
SECRETARY OF LABOR,

Complainant,

v.

NATIONAL ENVELOPE CORPORATION d/b/a
NEW YORK ENVELOPE CO.

Respondent.

OSHRC DOCKET
NOS. 94-2968
94-3547

Appearances:

Evan R. Barouh, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Alexander S. Moser, Esq.
Moser & Moser, LLP
New York, New York
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Between February and November of 1994, OSHA conducted two separate inspections of National Envelope Corporation's ("NEC's") plant in Long Island City, New York, where it manufactures envelopes of various types. As a result of these inspections, NEC was issued a total of five citations, four of which comprise docket number 94-2968, the remaining citation appears under docket number 94-3547. These cases have been consolidated. The inspections were conducted by compliance officers Cheryl Washington and Kevin Brennan, respectively. During the course of Washington's major inspection, she was accompanied on two occasions by Robert Zurlo, a compliance officer who conducted an inspection of the same NEC plant in 1991. A 1992 citation arising out of Zurlo's 1991 inspection serves as the basis for the Secretary's allegations of repeat violations under the current citations (Tr. 2444-45, 3583; Exhibit C-6).

TRAINING THE MACHINE OPERATOR

On November 4, 1994, NEC was issued a citation alleging serious violation of the machine guarding standard at 29 CFR § 1910.219(f)(1). This citation is docketed as 94-3547. In her complaint, the Secretary amended the citation to allege instead violation of a lockout/tagout training standard set forth at § 1910.147(c)(7)(iii)(A) or, in the alternative, the general duty clause of

§ 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1).¹ Section 1910.147(c)(7)(iii)(A) requires an employer to provide retraining for all authorized and affected employees whenever there is a change in their job assignments, a change in machines, equipment or processes that present a new hazard, or when there is a change in the energy control procedures. According to the Secretary, Mariano Mendoza, an NEC machine operator, was given a new job assignment, but not provided with the appropriate lockout/tagout training. It is undisputed that Mendoza was hired by NEC in 1988 to operate a rotary window (RW) machine which manufactures window envelopes (Tr. 47, 89-95, 391, 417; Exhibit R-9).² Under the general duty clause, the Secretary alternatively alleges that as an operator, Mendoza was not properly trained to keep his hands and other parts of his body out of the RW machine's points of operation and other dangerous parts as set forth in the American National Standards Institute's ("ANSI") safety requirements for envelope manufacturing machinery (Exhibit C-2).³ The Secretary contends that as a result of NEC's failure to train Mendoza, he sustained an injury to his right index finger, two-thirds of which had to be amputated (Tr. 145-46, 158-59, 209).

Mendoza testified that on August 8, 1994, the night his injury occurred, he arrived early for his shift and was told by the previous machine operator that the RW machine to which he was assigned, RW-2, had a problem with the "chip collector". (Tr. 46, 52, 60, 103). The chip collector is a metal tray or bin which hangs underneath the machine and collects the pieces of paper cut out of

¹ At the hearing, compliance officer Brennan, who recommended that the violation be issued under the machine guarding standard, conceded that the cited machine's gears were, in fact, guarded by location (Tr. 208-09).

² To produce window envelopes on this type of machine, the operator feeds stacks of paper or "blanks" into the machine, each of which are cut with a die, leaving a rectangular opening that serves as the envelope's window (Tr. 47-48, 419, 438-39). After seal gum and cellophane are applied, the blank is folded to create a finished envelope (Tr. 47-48, 419, 438-39; Exhibit R-12).

³ The cited ANSI standard, B169.1990 § 4.3.1(3), provides in part as follows:

4.3.1 *Operator Training*. Before being permitted to operate a machine independently, the operators shall be trained to:

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*

(3) Keep hands and other parts of the body out of the points of operation and other dangerous parts of the machinery when in operation.

each blank to create the envelope's window. Mendoza checked the collector and saw that it was "broken". When questioned on direct examination he repeatedly stated that the chip collector was "broken", or a "part was broken". When asked to explain "what specifically was broken," Mendoza again simply replied that "the chip collector was broken". He then went on to testify that before he started operating the machine, he got supervisor Nestor Pastor to take a look at the problem (Tr.61): "I told him to look and see how the chip collector was broken and not in the right position, and I asked for it to be fixed so that I could work on it". According to Mendoza, the chip collector was not functioning correctly, allowing the paper pieces, or "chips", to fall onto the envelopes and stick to the window gum and envelope sealant (Tr. 52, 60-64, 121, 140-143, 257, 333, 438; Exhibit R-13).

According to Mendoza, repairing a chip collector was a task performed by an adjuster, the NEC employee responsible for servicing and maintaining the manufacturing machines (Tr. 65-66, 68-69, 101-02). Mendoza stated that on four separate occasions throughout his shift, he asked supervisor Pastor to have the RW-2 machine's chip collector repaired by an adjuster (Tr. 61-63). He maintained that Pastor first told him to simply keep working on the machine as it was, then that there was no adjuster available to repair it, and finally that since he knew how to repair the chip collector himself, he should do so (Tr. 62-64, 68, 70-71, 106). According to Pastor, however, Mendoza never discussed the chip collector with him that evening (Tr. 333, 352-53, 370-71). In fact, Pastor testified that when he checked the RW-2 machine immediately after learning of Mendoza's accident, the chip collector was functioning properly (Tr. 339).

Mendoza also claimed that on three separate occasions, he asked an adjuster who was working overtime from the previous shift if he would repair the RW-2 machine's chip collector and the adjuster told him to wait until he was finished with other work (Tr. 69, 103-06, 332-33, 367-68).⁴ Although he admitted that he did not actually know how to do so, Mendoza decided to fix the chip collector himself (Tr. 71-72, 108-09, 121). In his attempt to make the repair, his finger was injured when it came into contact with a moving part of the machine (Tr. 73, 112).

⁴ The adjuster assigned to Mendoza's department that night did not report for work (Tr. 332-33, 367). However, Pastor and NEC's safety director, Kenneth Heym, testified that on the night of Mendoza's accident, there were approximately 12 to 14 adjusters present on the manufacturing floor and available to perform repair work (Tr. 331-32, 445).

There is some dispute over exactly how Mendoza sustained his injury. Mendoza testified that his hand was pulled up into the RW machine by its vacuum system and his fingers became tangled in the moving gears located above the chip collector (TR. 109-11, 121, 260, 338, 356; Exhibit R-7). However, both supervisor Pastor and safety director Heym testified that the vacuum systems on the RW machines were not operational for at least a year prior to the accident (TR. 334-35, 446). In addition, both men testified that there are no moving parts in the immediate area of the chip collector; the nearest moving parts are gears which are located about 8 to 10 inches above and to the right of the chip collector (TR. 338-39, 361-63, 450-51). When questioned on rebuttal, Mendoza admitted that the nearest moving parts were gears located about eight inches above the chip collector (TR 477).

The Secretary contends that Pastor essentially changed Mendoza's job assignment from operator to adjuster when he told Mendoza to repair the chip collector, a job for which the parties have stipulated Mendoza was not trained (Tr. 66-67, 209, 213, 284). But Mendoza's testimony is riddled with ambiguities and self-contradictions. For instance, he testified that the chip collector was "broken" and required repair, then explained that the "repair" consisted of merely lifting the chip collector back into position, without the use of tools (Tr. 60-61, 64, 121). This is inconsistent with Mendoza's claim that he sometimes assisted the adjuster in repairing the chip collector by handing him tools (Tr. 101-02). In any case, this much is clear: Mendoza acknowledged that repairing the chip collector (which apparently was a frequent occurrence) was always performed by an adjuster or his helper, and he admitted that supervisor Pastor did not order him to perform the repair work (Tr. 98-101, 106-07). Moreover, as previously noted, Mendoza admittedly did not know how to perform the repair work, which is consistent with NEC's job assignments (Tr. 114). Where there is no evidence to indicate that NEC's supervisory personnel said or did anything that would have led Mendoza to understand that he was assigned the job of repairing the chip collector, NEC was not required to retrain Mendoza pursuant to § 1910.147(c)(7)(iii)(A) (Tr. 98-107, 114).

In the alternative, the Secretary has alleged violation of the general duty clause, arguing in her complaint that by failing to train Mendoza to operate the RW machine in the manner outlined by ANSI B169.1990 § 4.3.1 (3), NEC failed to abate a recognized hazard. In making this argument, the Secretary contends that repairing the chip collector was a task that could, in fact, be performed

by an operator like Mendoza (Secretary's Post-Hearing Brief at 11-12). This would be consistent with the testimony of supervisor Pastor and safety director Heym, if the malfunctioning collector needed simple adjusting instead of repairing. Although both acknowledged that all machine repairs, including those involving the chip collector, were the responsibility of the adjuster, their testimony indicates that adjusting, i.e., *repositioning* a chip collector, was not actually repair work calling for an adjuster. It required nothing more than rehooking the tray into place underneath the machine (Tr. 351, 360-61, 370, 382, 420, 443-45, 462). Pastor and Heym also testified that neither tools nor special skills were needed to perform this task, and no special training beyond that of a machine operator (Tr. 361, 382, 444, 462-63).

In making her case under the lockout/tagout training standard, the Secretary argued that Mendoza was not properly trained when his job assignment was changed from operator to adjuster. In alleging a general duty violation under § 5 (a) (1), she argues that Mendoza was not properly trained as an operator. The Secretary's two-pronged attack seems to have caused her some confusion. In her post-hearing brief, the Secretary actually acknowledges that Mendoza, as an operator, received proper training when she claims, with regard to her alternative § 5(a)(1) allegation, that NEC "negated the *prior training it had given Mendoza, which was that he not place his hands into the machinery while it was operating...when it directed him to perform...repair work on a machine that was in operation and was not locked out or tagged out*" (Brief at 14) (citations omitted) (emphasis added). This argument is inconsistent not only with the Secretary's allegation set forth in her complaint, but also with the requirements of the cited ANSI standard, which deal expressly with *operating* procedures, not repair or lockout/tagout procedures. Moreover, any argument based on the assumption that Mendoza was "directed to perform...repair work" on the chip collector must fail given the conclusion reached with regard to the Secretary's allegation under the lockout/tagout standard.

The record clearly establishes that Mendoza was an experienced RW machine operator who received adequate safety training from NEC, particularly in machine operation. Upon his hire in 1988, Mendoza was assigned to work with an experienced adjuster and/or operator to learn and observe the operation of the RW machine (Tr. 88-92, 418-19). After a few days, Mendoza began working on the RW machine on his own and he operated this type of machine almost exclusively for

the six years prior to his accident (Tr. 92-93, 96-97, 418). In 1991, he received a certificate of completion for participating in an NEC operator training course whose accompanying materials specifically discuss safe machine operating procedures and include the admonition: “Never place your hands in moving parts of the machine” (Tr. 76-80, 146-51, 427-28, 432-33, 437; Exhibits C-1 & R-1 at 2.2, 9.3). NEC has a general safety program, a lockout/tagout program, and an employee safety manual, a copy of which Mendoza received (Tr. 230-31, 272-80, 421-23; Exhibits R-4 & R-10). As part of its safety program, NEC showed employees a safety video which refers to the dangers of moving parts in machinery (Tr. 401-03, 425-26; Exhibit R-8).

Where the Secretary has alleged that NEC’s safety training was inadequate, it is her burden to identify the additional steps NEC should have taken to address the cited hazard, as well as to show that a knowledgeable person familiar with the industry would regard such additional measures as necessary and appropriate given the circumstances existing at the plant. *Connecticut Light & Power Co.*, 13 BNA OSHC 2214, 2218, 1987-90 CCH OSHD ¶ 28,508 (No. 85-1118, 1989). Here, there is nothing in the record to indicate what more NEC could have done to train Mendoza about the cited hazard nor is there any indication that NEC had reason to believe its training in this area was somehow deficient. Accordingly, the citation is vacated in its entirety.

Of the four citations listed under docket number 94-2968, only two contain matters which remain in dispute.⁵ In citation 2, the Secretary alleges four willful violations of various machine guarding standards and a lockout/tagout standard, for which a total penalty of \$265,000 is proposed. In citation 3, the Secretary alleges four repeat violations of various standards addressing hazard communication, lockout/tagout, and machine guarding, for which a total penalty of \$51,000 is proposed. In keeping with the manner in which they were presented at the hearing, the alleged violations are grouped by subject matter.

LOCKOUT/TAGOUT

Willful Citation 2, Item 1

⁵ Two of the citations were withdrawn by the Secretary: serious citation 1, alleging a violation of the general duty clause, was withdrawn during the hearing, and other than serious citation 4, alleging a violation of a reporting regulation, was withdrawn prior to the hearing (Tr. 302, 709; 5/16/96 Letter; Secretary’s Pre-Hearing Exchange).

Under this item, the Secretary alleges a willful violation of § 1910.147(c)(4)(i) which provides that energy control procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.⁶ According to Cheryl Washington, the compliance officer who conducted the inspection, two NEC adjusters failed to utilize energy control procedures while performing repair and service work on a WEB-3 envelope folding machine (Tr. 714-15; Exhibit R-16). It is undisputed that NEC has a written lockout/tagout program and that the machine in question was not locked out or tagged out when observed by Washington (Tr. 556, 675-76, 739, 770, 804, 809-10, 825-26, 849).

When Washington observed the WEB-3 machine, the two employees were in the process of replacing a clogged vacuum hose located underneath the machine (Tr. 551-52, 588, 659-60, 716, 770; Exhibits R-16 & R-17). One employee, Rafael Benitez, an adjuster, was working underneath the machine inside a “cavity” where the hose was located, while the other employee, Richard Hoffman, the head adjuster, stood next to the machine just outside the cavity (Tr. 635, 658, 665-66, 770, 819, 828-29; Exhibits R-16 & R-18). The cavity was about 21 inches high, 18 inches wide, and 30 inches deep (Tr. 748-49). As the adjuster assigned to the WEB-3 machine that day, Benitez was alerted to the clogged vacuum hose when a problem developed with the machine’s envelope production; the hose, which was designed to contain nothing but air, was clogged with glue and/or paper dust (Tr. 727-28, 739-40, 786, 789-90, 793, 800, 825, 844-45; Exhibit R-17).⁷ According to the adjusters, the hose replacement took only minutes to complete (Tr. 773-75, 829-30, 848).

When compliance officer Washington noticed during her observation of the WEB-3 machine that rollers positioned inside the machine’s gum tray were in motion, she concluded that the machine was still energized (Tr. 554-55, 608-12, 636, 747; Exhibit R-16). At that time, NEC’s vice-president

⁶ The Secretary amended this item to allege a repeat violation in the alternative (Tr. 600; Amended Complaint 12/18/95).

⁷ In addition to periodic repairs, Benitez testified that his job duties included observing the WEB-3 machine’s production, monitoring the level of glue in the tray, and checking the machine’s oil and air pressure levels (Tr. 799-802, 821, 824).

of engineering, Zory Ginzburg, explained that the rollers had to remain energized and operational while the vacuum hose was replaced in order to keep them moist and prevent the gum tray from drying out (Tr. 662, 731). He indicated to Washington that disconnecting the WEB-3 machine's main energy source for such a "quick repair" would result in two hours of down time while the adjusters cleaned dried gum from the tray (Tr. 554-55, 589). Both adjusters confirmed Ginzburg's explanation (Tr. 778, 804, 849-50).

In order to prove the violation of a standard, the Secretary must show that 1) the cited standard applies, 2) its terms were not met, 3) employees had access to the violative condition, and 4) the employer knew or could have know of the violation with the exercise of reasonable diligence. *See, e.g., Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221, 1991 CCH OSHD ¶29,442 (No. 88-821, 1991). Here, § 1910.147(c)(4)(i) applies only when employees are engaged in servicing and/or maintenance, defined at § 1910.147(b) as:

Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tools changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

According to compliance officer Washington, replacing a machine part such as a vacuum hose constitutes service and/or maintenance under the cited standard (Tr. 564, 593-95). Although, v.p. of engineering Ginzburg claimed this task should not be considered a "repair", replacing a machine component that affects production certainly constitutes maintenance under the above definition (Tr. 738).

Determining whether the cited standard applies also requires consideration of the concept of "unexpected energization". As the Review Commission has held, a lockout/tagout standard will apply "only where the Secretary shows that unexpected energizing, start-up or release of stored energy could occur and cause injury." *General Motors Corp.*, 17 BNA OSHC 1217, 1219, 1995 CCH OSHD ¶30,793 (Nos. 97-2973, et al., 1995), *aff'd*, 89 F.3d 313 (6th Cir. 1996) ("*General Motors*"). Here, there is no question that NEC's employees were working on a machine which was still connected to an energy source and therefore, had the potential to energize unexpectedly. This

is true despite the fact that Ginzburg and both adjusters testified that production was shut down on the WEB-3 machine prior to beginning the hose replacement. According to their testimony, a red “safe” button is located at each of the machine’s work stations which, when engaged, shuts down production on the machine, but allows the gum tray rollers to remain operational (Tr. 733-34, 805-07, 811, 826-27, 850-51, 853; Exhibit R-18).⁸ Prior to beginning their work, the adjusters activated three of these buttons; Hoffman stood outside the cavity where the hose was located to ensure that the buttons were not deactivated (Tr. 733-35, 737, 771-72, 807-08, 836, 851, 859). To restart the machine, each of the activated buttons had to be released, then the start button engaged (Tr. 735-36).

It is not enough, however, to merely shut down production on a machine or piece of equipment to protect employees from unexpected energization; as the lockout/tagout standard’s preamble states, “[t]he generally accepted best means to minimize the potential for inadvertent activation is to ensure that all power to the machine or equipment is isolated, locked or blocked and dissipated at points of control, using a method that cannot readily be removed, bypassed, overridden or otherwise defeated.” See *Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule*, 54 Fed Reg. 36,644, 36,647-48 (1989). Here, head adjuster Hoffman acknowledged that the three-button method he and adjuster Benitez employed did not isolate the WEB-3 machine from its main energy source, and electricity was still running through the machine (Tr. 850-52). Moreover, the process required to startup the WEB-3 machine was relatively uncomplicated and would not have provided sufficient warning of imminent energization to a service or maintenance employee like Benitez. Cf. *General Motors*, 17 BNA at 1221 (employer’s eight-to twelve-step startup process, complete with warning bells and interlocking gates, provides service or maintenance employee with ample warning of energization). The Secretary has established that § 1910.147(c)(4)(i) applies here.

The critical question is whether the unexpected energization of the WEB-3 machine could have caused injury to the employees performing the hose replacement, i.e. did they have “access to the violative condition”? Access to a violative condition is established by showing that employees in the course of their assigned work duties will be, are, or have been in a “zone of danger”. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521, 1993 CCH OSHD ¶30,303 (No. 90-2866, 1993).

⁸ According to Ginzburg, the rollers are powered by a different branch of electricity than the rest of the machine (Tr. 731-33).

In the context of lockout/tagout, employee injury typically occurs when the unexpected energization of a machine or piece of equipment causes, in turn, the unexpected movement of a machine component to which an employee has access. *See Final Rule*, 54 Fed Reg. at 36,647-48 (1989). Here, compliance officer Washington testified that while there were no moving parts inside the cavity where the vacuum hose was located, “electrical wires” she observed in the area exposed the adjusters to various electrical hazards such as shock or burns should energization occur unexpectedly (Tr. 566, 615, 633, 638, 673). However, she admitted that she did not test any of these wires, and did not know if they were energized or whether energy was even directed to that area of the machine (Tr. 616-17, 639-40, 642, 644-45).

Testimony from v.p. of engineering Ginzburg and both of the adjusters, as well as the photographic evidence, indicate that there were no electrical wires whatsoever in this area of the machine nor was any energy directed to the area should energization occur (Tr. 727-30, 737-38, 775, 830, 835; Exhibit R-19). The testimony of NEC’s witnesses was credible. Under the circumstances, neither employee could have sustained injury should the WEB-3 machine have unexpectedly energized.

In addition to replacing the vacuum hose, compliance officer Washington claimed that during the inspection, the adjusters also informed her they intended to clean the WEB-3 machine’s folding mechanisms and other vacuum hoses (Tr. 551-52, 559, 561, 618, 634, 646, 660). However, she did not observe them perform this work and had no firsthand knowledge as to whether the work was actually done, or whether lockout/tagout procedures were required or even implemented at that time (Tr. 645).⁹ Having simply assumed that the work was, in fact, completed without instituting lockout/tagout procedures, Washington concluded that if the folding mechanisms were unexpectedly

⁹ Although Washington maintained that the adjusters later informed her during separate telephone conversations that the cleaning work was, in fact, completed over a two-hour period during which the WEB-3 machine was not locked out, these conversations took place well after the citation and complaint were issued (Tr. 565, 619, 623-25, 629, 634-35, 666-67). Neither adjuster could recall informing the compliance officer that they intended to perform additional work on the WEB-3 machine (Tr. 776-78, 815, 832, 834, 839). There was also considerable disagreement between Washington and the two adjusters regarding the circumstances of these telephone conversations, such as how many times the employees spoke with Department of Labor personnel and whether the discussions were with counsel for the Secretary, Washington, or both (Tr. 621, 625-26, 779-85, 832-33, 840, 842).

energized, the adjusters would have had access to moving parts that could have caused serious injury such as lacerations or amputations (Tr. 566, 634, 668-69, 678-79, 757). However, she admitted that she knew nothing about how the machine's folding mechanisms operated or even what the cleaning process would entail (Tr. 645-46, 677-79, 683). Moreover, Washington conceded that if the machine had to be energized in order to actually perform the cleaning process, the cited standard would not apply (Tr. 681-82). Given her weak testimony on this issue, there is no basis on which to establish a violation. Without proof of exposure to a hazard created by the unexpected energization of the WEB-3 machine, this item must be vacated.

Repeat Citation 3, Item 3

This item alleges a repeat violation of § 1910.147(c)(4)(ii) which provides that energy control procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, four specific elements. According to the record, NEC's lockout/tagout program consists of a three-page written document, copies of which are provided to all employees, and a videotape shown during training sessions conducted by v.p. of engineering Ginzburg (Tr. 986-87, 990-93, 1010; Exhibits C-10 & R-23).¹⁰ The Secretary contends that NEC's program lacked three of the cited standard's specified elements: (A) a specific statement of the intended use of the energy control procedure; (B) specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy; and (D) specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures (Tr. 879-84, 911-12, 914).¹¹

NEC argues not only that its lockout/tagout program satisfies the requirements of the cited standard, but also that it has satisfied the elements of an exception set forth at § 1910.147(c)(4)(i).

¹⁰ Although compliance officer Washington indicated that she did not consider the videotape to be part of NEC's lockout/tagout program, one could reasonably regard the videotape as a supplement to the written program in that it "documents" additional information not found in the written program (Tr. 906-10, 921-22, 995-96).

¹¹ The element designated as (C) under the standard covers the "specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them".

This exception provides that an employer need not document the energy control procedure for a particular machine or equipment when eight specific elements exist.¹² According to credible testimony provided by Ginzburg, all of these elements were present for each piece of equipment and machinery found in NEC's plant (Tr. 1004-09, 1030). On these grounds, NEC moved for the dismissal of this citation item at the hearing and the motion was granted (Tr. 1042-43, 1047-48, 1055, 1109-10, 1115). Relying largely upon the testimony of compliance officer Washington and Robert Zurlo, the compliance officer who inspected the NEC plant in 1991 and accompanied Washington on two occasions during her 1994 inspection of the plant, the Secretary argues that three of the exception's elements have not been established and therefore, dismissal of this item was erroneous (Secretary's Post-Hearing Brief at 44-46).

Specifically, the Secretary contends that the first three elements of the exception have not been met by NEC. Washington and Zurlo testified that several pieces of equipment at the NEC plant operated with more than one type of energy: electrical, plus pneumatic and/or hydraulic (Tr. 955-57, 1088-89, 1097).¹³ As a result, the compliance officers maintained that this equipment had the potential to store hydraulic and/or pneumatic energy even if the electrical source was properly locked out, a violation of the exception's first two elements (Tr. 1097-99). With additional sources of energy powering this equipment, Washington and Zurlo also claimed that locking out the electrical source did not serve to completely deenergize and deactivate the equipment, as required by the third

¹² These elements are: (1) The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which could endanger employees; (2) the machine or equipment has a single energy source which can be readily identified and isolated; (3) the isolation and locking out of that energy source will completely deenergize and deactivate the machine or equipment; (4) the machine or equipment is isolated from that energy source and locked out during servicing or maintenance; (5) a single lockout device will achieve a locked-out condition; (6) the lockout device is under the exclusive control of the authorized employee performing the servicing or maintenance; (7) the servicing or maintenance does not create hazards for other employees; and (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or reenergization of the machine or equipment during servicing or maintenance.

¹³ At the hearing, the Secretary also argued that NEC failed to establish this element of the exception because it has already acknowledged in the companion case that the WEB-3 machine had two sources of electrical energy - one for the glue rollers and one for the machine (Tr. 1111). Ginzburg explained, however, that the machine actually had only one source of electrical energy which branched into three different voltages. This feature prevented locking out the machine while keeping the glue rollers operational. (Tr. 731-33, 1113-15).

element of the exception (Tr. 962-64, 1098-99).

NEC does not dispute that many of its machines utilized air pressure for operation (Tr. 1005-06). However, Ginzburg testified that the air pressure for each machine remained controlled by a single electrical energy source (Tr. 1006-07). This is consistent with compliance officer Zurlo's own testimony that ancillary types of energy such as pneumatics or hydraulics are typically powered by a single electrical source such as a motor or pump (Tr. 1097, 1102-06). In addition, Ginzburg indicated that once a machine's electrical source was disconnected, the air pressure was automatically disconnected and the air lines bled to completely eliminate any stored pressure (Tr. 1007-08, 1037-40). Given that neither compliance officer was able to explain the operation of any of the machines they identified as using pneumatic or hydraulic energy, nor were they aware of how NEC's lockout/tagout procedures may affect these ancillary types of energy, Ginzburg's testimony regarding the application of the exception's elements was not effectively rebutted (Tr. 1107-08). Accordingly, the dismissal of this item stands.

EXIT SIGNS

Under the second item of the third citation, the Secretary alleges a repeat violation of § 1910.37(q)(5) which provides that a sign reading "Exit", or similar designation, with an arrow indicating the directions, shall be placed in every location where the direction of travel to reach the nearest exit is not immediately apparent. According to the Secretary, boxes and machinery reaching six feet in height blocked the view of the nearest exits for employees working in the plant's manufacturing area. The Secretary contends that exit directional signs should have been provided in this area.

The Secretary's case rests entirely upon the testimony of compliance officer Washington, which lacks clarity, consistency and credibility. On a floor plan depicting the layout of the cited work area, she identified several locations from which she stated it was not "immediately apparent" which direction to travel in order to reach the nearest exit (Tr. 1130-31; Exhibit C-14).¹⁴ Washington

¹⁴ There was some confusion as to the date on which the cited condition was actually observed by Washington. The citation indicates a date of March 4, 1994, but Washington testified that she was not in the
(continued...)

attributed this difficulty to boxes which were stacked over six feet high and machinery which was equipped with hoods that raised the height of the equipment to over six feet, conditions which she stated obstructed the view of the nearest exits; she failed, however, to relate these conditions to the specific locations she identified (Tr. 1118, 1125-26, 1143-44, 1147-48, 1215-16).¹⁵

Furthermore, most of the locations which Washington identified on the floor plan were located at individual work stations, areas in which exit directional signs would be unnecessary (Tr. 1428; Exhibit C-14).¹⁶ In the event of a fire or other emergency, an employee would naturally and simply leave his machine and walk to the nearest aisle or walkway (Tr. 1160-63). It is such passageways that require exit directional signs, not individual work stations.

As to whether exit directional signs were actually present in the manufacturing area, Washington's testimony was inconsistent. Although she insisted on direct examination that the manufacturing area contained no exit directional signs whatsoever, once confronted on cross-examination with her inspection notes, she admitted that exit directional signs were, in fact, mounted along the west wall of the plant, adjacent to the exits located there (Tr. 1134, 1138, 1141, 1165-66, 1202-07, 1222-24; Exhibit R-24).¹⁷ According to the testimony of safety director Heym and v.p. of

¹⁴(...continued)

plant on that day (Tr. 1209-10). Although her case file documents associated with the inspection do not clearly resolve the question, she maintained that she observed the condition on March 7, 1994 (Tr. 1208-10, 1300-02, 1349-52, 1358-60, 1371-74, 1384-85; Exhibits R-24, R-26 & R-30).

¹⁵ Initially, Washington suggested that exit directional signs would still be required even if the stacked boxes were removed, so that the view of the nearest exit was not obstructed; she later acknowledged that under such circumstances, the standard would not "come into play" (Tr. 1135-36, 1138, 1146).

¹⁶ Although she marked only about a dozen locations in the manufacturing area and her inspection notes document a concern only with those employees who operated machinery at these locations, Washington claimed that all 295 employees who worked at the plant were potentially exposed to the hazard created by this alleged violation (Tr. 1194, 1206, 1211-13, 1226-27; Exhibit R-24).

¹⁷ According to Washington, these notes, documented on the "OSHA 1B" form, were primarily taken, along with her field notes, during the walkaround inspection (Tr. 1353-57, 1365-70). She explained that the OSHA 1B notes were finalized only after all of the necessary information had been obtained, sometimes over the course of several days; she also indicated that her field notes were discarded after being copied into her safety narrative (Tr. 1357, 1364-65, 1367-70). In its post-hearing brief, NEC claims that Washington's disposal of her field notes violated OSHA's Field Operations Manual (FOM) (now known as the Field
(continued...)

engineering Ginzburg, exit directional signs were also suspended from the ceiling at the intersection of each aisle and walkway in the manufacturing area (Tr. 1240-43; Exhibit C-14). Both men indicated that these signs, positioned about 12 to 15 feet from the floor, were purchased and installed after NEC was cited in 1992 for a similar violation in another area of the plant (Tr. 1241, 1248-53, 1273-74, 1278, 1307-08, 1333-37, 1399-1400, 1406; Exhibits C-6 & R-25).¹⁸ Washington's conflicting and severely unfocused testimony on this issue does not stand up to the positive testimony of NEC's witnesses. The record shows that there was nothing in the main aisles or the walkways separating each bank of machinery to obstruct the view of the exit directional signs placed at each intersection (Tr. 1214, 1242, 1246-47). Since the direction of travel to the nearest exit would, therefore, be apparent to employees working in the cited area, the Secretary has failed to establish a violation; accordingly, the item is dismissed.

HAZARD COMMUNICATION

Under the first item of the third citation, the Secretary alleges a grouped repeat violation of all three subsections of § 1910.20(g)(1).¹⁹ This standard requires an employer, upon an employee's first entering into employment, and at least annually thereafter, to inform current employees covered by this section of (i) the existence, location, and availability of any records covered by this section; (ii) the person responsible for maintaining and providing access to records; and (iii) each employee's rights of access to these records. According to § 1910.20(b)(1), these informational requirements

¹⁷(...continued)

Inspection Reference Manual or "FIRM") and requires drawing the inference that these notes "would be harmful...would not support....or would be contrary to the contents of her Case File..." (Brief, Volume 13 at 2). However, it is not clear from the record that Washington's conduct was, in fact, contrary to the FOM, nor is it evident that the information contained in her field notes would have clarified the already inconsistent documents in her case file. See *supra* n.17, and discussion *infra* at p.19.

¹⁸ That NEC placed a purchase order for exit directional signs on March 8, 1994, does not in and of itself establish that such signs were not installed at the time of the inspection on March 4 or March 7, 1994 (Tr. 1284-86; Exhibit C-16). According to Ginzburg, the March 8th order was placed for additional signs to replace broken ones in the warehouse area of the plant (Tr. 1308-09, 1312-15, 1334).

¹⁹ In 1996, the standards set forth at § 1910.20 were redesignated as § 1910.1020. 61 Fed Reg. 31430 (June 20, 1996).

apply to each general industry, maritime, and construction employer who makes, maintains, contracts for, or has access to employee exposure or medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents. Here, compliance officer Washington testified that the alleged violations centered upon the information NEC provided employees about its material safety data sheets (MSDSs) (Tr. 1445).²⁰

After interviewing two employees, Washington concluded that in 1992, after compliance officer Zurlo's inspection, NEC had informed its employees of all three elements of § 1910.20 as they relate to the MSDSs, but had failed to repeat this information to employees on an annual basis thereafter (Tr. 1435-37, 1440-41, 1445-46, 1448, 1485-86). According to the record, employees were told at that time that the binder containing the MSDSs could be found at an "MSDS station" located in the plant's main corridor, adjacent to the cafeteria and time clock (Tr. 1446, 1464-67; Exhibits C-14 & R-31). As shown in photographs taken by safety director Heym, this station consists of a metal rack which holds the MSDS binder, a yellow triangular sign positioned above the rack which reads "MSDS" on each side, and a large white sign beneath that which reads "'RIGHT TO KNOW' CENTER, Material Safety Data sheets and Hazardous Materials used in this area"; the latter sign also has a large red arrow which points to the metal rack below (Exhibits R-32A through E). Washington admitted having observed the MSDS station during her 1994 inspection, but did not recall seeing the "Right to Know" sign at that time (Tr. 1447, 1451, 1453-58).

As the Secretary has indicated, the purpose of the cited standard is to provide employees a "right of access" to relevant exposure records. See § 1910.20(a). By providing employees with the required information in a direct and formal manner when first entering their employment, then placing the MSDS binder in a noticeable and well-marked location where all employees must pass, NEC accomplished this purpose. Employees were well aware that the MSDSs existed, and were accessible in the plant's main corridor (Tr. 1445-46, 1488-89). Where there is nothing in the standard requiring that the annual information be formally conveyed either verbally or in writing, making the MSDS station conspicuous by printed signs where employees must pass at least twice daily to punch in and out at the adjacent time clock constitutes more than sufficient notice of the fact that employees have

²⁰ The definition of "employee exposure record" includes MSDSs. § 1910.20(c)(5)(iii).

a right of access to this information (Tr. 1467). Although Washington did not remember observing the “Right to Know” sign during her inspection in 1994, she did recall the station itself and it seems unlikely that the sign, as depicted in the photographs in evidence, would have been posted after the MSDS triangle and metal binder rack were installed. Safety director Heym testified that they were all installed at the same time after compliance officer Zurlo’s 1991 inspection (Tr. 1478).²¹

The Secretary is correct in noting that the MSDS station did not actually serve to inform employees of the standard’s second element, the person responsible for maintaining and providing access to the records, a point which Heym conceded at the hearing (Tr. 1461, 1480). However, where the MSDS binder is openly accessible to all employees, identifying the person responsible for “providing access” to these records would not be necessary. Moreover, since 1992, each employee had been notified at least once that Heym, as safety director, was in charge of maintaining the MSDS binder (Tr. 1475-77). He continued to serve in this position and his presence at the plant could reasonably be considered a constant reminder to employees that he remained in charge of all safety matters, including the MSDSs. As a practical matter, it may fairly be concluded that NEC has complied with this element of the cited standard.

One final point deserves comment. Washington raised a valid concern at the hearing regarding the fact that NEC employed workers who did not speak English and therefore, might not have been able to understand the information conveyed by the MSDS station (Tr. 1461-62). It should be noted that OSHA does not require the MSDSs themselves to be provided in any language other than English (Tr. 1498-99). See § 1910.1200(g)(2) (“Each material safety data sheet shall be in English (although the employer may maintain copies in other languages as well)...”). The Secretary introduced no evidence to indicate that NEC’s non-English-speaking employees lacked this

²¹ In her post-hearing brief, the Secretary argues that NEC’s failure to call Santos Silva, an employee listed on its pre-hearing exchange, as a witness requires us to draw the inference that his testimony would have been adverse to NEC (Brief at 58, n.57). Silva was one of the two employees whom Washington interviewed in connection with this item. The other employee, Rafael Puentes, appeared at the hearing as a rebuttal witness for the Secretary; he testified that the MSDS station existed as depicted in the photographs taken by safety director Heym, but was uncertain as to the year in which he first observed it (Tr. 1486-87). Given that Puentes’s testimony on this issue is already on the record as a witness for the Secretary, it is not clear what new information Silva could have provided had he been called to testify. More importantly, the Secretary could have called Silva as a witness herself just as she did Puentes. Because Silva was susceptible to subpoena by either party, the uncalled-witness rule is inapplicable.

information. On the contrary, the record establishes that since 1992, the information required by the standard had been conveyed at least once to employees in their respective language (Tr. 1468-69). Under these circumstances, each employee, English-speaking or otherwise, would presumably be able to associate this information with the MSDS station. Accordingly, the item is vacated in its entirety.

MACHINE GUARDING

These alleged violations center upon numerous envelope folding machines found in the plant's manufacturing area. As with previous citation items, most of these machines are identified by an abbreviation of their type, such as RH (rotary high speed) or RW (rotary window), and an assigned number, such as RH-1 or RW-2. The manufacturing process on each of these machines is generally the same (Exhibit R-63). The machine operator places a stack of pre-cut paper known as "blanks" onto the machine's high-stack paper feeder where they are held and released in single sheets by a vacuum system and two rotating steel disks, known as separator disks (Tr. 2844-45, 3065).²² Each sheet then travels through a series of operation points where seal gum and/or patch gum is applied and dried (Tr. 2845-46). The blank then enters the "scoring" area of the machine where it is marked with creases to indicate where the blank will be folded to create the envelope (Tr. 2846). After several folding steps, the finished envelopes arrive at a "delivery table" located in the middle of the machine where they are removed by the operator and packed into boxes (Tr. 2846-47). The speed of the folding machines vary depending upon the type; the wide range window (WRW) produces about 250 envelopes per minute, while the RH machine produces about 650 to 675 envelopes per minute (Tr. 2849, 2931, 2934-35, 3069, 3179, 3463-65).

As with the other citations, the Secretary's machine guarding case rests almost entirely upon the testimony of compliance officer Washington. However, her testimony regarding these violations was extremely problematic, raising disturbing questions about her credibility. A close review of Washington's inspection notes reveal several inconsistencies, errors, and even fabrications, regarding employee exposure, none of which she was able to adequately explain at the hearing. Most troubling is what can only be termed a manipulation of the hazardous conditions which she claimed to have

²² A few of the folding machines were equipped with a special attachment that held large rolls of paper onto the machine for processing in lieu of pre-cut blanks (Tr. 1958-59).

observed during her inspection.

First, Washington acknowledged having obtained permission from her supervisor to use a “master copy” of her OSHA 1B inspection notes, one for each alleged instance of machine guarding violation, to generate the information related to each of the cited machines (Tr. 2381-82, 2411, 2416, 2418-20, 2424, 2430-31, 2473-74, 2487-91, 2519-20, 2530, 2545-51, 2559, 2582-92; Exhibits R-34 to R-55). After covering those areas on the master sheet which identify the machine cited, the employee allegedly exposed, and in some cases, the time of the alleged exposure, she simply photocopied the master sheet, then filled in the missing information relating to a particular machine, rather than generate a new sheet of notes (Tr. 2377-80, 2382-83, 2397-99, 2408-10, 2423, 2432, 2474-75, 2552-53, 2571-72, 2583-84, 2591-92). As a result, Washington’s descriptions of employee exposure are virtually identical for every machine cited under a particular instance of violation, irrespective of the fact that the cited machines were, in most cases, operated by different employees and purportedly observed at different times.

Perhaps Washington and her supervisor viewed this method of documentation simply as an efficient way to compile the information associated with a large inspection. However, the circumstances surrounding most of Washington’s documented observations undermine the veracity of her claims. Many inconsistencies were accurately summarized by NEC in a four-page exhibit which tracks some of Washington’s alleged observations by date and time, revealing a bizarre pattern of unlikely exposures (Exhibit R-56a).²³ For instance, Washington’s notes indicate that on March 23, 1994, she observed several employees exposed to the same hazard at the same time; thus, at 3:10 PM, she claimed to have observed four employees exposed to unguarded rotating separator disks on five different machines (Tr. 2383-84; Exhibits R-34 to R-38 & R-56a at 2).²⁴ Similarly, Washington’s notes indicate that on March 10, 1994, she observed five employees removing jammed envelopes from three different areas of their assigned machines at the same time; for instance, at 11:00 AM, she

²³ At the hearing, NEC was permitted to submit an amended copy of this exhibit that conforms to the evidence of record (Tr. 4071-73; Exhibits R-56 & R-56a).

²⁴ Although Washington explained that her observations did not actually occur at the same time, but most likely over the course of several minutes, she failed to explain why her inspection notes do not reflect as much (Tr. 2298-99, 2366).

claimed to have observed employee Ricardo Vasquez removing jammed envelopes from the transfer area, delivery area, and scoring area, of the RA-3 machine (Exhibits R-45 at 44, R-48 at 65, R-52 at 4, & R-56 at 1).²⁵

In addition to these implausible scenarios, Washington admitted to making two obvious “errors” regarding employee exposure, one of which she attempted to correct prior to the hearing. First, she acknowledged that she erred in documenting Ronaldo Gonzalez as the employee exposed to the unguarded separator disks of four different machines on the same day and within a ten-minute time frame (Tr. 1743-44, 2425-27; Exhibits R-36, R-38, & R-56a at 2). Indeed, the record indicates that employees are rarely, if ever, assigned to more than one machine during a shift (Tr. 3965-66, 3993-94).²⁶ Washington, however, never explained how she made such a glaring mistake, and also failed to indicate what she actually observed with regard to these four machines, this particular employee, and the condition in question.

Second, Washington conceded to having erred in naming Puentes as the exposed employee under four separate instances of violation when he was not even present at the plant on the dates alleged (Tr. 1792, 1794-95, 1797, 2675-76, 2687, 2692, 2697-98; Exhibits R-35 at 149, R-43 at 38, R-50 at 78, & R-59). Initially, Washington claimed to have simply “reconstructed” Puentes’s exposure based upon her interview of him in March of 1994 (Tr. 1792, 1794-95, 1797, 1887-89). Then on cross-examination, she admitted that after meeting with the Secretary’s counsel at some point after the notice of contest was filed, she recognized that her inclusion of Puentes as an exposed employee was an “inaccuracy” and amended her inspection notes to allege the exposure of a second employee, Catarino Tzumuc (Tr. 2676-89, 2695-96, 3142-43; Exhibits R-58, R-59, R-73, & R-74).²⁷ It remains unclear how adding a second employee to her inspection notes corrects this mistake,

²⁵ With the exception of employee Vasquez, Washington admitted at the hearing that she did not actually observe these employees remove jammed envelopes from all three sections of their assigned machines at the dates and times indicated in her notes. See discussion *infra* p.21, 34.

²⁶ Although employee Mendoza claimed that he once operated two machines at the same time, his testimony was effectively rebutted by supervisor Pastor, George Ramos, head adjuster, and Luis Cleto, a co-worker (Tr. 3835-36, 3904, 3907-08, 3920-21, 3965-68, 3993-94).

²⁷ The amended pages were designated in all but one case with the same page number as the original page, followed by the letter “a” (Tr. 3143, 3146; Exhibits R-56a, R-58, R-59, R-73, R-74 & R-77).

particularly where Washington apparently did not actually observe the exposure of Tzumuc either.

Finally, and most damaging, Washington admitted that in several instances, she did not in fact observe the employees named in her inspection notes as exposed to the documented conditions. At the hearing, she acknowledged relying upon a single statement alleged to have been made by v.p. of engineering Ginzburg during the inspection to establish employee exposure on machines which she never personally observed (Tr. 2152, 2158-61, 2177-82, 2195-96, 2204-05, 2209-11). Thus, under three instances of violation, discussed *infra*, she simply “assumed” employee exposure based upon what she admitted was a general comment made by Ginzburg without specific reference to any of the machines cited under these instances (Tr. 2183-87, 2212-13). In doing so, Washington essentially “multiplied” her findings to include machines which she herself never actually observed and which Ginzburg’s alleged “admission” never identified as hazardous (Tr. 2213).

An equally disturbing aspect of Washington’s actions is her unexplained fabrication of the dates and times which appear in both her inspection notes and the citation on which these nonexistent “observations” occurred. Washington simply decided to take Ginzburg’s alleged comment of April 5, and use it as a basis for documenting the exposures as occurring at various times on March 10, March 23, and April 14, 1994 (Tr. 2197-99, 2212; Exhibits R-48 & R-50). The alleged admission is discussed *infra*. Such an investigative technique is not by any means a legitimate case of extrapolation of known data, but rather a highly improper act of constructing evidence based upon conjectural knowledge without any connection with facts either known or proved. It is interesting to note that Washington amended some of the corresponding inspection note sheets by adding the word “reconstructed” to the beginning of each instance description; this one-word amendment does not serve to explain that the exposures detailed therein were never actually observed (Tr. 3149-54; Exhibits R-48, R-50, R-58 & R-77). See *infra* n.47.

Whether part of a deliberate attempt to bolster a weak case against NEC or the result of misguided efforts to simply perform her official duties, Washington’s actions are unacceptable and not without considerable consequence for the allegations presented here by the Secretary. In fact, having sensed the plight of his case, counsel for the Secretary preserved on the record at the close of the hearing a stipulation regarding NEC’s size and annual earnings, in admitted anticipation of a claim for attorney’s fees being filed by NEC under the Equal Access to Justice Act (EAJA) (Tr.

4076-77). Under EAJA, a prevailing party is entitled to an award of attorney fees and costs if the Secretary's position was not substantially justified. The significance of this unprecedented move on the part of the Secretary was not lost on NEC which argued at the hearing that a dismissal of this portion of the Secretary's case might be appropriate without further ado. The following analysis demonstrates that the machine guarding charges cannot be sustained on the merits.

Machine Guarding under § 1910.212(a)(1)

This standard requires an employer to provide one or more methods of machine guarding to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Under two separate charges, one repeat and one willful, the Secretary alleges that NEC employees were exposed to hazards presented by various unguarded moving parts of several different folding machines.²⁸

Repeat Citation 3, Item 4

This item is divided into five subitems, four of which remain in dispute.²⁹ The folding machines cited involve three types of alleged hazards: unguarded rotating separator disks, unguarded rotating parts, and unguarded pinch points.

Separator Disks [Subitems(b) & (c)]

Under these subitems, the Secretary alleges that employees were exposed to unguarded rotating separator disks located at the bottom of the high-stack paper feeders on fourteen folding machines. Each separator disk is ten inches in diameter and weighs five pounds; during production, the disks rotate towards each other and support the stack of blanks as they are separated and fed into the machine (Tr. 1543, 3081, 3083-84, 3463; Exhibits C-21A & C-21D). The distance between the disks could be adjusted and varied depending upon the size of the envelope being manufactured (Tr.

²⁸ Washington maintained that these conditions were cited under separate citation items based upon their respective characterizations. Specifically, she testified that for those conditions which were identical in terms of machine and unguarded area to that which had been previously cited in 1992, the item was characterized as willful; for those conditions which involved the same machines but different areas than that previously cited, the item was characterized as repeat (Tr. 1505, 1833-34). However, according to v.p. of engineering Ginzburg, this approach does not hold true for all of the violations alleged here. For instance, he testified that while the *machines* cited under willful citation 2, item 4, instance (e) were also cited in 1992, the *conditions* for which they are currently cited do not match those cited in 1992 (Tr. 3026; Exhibit C-6 at 8).

²⁹ Subitem (a) was withdrawn by the Secretary (Post-Hearing Brief at 10).

3084-86, 3458-59). The disks rotate at varying speeds, ranging from 117 rotations per minute (rpms) on the MO, WRW, and WR machines, to 800 rpms on the RA machine (Tr. 1754, 2931, 2973, 3463-65).

According to Washington, on March 23, 1994, she observed eleven employees place their hands within one-quarter to twelve inches of the rotating separator disks while loading and adjusting blanks on the feeders of the cited machines (Tr. 1510, 1539-43, 1555-56, 1739-50; Exhibits C-18, C-21A through C-21D, & R-34 through R-40).³⁰ She indicated that these employees had allowed the stack of blanks to drop below twelve inches in height before replenishing the feeder with additional paper; she acknowledged that there was no exposure when an employee replenished a stack of blanks whose height exceeded twelve inches (Tr. 1553-56; Exhibit C-18).³¹ NEC does not dispute that the separator disks on the cited machines were unguarded and that employees loaded blanks onto the feeder while the machine is in operation. Although the disks are not sharp, there is no question that should an employee come into contact with them during production, serious injury could result (Tr. 3082-83).³²

As discussed *supra*, Washington's testimony regarding employee exposure is highly suspect. She conceded to having erred in documenting Puentes and Gonzalez as the employees exposed to the unguarded rotating separator disks on five of the machines cited under these instances. In addition, Washington was unable to adequately explain how, according to her inspection notes, she was able to observe the named employees loading paper onto the feeders of seven different machines, all of whose stacks had depleted to some unspecified height of less than 12 inches, at essentially the same time (Tr. 2370-71, 2383-84, 2389-91; Exhibits R-34 through R-37 & R-56a at 2). When questioned on the brief amount of time it took her to make these observations, Washington

³⁰ In her post-hearing brief, the Secretary stated that Washington observed only four employees performing this task, having apparently neglected to include those employees working on the machines cited under instance (c) and documented in Washington's corresponding inspection notes (Tr. 1747-51; Exhibit R-40).

³¹ Washington was unable to identify, and did not document, the exact height of paper in the feeder for each exposed employee she observed (Tr. 2366-69, 2383-84).

³² In 1990, an NEC machine operator suffered injury to his hand when it became caught between a "feeder disc" and cylinder while he was resetting an MO machine (Tr. 3459-62; Exhibit C-52).

equivocated, “I did see [the employees] placing paper [on the feeders] but it may not have been necessarily when I approached them.” (Tr. 2390).

Without credible proof of actual exposure, the Secretary’s case hinges upon proof of access to the feeder’s separator disks. *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1560, 1996 CCH OSHD P 30,986 (No. 93-2535, 1996) (citations omitted) (to prove a violation of a machine guarding standard, the Secretary must prove either that employees had actually been exposed to the violative condition or that it was reasonably foreseeable that they would have access to the violative condition). Access to a violative condition may be shown by establishing that it is reasonably predictable that during the course of their normal work duties, employees might be in the “zone of danger” posed by the condition. *Id.*

Washington’s testimony comes up short, lacking critical details such as how the feeder operated and how employees loaded the feeder. For instance, she repeatedly alleged that employees “adjusted” each stack of blanks after placing it in the feeder, but never explained how they did so or why. NEC’s witnesses, on the other hand, provided relevant information about the feeder’s operation and did so in a knowledgeable manner. Based upon their credible testimony, it is evident that during the normal course of their work duties, employees did not have access to the “zone of danger” presented by the rotating separator disks.

Depending upon the speed of a given machine, blanks are replenished by the machine’s operator every one to five minutes (Tr. 3053-54, 3072; Exhibit R-70). During the production process, the operator stands behind the machine and places the stack of blanks in the feeder using one or two hands; the stack remains properly aligned by four adjustable posts positioned around the stack, as well as a vibration system which aids the feeding process, and therefore, does not require any sort of “adjustment” (Tr. 3054-56, 3061-63, 3086; Exhibits R-69 & R-70). As indicated *supra*, the separator disks are located *beneath* the stack of blanks and serve to support the stack as each sheet is separated and fed into the machine (Tr. 2845, 3084-85; Exhibits C-21A). Ginzburg, as well as head adjuster Ramos, testified that an employee could not wait until a stack of blanks was depleted to any height less than three inches before replenishing it since doing so would result in a paper jam which, in turn, would trip a sensor installed in this area of the machine that shuts down the machine’s

production (Tr. 2880-82 , 3064-67, 3925-26).³³ Thus, in order to avoid damaging the machine and disrupting production, employees were trained to keep the stack of blanks higher than three inches, at a height of about eight to nine inches (Tr. 3067).

Citing primarily to the testimony of Ginzburg, the Secretary claims in her post-hearing brief that “there is no dispute that [NEC’s] envelope folding machines were equipped with jam sensors...” (Post-Hearing Brief at 31). For some reason, though, compliance officer Washington made not one reference to the existence of such devices throughout her lengthy testimony during the Secretary’s case-in-chief. In fact, the subject of jamming was discussed extensively at the hearing, yet Washington failed to mention that any of the folding machines cited here were equipped with devices which would halt production under such circumstances (Tr. 1988-94). On the other hand, all three of the Secretary’s other witnesses ! Puentes, Mendoza, and Zurlo ! readily acknowledged this fact (Tr. 2782, 2787-88, 3546-47, 3804, 3843, 3848).

Relying upon the testimony of three NEC employees ! Ramos, Puentes, and Mendoza ! the Secretary claims that while sensors did exist on the cited machines, they did not function properly because they were broken and/or disconnected. However, the record contains no credible evidence to establish this fact, either generally or with regard to the cited machines.³⁴ The sensors, which were installed by the manufacturer in multiple areas of all folding machines, were tested by an NEC adjuster three times a day, before the start of each shift; if found to be inoperable, the machine is taken out

³³ On rebuttal, compliance officer Zurlo testified that he did not cite the unguarded separator disks in 1992 because he never observed an employee allow the stack of blanks to deplete to less than twelve inches in height (Tr. 3580-81, 3637-38). Yet during the course of just two visits to the NEC plant with Washington in 1994, he claimed to have observed employees on one or two occasions loading and straightening blanks with their hands three to four inches from rotating separator disks (Tr. 3580-81, 3639). He was unable to recall which employees were engaged in this conduct or on which machines they were working (Tr. 3639-40). Zurlo’s testimony strains credulity and contrasts sharply with that of Washington who was unable to specify the height of the stack of blanks on those occasions when she observed the same process and failed to indicate the distance between the employees’ hands and the rotating separator disks.

³⁴ On rebuttal, the Secretary introduced a videotape of Ginzburg attempting to demonstrate the operation of an infrared sensor for Washington (Tr. 3758, 3763; Exhibit C-64). In the videotape, Ginzburg is seen waving a pencil, then an envelope, in front of a small box located in the scoring area of a folding machine, but the machine continues to run (Tr. 3763-64; Exhibit C-64). At the hearing, Ginzburg explained the sensor was not broken, but that he simply had not realized that this type of sensor could not be activated by breaking the beam alone; a sequence switch must also be tripped (Tr. 4036-37, 4039-41, 4073-74).

of production until the sensor is repaired (Tr. 2856, 2868, 2873-78, 2896-97, 3988-89, 4001; Exhibit R-65). In addition, Ramos testified that only the jam sensor in the feeder area was ever disengaged and this occurred only during each machine's weekly warm-up session (Tr. 3991-92, 4001-04). Given the serious and potentially irreparable damage that a jam could cause if paper continued to be fed into production, it seems unlikely that the sensors in any other area of the machine would be disconnected for any purpose during production (Tr. 2854-55, 3812, 4006-07).

The testimony of Puentes and Mendoza is unpersuasive. According to Mendoza, he allowed the feeder on his machine to completely deplete the stack of blanks every hour of his shift, yet the machine continued to run; in fact, he maintained that while reloading the feeder, he came so close to the rotating separator disks that he touched them (Tr. 3821-23, 3812, 3815, 3868-70). He also claimed that many times Ramos did not check the sensors before their shift began (Tr. 3831, 3834-35, 3848, 3878). Similarly, Puentes testified that he witnessed jams occur in multiple areas of his assigned machine, yet production continued (Tr. 2753-56, 2780-81). Both witnesses displayed a hostile attitude towards NEC and many aspects of their testimony were inherently questionable. Moreover, their claims were effectively rebutted by the manifestly knowledgeable testimony of NEC's witnesses, particularly Ginzburg, Ramos, and employee Cleto.

Thus, given the location of the separator disks, the more than three-inch height of the stack on which a new stack of blanks was placed, and the presence of a sensor which tripped once the stack's height dropped below three inches, the hands of an employee loading a feeder with blanks remained well outside of any zone of danger presented by the unguarded rotating separator disks. Accordingly, the allegations in connection with the separator discs are unfounded.

Rotating Parts [Subitems(c) & (d)]

Under subitem (c), the Secretary alleges, in addition to the separator disc allegations, that employees were exposed to unguarded rotating parts located in the delivery and feeder sections of seven folding machines (Tr. 1630, 1636; Exhibit C-21F).³⁵ Washington testified that she observed employees reaching quickly into the "area" of these rotating parts in order to remove jammed

³⁵ Having failed to specifically identify these rotating parts by their "technical name" in the citation, Washington explained at the hearing that the parts in the delivery section of the cited machines were rotating cylinders known as "sill flat folders"; she never identified the rotating parts in the feeder section (Tr. 1559-63).

envelopes and/or prevent the envelopes from jamming (Tr. 1560-61, 1593, 1636-37).³⁶ She stated that Ginzburg told her during her inspection that it was normal operating procedure for employees to do this in order to prevent the envelopes from jamming (Tr. 1638-39).

Ginzburg flatly denied making any such statement. He testified that it was simply not possible for an employee to anticipate when a folding machine was about to jam (Tr. 2856, 3403-04, 3406).³⁷ As indicated *supra*, these machines operated at very high speeds, making it virtually impossible for an employee to visually observe the onset of a jam, let alone actually reach into any area of the machine to pull out envelopes while the machine was still in production (Tr. 1988-94, 2856, 3996-97; Exhibit C-18). Furthermore, should a paper jam actually occur, it has already been established that the folding machines were equipped with sensors that would immediately halt production (Tr. 2855-58, 2863; Exhibit R-64). The Secretary failed to provide credible proof of employee exposure to any hazard presented by the unguarded rotating parts of the machines cited under subitem (c).

Under subitem (d), the Secretary alleges that an employee was exposed to an unguarded rotating part located at the rear of a Latex machine (Tr. 1628; Exhibit C-21E). According to Washington, she observed an employee reach into the “area” to remove jammed envelopes, coming within one inch of two large rotating disks (Tr. 1533-36, 1751, 2452-53; Exhibit C-21E). She had difficulty explaining exactly where the jammed envelopes were located in respect to these disks (Tr. 2451-54, 2460-63; Exhibit C-21E). While he acknowledged that a jam could occur in this area of the Latex machine, Ginzburg asserted that a sensor would halt production in such instances, and that there was no reason for an employee to place his hands in this area during the course of normal production (Tr. 3094-97). Ginzburg’s testimony, marked by intense knowledge of the equipment and production process, is creditable and convincing. The Secretary failed to provide credible proof of employee exposure, actual or potential, to any hazard presented by an unguarded rotating part on the cited Latex machine. Accordingly, both subitems (c) and (d) are vacated.

³⁶ Although the Secretary states in her post-hearing brief that Washington observed six employees exposed to these rotating parts, her corresponding inspection notes only detail the exposure of six employees to the rotating separator disks on these machines (Tr. 1747-51; Exhibit R-40; Brief at 12); it is not clear from the record which employees, or how many, were exposed to the rotating parts of these machines.

³⁷ Puentes’s and Mendoza’s claims that they reached into their folding machines during production to remove stuck envelopes and prevent a jam from occurring are not credible (Tr. 2796-97, 3837-42).

Pinch Point [Subitem (e)]

Under this subitem, the Secretary alleges that employees were exposed to an unguarded pinch point located at the “patter” of three folding machines. The patter consists of several fingerlike metal extensions that are secured at one end, while the other end raises up and down, “patting” envelopes as they travel through production (Tr. 1566, 1570-71, 3176; Exhibits C-18, C-21F, C-21G, C-21H, & R-72). During her testimony, Washington failed to explain exactly what function the patter served. Ginzburg testified that it served to slow an envelope’s forward progress during production (Tr. 1571, 3175-78). Washington testified that she observed three employees reaching in front of and behind the patters on the cited machines in order to prevent a jam from occurring and/or to remove jammed envelopes (Tr. 1567, 1571-73, 1576-77, 1630-32, 1634, 1637, 1751, 2481-83; Exhibits C-21G, C-21G, C-21H & R-41). Her inspection notes indicate that she observed all three of these employees engaged in the same conduct at the patters of their respective machines over a fifteen-minute period (Exhibits R-41 & R-56a at 3). Estimating that the employees came within an inch or two of the patter when removing envelopes from this area, Washington claimed that their fingers could have become caught in the pinch point created by the movements of the patter (Tr. 1566, 1575-76, 1634).

The evidence indicates that both the speed and height of the patter made it virtually impossible for an employee to remove envelopes from this area during production (Tr. 3181-82). According to Ginzburg, the patters on these machines operated at a speed of 8.3 strokes per second and would raise to a height of only about 3/4 of an inch (Tr. 3176, 3179-80). On rebuttal, Washington estimated that the patter operated at a speed of one stroke per second (Tr. 2471-73, 2481-83, 3747-53, 3797-98; Exhibits C-63a & C-63b). The video segments on which she based this estimate do, in fact, suggest a somewhat slower patter speed than that indicated by Ginzburg (Tr. 3751-52, 4059-60; Exhibits C-63a & C-63b). However, even at the slower speed depicted by the video an employee would still have to move very quickly in order to reach under the fingers of the patter and successfully remove an envelope while the machine was in production, particularly since the space between a moving envelope and the raised patter measured less than one inch (Exhibits C-63a & C-63b). Given the patter’s speed and the fact that the envelopes travel underneath the patter, it would be impossible for an employee to anticipate the occurrence of a jam, and should one occur, a sensor would

immediately halt production (Tr. 3182-84, 4065-66). Ginzburg testified that employees had no reason to place their hands in this area during production (Tr. 3182-84). The Secretary failed to provide credible proof of employee exposure, actual or potential, to any hazard presented by the unguarded patters of the cited machines. Accordingly, this subitem is vacated.

Willful Citation 2, Item 2

Under this item, three subitems are in dispute, all of which involve unguarded ingoing nip points in three different areas of various folding machines.

Under subitem (a), the Secretary alleges that employees were exposed to an unguarded ingoing nip point at the delivery area of five folding machines (Tr. 1855-56; Exhibits C-23, C-26A & C-26B).³⁸ Compliance officer Washington testified that she observed three employees reach into this area of their assigned machines during production to remove envelopes that had flipped out of order (Tr. 1837-38, 1845-46, 1858-62, 1886-87; Exhibits R-43& R-74).³⁹ In doing so, she testified, the employees came within two inches of an unguarded ingoing nip point created by two rotating cylinders (Tr. 1855-57, 1859-60, 1880).

Ginzburg testified that these cylinders presented no hazard to employees since one of them did not rotate, but was actually a stationary part of the machine's vacuum well (Tr. 2903-07, 2911-12). Although he acknowledged that a six-inch-wide ingoing nip point did exist to the right of these cylinders, he maintained that it was adequately guarded by a 36-inch-wide piece of Lexan plastic (Tr. 2904-05, 2907-09, 2915). He stated that after NEC was cited in 1992 for failing to guard the delivery areas of the two RW machines cited here, guards were installed not only on these machines,

³⁸ At the hearing, the Secretary amended this subitem to allege that the RW-2 machine, not the RW-3 machine, was in violation (Tr. 1834-35).

³⁹ As with the separator disks, Washington's claims regarding employee exposure under this item were undermined by the two errors she acknowledged at the hearing. First, she identified Gonzalez as the exposed employee on two of the machines cited here with only a fifteen-minute span between alleged observations (Tr. 1858-62; Exhibits R-43 & R-56a at 4). As indicated *supra*, NEC employees were rarely, if ever, assigned to more than one machine at a time. Also under this item, Washington mistakenly identified Puentes as an exposed employee, an error which, as previously discussed, she "corrected" by amending her inspection notes to allege the exposure of a second employee whom she also did not actually observe (Tr. 1887-89; Exhibits R-43, R-56a at 4, & R-74).

but also on the RH machines currently cited here (Tr. 2898-2903, 2920; Exhibit C-6). His testimony is supported by two video stills submitted into evidence by the Secretary which depict an RW and RH machine, both of which are clearly shown to be equipped with plastic shields (Tr. 1853-54; Exhibits C-26A & C-26B). Although Washington claimed that at the time of her 1994 inspection, guards were present only on the two machines shown in the video stills, it seems unlikely that NEC would selectively guard only these machines, particularly where the RH machine was not one of the two machines originally cited in 1992 (Tr. 1846, 1880, 1883-84).

Ginzburg testified that there was no reason for an employee to reach under the shield during production (Tr. 2918). Moreover, he stated that the ingoing nip point located underneath the shield could not be accessed by an employee because the opening at the side of the guard measured only about one inch and there was a rotating, spiked wheel positioned above the ingoing nip point (Tr. 2907-08, 2917-20).⁴⁰ The Secretary's case lacks credible proof of employee exposure to an ingoing nip point hazard in the delivery area of the cited folding machines.

Under subitem (b), the Secretary alleges that employees were exposed to two unguarded ingoing nip points located in the transfer areas of six folding machines (Tr. 1896, 1898-1931, 1955-57, 1961-63, 1967; Exhibits C-27A to C-27F, C-28 & C-29).⁴¹ NEC concedes the existence of one of the nip points identified by Washington; the second, according to Washington, was located just to the right of the first and was created by two rotating cylinders (Tr. 1900, 1903-04, 1909-10; Exhibit C-27A to C-27F). Since both of these cylinders are not visible in video stills of the cited area, Washington's identification of the second nip point was based upon a small diagram she drew in her inspection notes (Tr. 1915-31, 1967-69; Exhibits C-28 & C-29). Given the configuration of this equipment as depicted in the video stills, as well as Washington's diagram, it seems unlikely that an employee reaching into this area could actually access any "zone of danger" presented by the alleged ingoing nip point.

⁴⁰ According to Washington, these guards did not protect employees from exposure to the ingoing nip point she identified, but only protected employees from the rotating wheel (Tr. 1844, 1855, 1868-70, 1874-79).

⁴¹ Though the area of the machines are identified as the printing section in her inspection notes, as well as the 1992 citation, Washington testified that she learned at the closing conference that the proper name for this section of the cited folding machines is transfer area (Tr. 1986-87, 2921; Exhibit C-6)

Washington stated that she observed six employees reaching quickly into the “areas” of both ingoing nip points to remove jammed envelopes from the cited machines (Tr. 1934-38, 1941, 1943, 1969-70, 2523-24; Exhibit R-45). She maintained that when she asked the employees why they were engaged in this conduct, they told her that the jammed envelopes had to be removed in order to avoid disrupting production (Tr. 1976-79). However, Washington’s testimony regarding employee exposure was far from being persuasive. Initially, she testified that the employees she observed were *preventing* a jam from occurring, then later “clarified” that her inspection notes indicated the employees were removing an *actual* jam (Tr. 1981, 1986-87, 1995-96; Exhibits C-28 & R-45). Washington also claimed to have witnessed jams occurring in the “areas” of *both* ingoing nip points, but could not pinpoint the exact location of the jams and did not recall whether they occurred at the same time (Tr. 2525-26). In fact, Washington stated that all six of the cited machines experienced two jams in the transfer area over the course of less than an hour, yet all six continued to operate (Tr. 2520-22; Exhibits R-45 & R-56a at 1).

Ginzburg testified that the design of these machines prevented a jam from ever occurring in the transfer area. He asserted that he had never witnessed a jam occur in this area during his seventeen-year tenure with NEC, and that there was no reason for an employee to place a hand in the transfer areas of the cited machines in the manner alleged by Washington (Tr. 2925, 2931-35). Furthermore, Ginzburg stated that extended guards were installed on all of the machines cited here after NEC was cited in 1992 for failing to guard an “inrunning nip point” in the transfer area of the same machines (Tr. 2920-21, 2934; Exhibit C-6).⁴² These guards are visible in video stills of two of the machines cited here (Tr. 1938-39, 2922-24; Exhibits C-27 A to F). Ginzburg’s testimony is convincing. The Secretary failed to provide credible proof of employee exposure to any hazard created by the ingoing nip points in the transfer area of the cited machines.

Under subitem (c), the Secretary alleges that employees were exposed to an unguarded ingoing nip point created by the gum roller and patch applicator of five folding machines (Tr. 1999-2001; Exhibit C-30). Although the Secretary concedes that all of these machines had a 14-inch by 14-inch Lexan guard mounted over this area, Washington claimed to have observed five employees

⁴² Should an employee attempt to bypass these guards for any reason, Ginzburg testified, an interlock device would immediately halt production (Tr. 2931-33). See interlock discussion *infra* p.35.

reaching behind the left side of the guard in order to clean “rollers” with a rag or a brush and remove jammed envelopes (Tr. 2001-04, 2009-17, 2532-33; Exhibits C-30 & R-47). While she acknowledged that these tasks were two separate operations, she failed to indicate which of the two tasks the employees she observed were performing (Tr. 2009-10, 2013-14, 2534-35). Washington’s inspection notes only indicate that over the course of forty minutes, she observed all five employees engaged in both tasks on their respective machines (Tr. 2532-33; Exhibits R-47 & R-56a at 3). She also maintained that three inches on either side of the guards was exposed and that employees reaching into this area came within two inches of the ingoing nip point (Tr. 2002, 2010; Exhibit R-47).

Ginzburg testified that the area which Washington identified as an ingoing nip point actually consisted of only one rotating cylinder whose function was merely to transfer the clear plastic film which was placed over the opening of a window envelope (Tr. 2938). With no envelopes moving through this area, it is not clear how Washington could have observed employees removing jammed envelopes, let alone doing so while the machine remained in production. Ginzburg also testified that there were no “rollers” in this area to clean, and any clean-up operation would be performed at the start of each shift, not during normal production (Tr. 2939-40). Ginzburg explained that the Lexan guards mounted over the cited area were specially manufactured at the plant and installed on the machines in 1992 after NEC was cited for failing to guard ingoing nip points in this area of the same machines (Tr. 2935-36; Exhibit C-6). As pictured in two video stills of the same machine, the opening at the side of these guards appears much smaller than three inches; Ginzburg estimated that the opening measured no more than half an inch and he maintained that there was no way an employee could realistically access the area behind the guard (Tr. 2939-40; Exhibits C-30 & R-66). The Secretary has failed to prove employee exposure to an ingoing nip point hazard in the gum/patch area of the cited machines. Accordingly, this subitem is vacated.

Machine Guarding under § 1910.212(a)(2)

This standard requires, in relevant part, that guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible.

Willful Citation 2, Item 3

Under three subitems, (a), (b), and (c), the Secretary alleges that the metal guards located in the delivery areas of seven folding machines and in the scoring areas of twelve folding machines were not secured or interlocked so that each machine would stop automatically once the guard was lifted (Tr. 2143-44, 2191; Exhibits C-29, C-38 to C-45).⁴³ Washington testified that the guards in question were attached to the machines only by a piano hinge which allowed employees to raise and lower the guards during production, exposing them to ingoing nip points located in the delivery area and “blades” located in the scoring area (Tr. 2145-46, 2150-51, 2166-67, 2191, 2193-95, 2224, 2229; Exhibits R-48, R-50, & R-67).⁴⁴ She stated that the machines were not equipped with interlock devices which would halt production if the guards were raised (Tr. 2162-63).⁴⁵

Of the 19 machines cited, Washington admitted to having observed only three machines on which three employees were reaching quickly into the delivery area underneath the raised guard to remove jammed envelopes (Tr. 2152-58, 2163-65, 2167-68, 2229, 2555; Exhibits C-39, R-48 at 63, 65-66, & R-56a at 1). For the remaining 16 machines, which includes all of those cited for unsecured guards in the scoring area, Washington “reconstructed” the exposures based upon a statement made to her by v.p. of engineering Ginzburg in which he allegedly admitted knowing that employees “were working with the guards in the up position” (Tr. 2152, 2158-61, 2177-82, 2195-96, 2204-05, 2209-11, 2226-27, 2229; Exhibits R-48 & R-77).⁴⁶ As indicated *supra*, p. 21, she conceded that Ginzburg’s comment was a general one in that he never identified a specific machine or area in which he allegedly observed such conduct (Tr. 2183-87, 2212-13, 2227). Also, his purported statement, as testified to repeatedly by Washington, indicates only that employees “worked” on machines with the guards raised, and not that they, during the normal course of their duties, actually reached into

⁴³ At the hearing, the Secretary amended subitem (c) to allege that the RW-2 machine, not the RW-3 machine, was in violation (Tr. 2229).

⁴⁴ Although she provided detailed testimony regarding the ingoing nip point created by two rotating cylinders located in the delivery area, Washington failed to specifically identify at the hearing the hazard to be found underneath the scoring area guards (Tr. 2153-54, 2165-67; Exhibits C-39 & C-41). Her inspection notes, however, reveal that she identified “scoring blades” as the hazard in this area (Exhibit R-50).

⁴⁵ Ginzburg explained that interlock devices served to interrupt the circuit breaker to stop the machine whenever the guard was raised during production (Tr. 2965).

⁴⁶ As previously noted, Ginzburg flatly denied ever making such a statement (Tr. 3402-03).

the areas exposed by the raised guards.

As discussed *supra*, neither the citation nor Washington's inspection notes clearly indicate that the documented observations for 16 of the 19 machines cited were not her own. In fact, both the citation and corresponding inspection notes contain three separate dates and various times at which these observations were allegedly "made". Moreover, most of the inspection notes which correspond to this citation were never amended to reflect their "reconstructed" status.⁴⁷ These actions alone render Washington's findings under this item completely unreliable.

With regard to the delivery area of the cited machines, NEC disputes the existence of a hazard. According to Ginzburg, the steel hood which Washington called a "guard" is actually a sound barrier and splash guard with no safety function whatsoever (Tr. 2946-47, 2950-51; Exhibit R-67). He testified that while the hood, which was lined with acoustical foam rubber, was sometimes raised by employees during production for certain operations, the two rotating cylinders located underneath the hood created only an outgoing, not ingoing, nip point and therefore, presented no hazard to employees (Tr. 2947-50, 2954).

With regard to the scoring area of the cited machines, NEC contends that the guards in question were, in fact, equipped with interlock devices that served to stop production once the guards were raised. Ginzburg testified that after NEC was cited in 1992 for failing to interlock the guards on all but two of the machines cited here, interlock devices were installed on all of the machines equipped with guards in the scoring area (Tr. 2960-65, 2989-90; Exhibit C-6). According to Ginzburg, the interlock devices were observed by compliance officer Zurlo during his follow-up visit to the plant to verify abatement of the 1992 citation items and were in place during Washington's 1994 inspection (Tr. 2965-67, 2990-91).

As was the case with the sensors, the Secretary acknowledges in her post-hearing brief that the cited machines were equipped with interlocks, but argues that they were broken and/or disconnected (Brief at 31). Washington testified that during her inspection, she asked Ginzburg to

⁴⁷ Washington amended only those inspection note pages which relate to the four machines cited under subitem (a) which she did not personally observe and the one machine cited under subitem (c) which employee Puentes allegedly operated (Exhibits R-48, R-50, R-58 & R-77). As noted *supra*, these amendments consisted of merely adding the word "reconstructed" to the beginning of the description.

demonstrate these devices by raising the guards in the scoring area of several of the cited machines, but none of the machines stopped operating (Tr. 2173-74, 2191, 2204, 2214, 2224, 2229-30). Ginzburg, on the other hand, testified that the only “guard” he raised for Washington during the inspection was actually a sound barrier hood which was not interlocked because it does not serve to protect employees from any type of mechanical hazard (Tr. 2986, 2991, 3407). Given Washington’s documented credibility problems and her general lack of knowledge regarding NEC’s machinery and equipment, particularly with regard to this citation item, Ginzburg’s testimony is credited on this point.

As established *supra*, it would not be possible for employees to remove jammed envelopes from the scoring area during production since any jam occurring there would trip a sensor and immediately halt production (Tr. 2971-76, 2993, 3200; Exhibit C-43).⁴⁸ It was also not possible for an employee to anticipate the occurrence of a jam in the scoring area given the speed of production and the fact that the area was covered by a guard (Tr. 2977, 2992, 3995-97). As Ginzburg testified, employees had no reason to place their hands in this area during production (Tr. 2977-78, 2992-93).⁴⁹ The Secretary failed to provide credible proof of employee exposure to any hazard created by the interlocked guards located in the delivery and scoring areas of the cited machines. Accordingly, this item is vacated in its entirety.

⁴⁸ Mendoza’s claim that he lifted the guard over the scoring area of his assigned machine twenty times a day in order to remove envelopes and prevent a jam from occurring lacks credibility (Tr. 3843-47, 3887-88).

⁴⁹ On rebuttal, compliance officer Zurlo testified that during his 1991 inspection of NEC and in the presence of Ginzburg, he observed employees reaching into some of the currently cited folding machines to remove stuck envelopes in an attempt to prevent the machine from jamming; in doing so, these employees, according to Zurlo, came within five to six inches of the adjacent scoring blades (Tr. 3543-46, 3550, 3554, 3557-58, 3565-66, 3626; Exhibits R-81 & R-82). This testimony was offered for the limited purpose of rebutting Ginzburg’s statement that he never observed employees reaching into the folding machines to remove envelopes during production, not to supplement the Secretary’s case-in-chief regarding exposure (Tr. 3548). Zurlo’s testimony, however, was far from convincing. He failed to make note of these alleged observations in any of his 1991 case file documents, even though he claimed that the exposures he observed served at that time as the basis for violations which charged NEC for failing to secure the guards located over the scoring area (Tr. 3555, 3620-22; Exhibit C-6). He was unable to recall how many employees he actually observed engaged in this conduct and did not identify when or under what circumstances the observations were made (Tr. 3624). Zurlo acknowledged that sensors located in the scoring area “shut down” production on some of the machines he observed (Tr. 3546-47). Accordingly, his vague and ambiguous testimony fails to undermine Ginzburg’s credibility on this point.

Machine Guarding under § 1910.212(a)(3)(ii)

This standard requires that the point of operation of machines whose operation exposes an employee to injury, shall be guarded with a guarding device that conforms with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

Willful Citation 2, Item 4

This item is divided into 5 subitems, but only one remains at issue. Subitems (b), (c), and (d) were dismissed at the hearing as duplicative, and subitem (a) was withdrawn by the Secretary in her post-hearing brief (Tr. 2314-16; Brief at 24).

In her post-hearing brief, the Secretary seeks reconsideration of the decision to dismiss subitems (b) and (d) as duplicative of the conditions cited under subitems (b) and (c) of the third item of the same citation (Tr. 2317; Brief at 27). The Secretary argues that the two dismissed subitems are based upon a different set of facts than the two latter issues (Brief at 28). However, all four of the subitems involve the same machines, observed at the same time, on the same day, with the same operators allegedly exposed to the same hazard created by the same alleged inadequate guards (Tr. 2309-16, 2627, 2640). As indicated at the hearing, the standards under which these violations are cited also require an employer to provide the same type of protection: adequate machine guarding (Tr. 2313). *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207, 1991-93 CCH OSHD P 29,964 (No. 87-2059, 1993) (violations are duplicative where the two standards cited are directed at the same conduct). Thus, the dismissal stands.

Under subitem (e), the remaining matter in dispute, the Secretary alleges that the Lexan guards over the gum-applying sections of two folding machines did not adequately guard a point of operation (Tr. 2319-20; Exhibits C-49 & C-50). According to Washington, the guards were twenty inches wide and twelve inches long, but failed to protect employees from an ingoing nip point created by two seven-inch diameter stamps and a twenty-inch diameter rotating cylinder (Tr. 2320, 2326; Exhibit R-54). She testified that she observed an employee reach into the “area” of these nip points from the left side of each guard to clean the rear rollers on the cited machines (Tr. 2321-25, 2328-29;

Exhibits C-49 & R-54).⁵⁰

Washington's identification of the hazard in this area was far from clear. Having conceded that the ingoing nip point was not depicted in either of the video stills of the alleged condition, she indicated that the basis for her testimony regarding the condition was simply "observation", then failed to provide any details regarding how the two "stamps" and one rotating cylinder actually operated to create a nip point (Tr. 2320, 2326-28). Similarly, Washington's testimony failed to indicate what function a "rear roller" served, where it was located in relation to the identified ingoing nip point, and why an employee would need to clean it. Without such information, there is no satisfactory foundation for assessing the adequacy of the Lexan guards.

Ginzburg, on the other hand, provided detailed testimony about the folding, transferring, and gumming operations performed in the area identified by Washington (Tr. 3026-27; Exhibit C-49). According to Ginzburg, there was no ingoing nip point located in this area since only one of the three shafts located here actually rotated; this rotating shaft had a special pad attached to it that applied gum to each envelope transferred through the area (Tr. 3026-30; Exhibit C-49). In fact, Ginzburg indicated that the Lexan guard covering this area served no safety purpose, but acted only as a splash guard (Tr. 3033). Furthermore, Ginzburg testified that there were no "rollers" in this area that required cleaning (Tr. 3031). Thus, he asserted there was no reason for employees to reach into the area as claimed by Washington (Tr. 3030, 3034-35). Ginzburg's testimony is persuasive. There being no reliable proof of employee exposure to an ingoing nip point hazard in the gum applying section of the cited machines, the item is vacated.

Based upon the foregoing findings and conclusions, it is

ORDERED that serious citation 1, item 1, as amended, in docket number 94-3547 alleging violation of § 1910.147(c)(7)(iii)(A) or, in the alternative, the general duty clause of § 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), is vacated. It is further

ORDERED that serious citation 1, item 1, in docket number 94-2968, alleging violation of § 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), having been withdrawn by the Secretary, is vacated. It is further

⁵⁰ According to her inspection notes, Washington witnessed the same employee perform this task on two different machines over a ten-minute period (Tr. 2328, 2593; Exhibit R-54).

ORDERED that willful citation 2, item 1, alleging violation of § 1910.147(c)(4)(i), is vacated.

It is further

ORDERED that willful citation 2, item 2, alleging violation of § 1910.212(a)(1), is vacated.

It is further

ORDERED that willful citation 2, item 3, alleging violation of § 1910.212(a)(2), is vacated.

It is further

ORDERED that willful citation 2, item 4, alleging violation of § 1910.212(a)(3)(ii), is vacated; subitem (a) having been withdrawn by the Secretary, subitems (b), (c), (d) having been dismissed as duplicative, subitem (e) having been vacated on the merits. It is further

ORDERED that repeat citation 3, items 1a, 1b, and 1c, alleging violation of § 1910.20(g)(1), is vacated. It is further

ORDERED that repeat citation 3, item 2, alleging violation of § 1910.37(q)(5), is vacated.

It is further

ORDERED that repeat citation 3, item 3, alleging violation of § 1910.147(c)(4)(ii), is vacated. It is further

ORDERED that repeat citation 3, item 4, alleging violation of § 1910.212(a)(1), is vacated; subitem (a) having been withdrawn by the Secretary, subitems (b), (c), (d), (e) having been vacated on the merits. It is further

ORDERED that citation 4, alleging violation of § 1904.2(a), having been withdrawn by the Secretary, is vacated.

RICHARD DEBENEDETTO
OSHRC Judge

Dated: _____
Boston, Massachusetts