SECRETARY OF LABOR,

Complainant,

v. OSHRC DOCKET NO. 97-0216

PARSONS COMPANY, INC.,

Respondent.

APPEARANCES:

For the Complainant:
Leonard Borden Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois

For the Respondent:
Robert Walsh, Esq., Walsh, Fleming & Chiacchia, P.C., Blasdell, New York

Before: Administrative Law Judge: James H. Barkley

## DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the AAct@).

Respondent, Parsons Company, Inc. (Parsons), at all times relevant to this action maintained a place of business at the junction of Route 116 and 117, Roanoke, Illinois, where it was engaged in cutting sheet metal and related activities. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On December 13, 1996, and thereafter, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Parsons= Roanoke work site. As a result of that inspection, Parsons was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Parsons brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 29, 1997, a hearing was held in Peoria, Illinois. The parties have submitted briefs on the issues. In addition Parsons has submitted its motion to dismiss portions of the citation and to strike certain testimony. Complainant has filed its response and these matters are ready for disposition.

## Alleged Violations

Willful citation 1, item 1 alleges two instances where CFR 1910.212(a)(3)(ii) were violated:

a. In the Fabrication Department, the point of operation of the Amada 1/4" Shear, serial number 40650027, was not guarded due to the fact that the finger guard was not adjusted to prevent the operator from having any part of his/her body in the danger zone during the operating cycle.

b. On or about October 11, and December 6, 1996, in the Fabrication Department, the point of operation on the Cincinnati Shaper Co. 350 Ton Press Brake was not guarded to prevent the operator from having any part of his/her body in the danger zone during the operating cycle.

The cited standard provides:

> The point of operation of machines whose operations exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefore, 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.

## Amada Shear

*Facts*

On November 19, 1996 a Parsons employee, Wesley Schalk, was injured while cutting scrap on the Amada 1/4" shear. A piece of metal slipped out of Schalk=s hands as he pushed it under the shear blades; Schalk automatically reached under the shear=s finger guard to retrieve the piece. As Schalk reached under the finger guard, he accidentally depressed the shear=s foot pedal and activated the shear, amputating the tips of his six middle fingers (Tr. 193-95). A complaint regarding the November 19 accident was filed with OSHA, and Compliance Officer (CO) Nick Walters was assigned to inspect Parsons= Amada shear (Tr. 69-70).

CO Walters testified that the Amada shear consisted of a 13 foot long worktable approximately 2-3 feet wide (Tr. 74). A blade runs the length of the table; a hold down bar made up metal Afeet@ joined by three metal rods is located in front of the blade (Tr. 75, 79; Exh. C-2 through C-5). The hold down bar forces the metal sheet flat against the worktable during the shearing operation (Tr. 75). Walters observed a Parsons employee, Derrick Perry, feeding sheet metal into the point of operation with his left hand. During the feeding operation, Perry=s left hand was next to the hold down bar, approximately four inches away from the point of operation (Tr. 74-78; Exh. C-3, C-4).

Walters testified that a finger guard intended to keep the operator=s fingers out of the point of operation is located behind the hold down bar, approximately 1" to 1-1/8" in front of the blade (Tr. 81, 84, 88, 90). CO Walters found that the north end of the finger guard was approximately 2" above the surface of the work table (Tr. 89). At the south end of the shear, the finger guard was between 2" and 5/8" above the work table (Tr. 90-91). CO Walters stated that '1910.212(a)(3)(ii), which in his view adopts ANSI standard B11.4,[1] allows no more than 1/4" clearance for a finger guard which is 1-1/8" from the point of operation (Tr. 99).

James Kenagy, Parsons= maintenance manager (Tr. 239), stated to CO Walters, and again at the hearing, that Parsons= had trouble with the finger guard before. Bowed and twisted metal fed into the machine could bump up the hold down bar and finger guard enough to allow the operator to get his fingers into the point of operation (Tr. 95, 240, 247, 267). When the guard became bent Kenagy adjusted it by placing a 1/4" plate on the worktable, and adjusting the guard downward until it began to interfere with the placement of the steel (Tr. 241). The guard was not adjusted on a regular schedule; Kenagy would be called in to remove a sheet of metal which had became caught, and would readjust the guard downward at that time (Tr. 247, 273-74).

Schalk=s training included instructions to keep his hand out of the shears (Tr. 184, 204-05). Schalk stated that there was no way to get his hand close to the blade of the shear he was trained on, because of the guard (Tr. 185). Schalk received no safety training specific to the Amada shear (Tr. 186-87); no one discussed the possibility of problems with the finger guard with him (Tr. 197).

Kenagy testified that after the accident, the maintenance department began to check the guard on the shear on a weekly basis (T. 247-48). After the OSHA inspection, they bolted blocks across the slots where the guard attaches to the shear in order to keep it from riding up (Tr. 251, 268, 270). In addition, they shimmed the guard out 1/4" further from the blade. Kenagy stated that the distance between the blade and the guard was now 1-1/2", which allows them to maintain a 3/8" clearance between the guard and the work table (Tr. 259). Finally, shear operators were told of the problems with the guard, and asked to immediately inform the maintenance department if any pieces became caught, or any parts looked bent (Tr. 252-53).

[1] The ANSI standards were not introduced into evidence.

CO Walters returned to Parsons= work site on December 23, 1997 (Tr. 130). At the hearing Walters testified that Schlink told him that the finger guard on the Amada shear had been adjusted, but that when he measured the distance between the guard and the worktable he found it to be greater than 3/8" (Tr. 140-43; Exh. C-14). Walters testified that he did not measure the distance from the point of operation to the finger guard, because it did not appear to have changed between December 13th and the 23rd (Tr. 168). Walters stated that if the distance between the point of operation and the guard was 1-1/2" or greater, OSHA regulations allowed for a 3/8" clearance between the finger guard and worktable (Tr. 169), and that if the shear blade was 1-1/2" or more from the guard, the Amada shear was in compliance on December 23 (Tr. 171). Walters testimony on this point again assumes the ANSI standard is adopted by the OSHA standard.

*Discussion*

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD &29239, p. 39,157 (No. 87-1359, 1991).

The cited standard=s guarding requirements apply when a machine=s point of operation exposes an employee to injury. *Rockwell International Corp.*, 9 BNA OSHC 1092, 1980 CCH OSHD &24,979 (No. 12740, 1980). In this case, the standard=s applicability is clear.

Section 1910.212(a)(3)(iv) lists a number of machines which usually require point of operation guarding; shears are listed at (iv)(b). Both the manufacturer and employer recognized the need for guarding; the shear came equipped with guards (Tr. 249). The testimony establishes that operation of the shear requires the operator to place his hands within inches of the zone of danger, exposing him to injury. Finally, there was an injury incurred, allegedly as a result of the inadequacy of the guard. The standard clearly applies, the issue in this case is whether the guard on the Amada shear conformed with the minimum requirements of the standard.

The standard requires that guards shall conform with appropriate standards, or, Ain 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.@ Here, the parties made no showing that applicable specific standards apply to the cited shear.

At the hearing Complainant introduced evidence, through the CO, that the finger guard on the Amada shear failed to meet the requirements of an industry consensus standard, ANSI B11.4. The Commission, however, has held that Aapplicable specific standards,@ for the purpose of '1910.212(a)(3)(ii) refers only to standards published or incorporated by reference as OSHA standards, rather than to industry consensus standards. *George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436, 1982 CCH OSHD &25,956 (No. 76-647, 1982).

It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language, thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC*, 613 F.2d 1227, (3rd Cir. 1980). Because the cited standard does not reference the ANSI standards in any way, the Secretary may not rely on the provisions of ANSI B11.4. To rule otherwise would require the employer to comply with a standard of which it has no notice.

In the absence of applicable specific standards, a guard is considered adequate where its is designed and constructed so as to prevent the operator from having any part of his body in the danger zone during the operating cycle. The accident indisputably establishes that the Amada shear guard was inadequate to prevent the operator from reaching into the point of operation as it was configured on November 19, 1996. The guard was not, therefore, in compliance with the standard.

As noted above, employer knowledge is established where it is shown that the employer knew or with the exercise of reasonable diligence could have known of the violative conditions. Due diligence includes Athe obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent their occurrence.@ *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233, 1981 CCH OSHD &25,129, p. 31,032 (No. 76-4627, 1981). The testimony of James Kenagy establishes that Parsons was aware of the finger guard=s tendency to come out of adjustment and to ride up high enough to allow operators to get their fingers into the point of operation. Though Kenagy adjusted the guard when he knew it was out of alignment, there was no established schedule for checking the guard. Operators were not trained to check the guard=s alignment prior to using the shear. A reasonably diligent employer, aware of problems with the finger guard=s alignment, would have regularly inspected the finger guards, and/or trained shear operators to recognize and inform maintenance when the guards came out of alignment. Employer knowledge has been established.

The Secretary has established that the cited standard applies to the Amada shear, that the shear guard did not conform with the standard, and that the shear operator was exposed to the cited hazard.

Parsons= knew, or in the exercise of due diligence should have known of their employees exposure to the hazard. Complainant has made out its prima facie case.

*Employee Misconduct*

In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1995 CCH OSHD &30,745 (91-2897, 1995).

The violation in this case is the misalignment of the required finger guard. Parsons introduced no evidence that it had any rules in place designed to assure that the shear was not operated while the guard was out of alignment.[2] Parsons has not, therefore, made out an employee misconduct defense.

The violation is established.

*Willful*

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. It is differentiated from other types of violations by a heightened awareness -- of the illegality of the conduct or conditions -- and by the state of mind -- conscious disregard or plain indifference. *Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD &24,419 (No. 76-3743, 1980).

This is not a case in which the employer failed to provide guards on a machine that clearly called for them; finger guards were in place on the Amada shear. However, the guards came out of adjustment when bowed stock was cut. The record establishes that Parsons failed to meet the standard of due diligence in anticipating and taking precautions to protect its employees from the hazard created by the misaligned finger guard. Parsons failure to prevent the anticipated hazard is adequate to establish constructive knowledge of the cited conditions. An employer=s constructive knowledge of a hazardous condition is

[2] Where, as here, physical guards are required under the terms of the standard, the employer may not rely on employee training in lieu of providing adequate guards. Parsons, therefore, may not rely on its instructions to Schalk warning him to keep his hands away from the blades.

insufficient to support a finding that a violation was willful in nature; additional evidence demonstrating the employer=s conscious disregard for the requrements of the Act, or for employee safety is required.

Complainant relies on Parsons failure to comply with the 1/4" clearance established under ANSI guidelines to establish that heightened awareness. Complainant maintains that the measurements taken by the CO on December 13, and 23 demonstrate that Parsons continued to ignore the 1/4" clearance requirement even after its shear operator sustained a severe injury on the shear, and that Parsons= was indifferent to both the requirements of the standard, and the safety of its employees.

As discussed above, the ANSI standards were not adopted or referenced under '1910.212(a)(3)(ii), were never introduced into evidence, and are no more than advisory guidelines. Parsons failure to adhere to such guidelines[3] cannot serve as a basis for a willful citation. Because no other evidence was introduced to show that the guard, as adjusted on December 13 and 23, would not have prevented the operator from having any part of his body in the danger zone during the operating cycle, this judge cannot find that the adjustment of the guard, which allowed a gap of between 3/8 and 5/8 inches, violates the standard, much less demonstrates an indifferent state of mind.

Since the accident Parsons has taken a number of measures to correct the problem of the finger guard coming out of alignment, including the installation of blocks, shimming the hold down out further from the blade, and instituting a regular schedule for checking the finger guard clearance.[4]

Taking into account the single proven violation and given Parson=s efforts at abatement, I cannot find that the cited violation was willful in nature. This instance will be affirmed as a Aserious@ violation.

**Press Brake**

*Facts*

**The Inspection.** Upon CO Walters= arrival at Parsons, Walters conducted an opening conference with Greg Schlink, the operations manager. Walters provided Schlink with a copy of the complaint, and told Schlink that he would be investigating that item and any other hazards which were in plain view in the inspection area. Walters testified at the hearing that Schlink told him that was fine (Tr. 71-72).

[3] It is not clear, moreover, that the finger guard was out of alignment during the December 23, 1996 inspection due to the incomplete measurements taken by the CO.

[4] Absent is the institution of employee training informing operators of safe clearances and prohibiting the use of the shear where such clearances are exceeded. In itself, however, this failure is insufficient to establish that the cited violation was willful.

Schlink testified that he understood Walters= explanation of the scope of the inspection (Tr. 297). Schlink never told Walter that he objected to any portion of the inspection (Tr. 298). Schlink testified that he did not believe that he could not stop Walters from conducting the inspection (Tr. 297).

**Press Brake.** While returning to Parsons= offices after inspecting the Amada shear, Walters noticed a Cincinnati mechanical press brake (Tr. 104-05). There was no point of operation guarding on the press brake (Tr. 105; Exh. C-9). Schlink was present as Walters began to videotape the press brake, and did not object to Walters= taping (Tr. 107). Schlink told Walters he was aware of the need to provide guards on the press brake, and had gotten bids on a light curtain to guard the point of operation three or four years prior to the inspection (Tr. 108-09, 159-60).

Schlink told Walters that Danny Berry, a Parsons employee, had used the press brake approximately a week before. Berry was called over and he and Walters were shown to an office so that Berry could be interviewed (Tr. 109-13). Berry told Walters that he last operated the press brake a week prior to the inspection, during which operation he had not placed his hands within 24" of the press brake=s point of operation (Tr. 114). However, Berry also stated that he had straightened some track guards on the press brake approximately two months prior to the inspection (Tr. 114). During that operation he had needed to place his hands approximately four inches from the point of operation (Tr. 114).

At the hearing, Wesley Schalk testified that he used the press brake two or three times shortly after he was hired in October 1996 (Tr. 179-80, 189). Schalk estimated that his hands were approximately 3 to 4" from the point of operation when he was straightening 8" steel (Tr. 182). There was no point of operation guarding on the machine when he used it (Tr. 181).

*Discussion*

As a threshold matter, Parsons requests that the testimony of Wesley Schalk and evidence gathered by CO Walters regarding the press brake be stricken.

**Testimony of Wesley Schalk.** Parsons requests that Schalk=s testimony regarding his operation of the press brake be stricken. Parsons maintains that it was not apprised of Complainant=s intent to elicit such testimony, and was prejudiced in its ability to defend against it.

In its pre-hearing statement, the Secretary stated that Schalk would testify to Athe positions, instruction, assignment and work he performed at Parsons including his operation of the press brake.. . .@ Parsons argues that, given the lack of detail in this statement, it reasonably believed this statement was a typographical error, and was intended to refer to the Amada shear.

The press brake was placed in issue by the Secretary=s pleadings. The Secretary=s pre-hearing statement gave Parsons notice that Schalk would testify as to the press brake, as, in fact, Schalk did. No relief is available merely because Parsons did not believe Complainant=s pre-hearing statement. Parsons= post-hearing motion to strike is DENIED.

**Consent to the Inspection.** Parsons argues that the scope of the OSHA inspection exceeded Parsons= consent, insofar as it addressed hazards presented by the Cincinnati press brake. Parsons maintains that any consent was involuntary. Parsons further maintains that CO Walters misrepresented the scope of the inspection, in that the cited violation was not in plain view.

Parsons points out there can be no violation of '1910.212(a)(3)(ii) without proof that the method of operation places the operator in the zone of danger. Because the press brake was not in operation at the time of the inspection, CO Walters could not have actually seen the cited violation. Parsons argues that Walters= expansion of the search to include employee interviews to ascertain the operation of the press brake exceeded the represented scope of the inspection.

Parsons admits that it consented to the OSHA inspection. Where, as here, an employer consents to an inspection, relief is available only if the employer can present clear and convincing proof that the Secretary=s affirmative misrepresentation resulted in such consent. An inspecting officer is not generally obligated to inform the employer of its rights to object and demand a warrant. Moreover, an employer=s failure to protest undermines that employer=s attempt to show its consent was coerced. *Secretary of Labor v. Sanders Lead Company*, 15 BNA OSHC 1640, 1991-93 CCH OSHD &29,690 (No. 87-260, 1992) (citations omitted).

The evidence does not establish any misrepresentation by CO Walters. Walters observed an unguarded machine, which led him to investigate further. The D.C. Circuit has held that AOSHA=s right to inspect must necessarily include some right of closer examination once an observation is made which justifies a reasonable suspicion that a violation exists.@ *Donovan v. A.A. Beiro Construction Company, Inc.*, 746 F.2d 894 at 903 (D.C. Cir. 1984). Danny Berry=s interview was justified by Walter=s reasonable suspicion that the unguarded press brake posed a hazard to the machine=s operators. Moreover, any expansion of the search was also consented to; Parsons= representative not only failed to object, but actively participated in securing Berry=s interview for the CO.

Parsons= consent was valid. Its post-hearing motion is DENIED.

**The Violation.** The evidence establishes that the press brake was unguarded, and when in operation exposed employee operators to the hazard of having their hands crushed in the point of operation. Respondent offered no evidence in rebuttal or mitigation. The violation is established.

*Willful*

Complainant bases the Awillful@ classification solely on Parsons= admission that it solicited a bid on a light curtain. This single fact is insufficient to carry the Secretary=s burden of proving, by a preponderance of the evidence, that Parsons was indifferent to the requirements of the Act, or to employee safety. In the absence of additional information regarding this machine, its operation, its injury history, if any, citation history, if any, and the reason the light curtain was rejected, a finding that this violation was willful cannot be made.

*Penalty*

The violations are both high gravity serious, in that the most probable result of an accident involving either the shear or the press brake is amputation (Tr. 152). CO Walters testified that the probability of an accident on the shear was high because the shear was in almost continual use, six to eight hours daily (Tr. 152). The probability of an accident occurring on the press brake was also high, because no guard whatsoever was provided. Parsons was entitled to a reduction in the penalty based on the number of employees, and on the absence of prior violations (Tr. 152). A combined penalty of $49,000.00 was proposed.

It is well settled that the Commission has the sole authority to assess penalties. The Secretary=s proposed penalties are merely advisory; the judge=s determination of the penalty is *de novo*. *Valdak Corp.*, 17 BNA OSHC 1135, 1995 CCH OSHD &30,759 (No. 93-0239, 1995); *Hern Iron Works,* 16 BNA OSHC 1619, 1994 CCH OSHD &30,363 (No. 88-1962, 1994). In this case, the Secretary=s assessment of the gravity of the violations, together with the adjustment for size and history are accepted. However, because the violation was not found to be willful, the proposed penalties will be reduced by a factor of 10, the multiplier used by the Secretary in assessing the penalties for willful violations. Finally, given the factual differences between the two violations, the type of machines involved, the types of guarding in place and the fact that an injury occurred at one machine and not the other, I find that separate penalties are appropriate. *See, Caterpillar, Inc.*, 15 BNA OSHC 1953, 1991-93 CCH OSHD &29,962 (No. 87-922, 1993)[The Commission has the authority to assess separate penalties for separate violations of a single standard or regulation where the cited regulation permits multiple units of prosecution].

A penalty of $4,900.00 is assessed for each violation.

## ORDER

1. Citation 1, item 1a, alleging violation of '1910.212(a)(3)(ii) is AFFIRMED as a Aserious@ violation of the Act, and a penalty of $4,900.00 is ASSESSED.

2. Citation 1, item 1b, alleging violation of '1910.212(a)(3)(ii) is AFFIRMED as a Aserious@ violation of the Act, and a penalty of $4,900.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: