had established work rules designed to prevent the violation, (2) it had adequately communicated the rules to its employees, (3) it had taken steps to discover violations, and (4) it had effectively enforced the rules when violations were detected. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). Respondent asserts that it had a written safety rule requiring "[p]alm buttons or other operating controls [to] be secured at the approved distance from the nearest pinch point." (Tr. 251-52; C-10). This rule was not designed to prevent the violation in this case because it did not prohibit employees from relocating the controls, and the rule says nothing about only supervisors or safety engineers being allowed to relocate controls. Moreover, even if the rule had been designed to prevent the violation, it was not communicated adequately to its employees, based upon the testimony of the former employee that operators were routinely considered to be responsible for affixing the control stand before using the OBI 200 press. (Tr. 89, 96). Based on the

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[11]Respondent was cited previously pursuant to the same standard at another plant located in South Charleston, West Virginia; there, the violation was ultimately designated as "unclassified, with no penalty." (Tr. 244, 253-54, 261; R. Brief, pp. 11-12).

[12]Respondent urges that the injured employee, a team leader, was a supervisor and was therefore permitted to relocate the control stand. This argument does not need to be resolved, since the evidence shows that employees other than supervisors or safety engineers had also relocated the stand.

evidence, Respondent has not met the first two elements of its affirmative defense. Its asserted defense is accordingly rejected.[13]

The Secretary alleges that the violation was serious. However, I reject this classification and find the violation to be *de minimis*. The Commission has the authority to re-characterize a violation as *de minimis* based on the facts of the case. *Erie Coke Corp.*, 15 BNA OSHC 1561 (No. 88-611, 1992), *aff'd*, 16 BNA OSHC 1241 (3d Cir. 1993); *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1315 (No. 89-2253, 1991). *De minimis* violations are those with no direct or immediate relationship to safety or health. Section 9(a) of the Act, 29 C.F. R. § 658(a). Stated another way, a violation is *de minimis* when there is technical noncompliance with a standard but the violation has such a negligible relationship to employee safety or health that it is not appropriate to order abatement or assess a penalty. *Whiting-Turner*, 13 BNA OSHC 2155, 2156; *Cleveland Consolidated*, 13 BNA OSHC 1114, 118; *Fabricraft, Inc.*, 7 BNA OSHC 1540, 1543 (No. 76-1410, 1979); *Rust Eng'g Co.*, 5 BNA OSHC 1183, 1184 (Nos. 12200 & 12201, 1977).

Based on the specific facts of this case, I conclude that Respondent's noncompliance with the cited standard was *de minimis* because, standing alone, it did not necessarily result in a safety hazard. The hazard contemplated by the standard is that of operators setting up their controls in such a location that they would be able to work too close to the point of operation. It is clear that any employee, supervisory or not, moving the control stand in this case too near to the press could have resulted in an injury. On the other hand, any employee could also move the control stand farther away which, although a violation of the standard, would not have created a hazard.. In light of this consideration, together with the fact that the citation item under another machine guarding standard was withdrawn by the Secretary, I find that the Secretary has not shown that employee safety and health were compromised by the violation of this standard standing alone. Thus, under the evidence presented in this case,

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[13]Also rejected is Respondent's assertion, as set out in its brief, that the means of compliance with the standard is vague and the Secretary's enforcement of the standard has been inconsistent. Respondent did not raise this defense in its notice of contest or answer nor did it present any evidence as to confusion or misunderstanding as to its requirements. Indeed, it was familiar with the standard. *See* footnote 6, *supra*.

I find that the violation of this standard, by itself, had a negligible relationship to employee safety or health. This item is therefore affirmed as a *de minimis* violation.

Findings of Fact

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

Conclusions of Law

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Act.

2. The Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in violation of 29 C.F.R. § 1910.217(c)(3)(vii)(d) as alleged in Citation 1, Item 2; the violation was *de minimis*, and no civil penalty is appropriate.

ORDER

1. Citation 1, Item 2 is AFFIRMED as a *de minimis* violation.
2. No civil penalty is assessed.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: December 22, 2000
Washington, D.C.