United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. WORLDWIDE MANUFACTURING, INC. Respondent.	OSHRC Docket No. 97-1381

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

ROGERS, Chairman:

Worldwide Manufacturing, Inc. ("Worldwide") operates a small factory in Berkeley, Missouri, where it manufactures collapsible metal sawhorses, folding metal tables, and metal legs that purchasers can attach to their own tabletops. The Occupational Safety and Health Administration ("OSHA") initially inspected Worldwide's factory in February 1995 and cited several violations of safety and health standards, including the standards governing mechanical power presses, and the control of hazardous energy (lockout/tagout). That citation was resolved by a settlement agreement in which Worldwide agreed to abate all the cited violations. In February 1997, an OSHA compliance officer ("CO") performed a follow-up inspection of Worldwide's factory to verify that abatement had occurred and discovered that many of the violations still existed. As a result, the Secretary of Labor ("the Secretary") issued the citations at issue here alleging that Worldwide had committed two

serious and seven repeated violations of safety and health standards issued under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").

I agree with my colleagues to affirm the decision of the administrative law judge. The judge's findings of serious, willful, and repeated violations are fully supported by the record. I adopt the factual findings and legal conclusions contained in his decision, attached hereto. I find, however, that the judge erred in assessing unreasonably low penalties for Worldwide's willful violations of items 1a-d, 2, 3, and 4 of Citation 2.

In item 1 of citation 2, the Secretary alleged repeated violations of four subsections of the standard governing the control of hazardous energy ("lockout/tagout," or "LOTO"). The Secretary grouped the four violations and initially proposed a single penalty of $10,000. In the complaint, the Secretary amended the citation to allege in the alternative that these violations were willful as well as repeat violations. The compliance officer testified that if the violation had originally been cited as willful, the penalty proposed would have been $22,000. The administrative law judge found willful violations of all four sections of the standard and assessed a penalty of $7,000. I do not find this amount to be appropriate for the willful violations here.

The Act requires a mandatory minimum penalty of $5,000 for a willful violation, with a maximum of $70,000. In determining what penalty is appropriate for a violation, section 17(j) of the Act, 29 U.S.C. § 666(j), requires the Commission to consider the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. Here, only size mitigates in favor of Worldwide. The gravity of these four violations is somewhat high in light of the nature of an injury that would likely result from violations of the LOTO standard. In addition, Worldwide had a history of prior violations of the Act, including violations of the standards cited here. Any abatement measures taken by the company came too late to be given credit as demonstrating good faith here. On the other hand, Worldwide is a very small company, with a maximum of 24 employees. After considering the factors set out in section 17(j), I find a penalty of $14,000 to be appropriate.

Item 2 of citation 2 alleged that Worldwide had committed a repeated violation of the standard at 29 C.F.R. § 1910.217(b)(8)(i) by failing to have switches that could be locked in the "off" position, proposing a penalty of $10,000. That allegation was amended in the complaint to plead in the alternative that the violation was willful or repeated. The compliance officer testified that a penalty of $22,000 would have been proposed if the violation had initially been cited as willful. The judge found a willful violation and assessed a penalty of $5,000, the minimum permitted under the Act for a willful violation. I believe that this violation warrants a penalty greater than the minimum. Having weighed the four statutory 17(j) factors, I find a penalty of $10,000 to be appropriate for this violation.

As amended, item 3 of citation 2 alleged in the alternative willful or repeated violation of 29 C.F.R. § 1910.217(b)(8)(iii) for failure to have an automatic disconnect or "positive off" switch on the power presses so that, in the event of a power failure, the machines would have to be restarted when the power came back on instead of automatically resuming operation. The judge found a willful violation. As with the previous item, the Secretary originally proposed a penalty of $10,000 in the citation, amended the citation to willful, and presented testimony at the hearing that the proposed penalty would have been $22,000 if the violation had initially been cited as willful. The judge again assessed the minimum penalty of $5,000 for a willful violation under the Act. Here, too, I believe that the minimum penalty is not appropriate. I have considered the evidence relating to the factors set out in section 17(j) and deem a penalty of $10,000 to be appropriate for this violation.

As amended in the complaint, item 4 of citation 2 alleged in the alternative that Worldwide had committed a willful or repeated violation of the standard at 29 C.F.R. § 1910.217(c)(2)(i)(a) because the guards on Worldwide's presses did not prevent employees from putting their hands into the point of operation of the machines. The Secretary's initial proposed penalty was $10,000 for a repeated violation, but, according to the compliance officer, the penalty proposed for a willful violation would have been $22,000. The administrative law judge found that the Secretary had proved a willful violation but assessed a penalty of only $8,000.

After reviewing the record, I find that the penalty assessed for this item was inadequate. Worldwide made a conscious decision not to use the guards. Even though Worldwide had experienced serious injuries on the presses, including one after an earlier citation, it did not use the guards during normal operation of the machines but saved them for visits from its insurance company and OSHA. This attitude of sacrificing employee safety for the sake of production is completely contrary to the intent of the Act and warrants a more severe penalty than the judge assessed. Having considered the evidence in the record in light of the four statutory penalty factors, I find a penalty of $16,000 to be appropriate.

Finally, I agree that the judge did not abuse his discretion in denying the Secretary's motion to amend the complaint. The Secretary moved at the end of her case to amend item 1 of citation 1 from serious to willful. Worldwide objected, claiming that it would be prejudiced[1] because it was not prepared to try the new issue the amendment would introduce.[2] The judge decided to defer ruling on the motion, ultimately denying it in his decision. A judge's ruling on a motion to amend will be upheld unless it was an abuse of discretion.[3] *Bland Constr. Co.*, 15 BNA OSHC 1031, 1041, 1991-93 CCH OSHD ¶ 29,325, p. 39,401 (No. 87-992, 1991).

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[1]Prejudice in this context means a lack of opportunity to prepare to meet the unpleaded issue. *George Campbell Painting Co.*, 18 BNA OSHC 1929, 1931, 199 CCH OSHD ¶ 31,935, p. 47,387 (No. 94-3121, 1999) (quoting 6A Wright, Miller, *et al.*, *Federal Practice and Procedure*).

[2]An amendment to allege a willful violation would have placed new facts in issue because proof that a violation was willful requires more than the simple showing of knowledge required to establish other violations; a willful violation is distinguished by an employer's heightened awareness of the illegality of its conduct and by a conscious disregard of the law or plain indifference for its employees' safety and health. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHD ¶ 30,059, p. 41,330 (No. 89-2883, 1993).

[3]Abuse of discretion occurs when a judge's decision is clearly unreasonable, arbitrary, or fanciful, when the decision is based on erroneous conclusions of law, when the judge's findings of fact are clearly erroneous, or when the record contains no evidence on which the judge rationally could have based his decision. *Sealtite Corp.*, 15 BNA OSHC 1130, 1134 n.7, 1991-93 CCH OSHD ¶ 29,398, pp. 39,582-83 n.7 (No. 88-1431, 1991).

Under Rule 15(b) of the Federal Rules of Civil Procedure, a court shall freely allow amendment of the pleadings during trial unless the objecting party would be prejudiced by the amendment. Here, the judge denied the Secretary's motion to amend without affording Worldwide's counsel additional time to investigate and prepare a defense to the new allegations and without stating the basis of his decision at the hearing. While the judge's handling of the motion represents a departure from recommended practice,[4] the judge did not abuse his discretion. First, the Secretary did not justify the lateness of her motion. Second, there are indications that the motion could have been made earlier so as to avoid potential prejudice. Under these circumstances, I find that there was no abuse of discretion.

For the reasons stated above, I adopt the judge's factual findings and legal conclusions. I find that a combined penalty of $14,000 is appropriate for Worldwide's willful violations of the lockout/tagout standards at 29 C.F.R. §§ 1910.147(c)(1), 1910.147(c)(4)(i), 1910.147(c)(5)(i), and 1910.147(c)(7)(i). Finally, I find that penalties of $10,000, $10,000, and $16,000 are appropriate for Worldwide's willful violations of the mechanical power press standards at 29 C.F.R. §§ 1910.217(b)(8)(i), 1910.217(b)(8)(iii), and 1910.217(c)(2)(i)(a), respectively.

_____
Thomasina V. Rogers
Chairman

Dated: _____

[4]The Commission has previously recommended to our judges that they inquire of counsel how long it would take to prepare on the new issues. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167 n.7, 1993 CCH OSHD ¶ 39,041, p. 41,219 n.7 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994).

WEISBERG, Commissioner, concurring:

I agree with the approach taken by my colleague, Commissioner Visscher, to simply affirm the judge's decision -- upholding the serious, willful and repeated violations found by the judge based on the record, and holding that the judge did not abuse his discretion by denying the Secretary's motion to amend the complaint made at the close of her case.

However, unlike my colleague, I would not affirm the judge's penalty recommendations for Worldwide's willful violations of items 1a-1d, 2, 3, and 4 of Citation 2,[5] because the judge clearly and unquestionably erred in this regard. The penalty issue was squarely presented in the Secretary's petition for review, it was specifically raised in the briefing order, and it was discussed by the parties in their briefs.

The Secretary had proposed a penalty of $22,000 for each of these four items (the Secretary had grouped items 1a-d for penalty purposes). These violations were found by the judge to be willful as well as repeated. Many of these conditions had been cited during an inspection at this facility two years earlier, but the company had continued to refuse to comply with the standards or to correct the hazardous conditions. With respect to item 4, the employer had been cited in April 1995 for having no point of operation guards on mechanical power presses. At the time of the February 1997 inspection, while there were guards in place, they had openings large enough for an employee "to get into the point" and thus did not protect employee's hands or fingers from contact with the same hazardous conditions. The judge further found that these guards were only used during plant inspections by OSHA and insurance carriers so as to convey the appearance of compliance, but were removed at other times because they apparently slowed down production.

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[5]Items 1a-1d involved the company's failure to comply with four subsections of the lockout/tagout standard over a prolonged period of time. Item 2 related to the company's failure to have power disconnect switches capable of being locked in the off position on its mechanical power presses. Item 3 involved the company's failure to have starters with disconnects on its mechanical presses. Item 4 related to the company's failure to have proper point of operation guards on mechanical power presses.

Under section 17(j) of the Act, in determining the appropriate penalty the Commission must give due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations. "These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J. A. Jones Constr.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). Applying these section 17(j) factors, the judge noted that Worldwide was a small employer with about 24 employees. The judge also found that the violations were of high gravity, that serious injury could result, that the employer had a history of previous violations, and there was no good faith. However, the judge, without explanation or reason, assessed penalties either at or just above the $5000 statutory minimum required under the Act for a willful violation. Despite Worldwide's small size, the gravity of these violations in conjunction with Worldwide's history of previous violations and lack of any good faith simply does not add up to or equate with the statutory *minimum* penalty for these willful violations. Thus, the judge's penalty assessment is at odds with his own findings relating to the individual 17(j) factors, with three of the four factors, including the most important one, the gravity, warranting a much higher penalty. Accordingly, I join with Chairman Rogers in assessing higher penalties than those recommended by the judge for these willful violations.

_____

Stuart E. Weisberg
Commissioner

Dated:_____

VISSCHER, Commissioner, concurring:

Having reviewed the record, I would simply affirm the judge's decision.

/s/
Gary L. Visscher
Commissioner

Date: August 1, 2000

Secretary of Labor,
Complainant,
v. OSHRC Docket No. **97-1381**

Worldwide Manufacturing, Inc.,
Respondent.

Appearances:

Elizabeth C. Lawrence, Esquire
Rachel Parsons, Esquire
Office of the Solicitor
U. S. Department of Labor
Kansas City, Missouri
For Complainant

William R. Dorsey, Esquire
St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Worldwide Manufacturing, Inc. (Worldwide), is a corporation engaged in the manufacture of folding tables and metal sawhorses in Berkeley, Missouri. The Occupational Safety and Health Administration (OSHA) conducted an inspection at respondent's facility on February 21, 1997. As a result of this inspection, OSHA issued respondent three citations. Respondent filed a timely notice contesting these citations and proposed penalties. A hearing was held in St. Louis, Missouri, on April 23, 1998.

At the hearing, complainant moved to amend her citations as follows:

1. Amend Citation No. 1, item 1, a serious violation, to plead a willful violation in the first instance or in the alternative.

2. Amend Citation No. 2, item 4, to allege in the alternative a violation of 29 C.F.R. § 1910.217(c)(2)(i)(a).
3. Amend all repeat violations to allege willful violations and, in the alternative, repeat violations and, in the alternative, serious violations.

Complainant did not seek to amend Citation No. 1, item 1 to allege a willful violation or Citation No. 2, item 4 to allege a violation of another standard section until the conclusion of her

case-in-chief at the hearing. To allow these amendments would be prejudicial to the respondent in the preparation of its defense. These motions are denied.

In her complaint, the Secretary alleged that the violations listed in Citation No. 2, items 1a-d, 2, 3 and 4 were repeat violations and, in the alternative, willful violations. She further alleged that these violations are serious if not found to be repeat or willful. In its answer, respondent denied that these violations were either repeat or willful.

Respondent received notice in the complaint of the Secretary's amendment to allege in the alternative repeat and willful violations of items 1-4 of Citation No. 2. Respondent acknowledged this notice by its answer denying that such violations were repeat or willful. Respondent was not prejudiced in its defense since the amendment was made in the complaint filed September 29, 1997, almost eight months before the hearing. Complainant's motion to amend all repeat items to allege willful violations and, in the alternative, repeat violations, and in the alternative, serious violations is granted.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

Citation No. 1, Item 1
Alleged Violation of 29 C.F.R. § 1910.212(a)(3)(ii)

The Secretary in Citation No. 1, item 1, alleges that:

> Point(s) of operation of machinery were not guarded to prevent employee(s) from having any part of their body in the danger zone(s) during operating cycle(s):
>
> (a) In the riveting area, the Townsend riveters, Model 161 were not guarded at the point of operation. There are five Townsend riveter, three were being used on a daily basis, two are used on a part time basis. None of the five riveter have guards.

This standard clearly applies to this operation. The riveters were not guarded for at least two years before the inspection. No efforts were made after the inspection to guard these machines. Prior to the inspection, at least two employees were seriously injured by the points of operation on these riveters. Raymond O'Brien, respondent's plant manager at the time of the inspection, testified that no riveters in this plant had point of operation guards at anytime during his employment from May 1995 through March 1998. Employee exposure to the unguarded points of operation on these riveters was observed during the inspection by the OSHA compliance officer. Charles Mull, respondent's vice president, admitted that riveter operators' hands are from 2 to 10 inches from the unguarded point of operation during normal riveting operations. Respondent violated 29 C.F.R. § 1910.212(a)(3). This violation was serious and could result in serious hand and finger injury including amputation.

Citation No. 1, Item 2
Alleged Violation of 29 C.F.R. § 1910.305(g)(1))(iii)

The Secretary in Citation No. 1, item 2 alleges that:

> Flexible cords and cables were used for purposes prohibited by subparagraphs (a) through (e) of this paragraph:
>
> (a) Flexible cord sets (extension cords) were used as substitutes for the fixed wiring of the plant and to power various stationary equipment, such as, but not limited to, Chicago Rivet machines (five) which did not require frequent interchange, exposing the employees to hazards such as electrical fires.

Testimony of the Secretary's compliance officer established that flexible extension cords were used instead of fixed wiring to power Chicago Rivet machines which did not require frequent interchange or movement. Respondent's plant manager and vice-president admitted that flexible cords were used here. Employees worked in this area exposed to electric shock and fire hazards. While Mr. Mull claimed these machines were moved, he did not state which machines were moved or the frequency of such movement. Respondent violated 29 C.F.R. § 1910.305(g)(1)(iii). This was a serious violation that could result in electric shock or fire, causing serious injury or death.

Citation No. 2, Item 1, (a-d)
Alleged Violations of 29 C.F.R. §§ 1910.147(c)(1),
1910.147(c)(i), 1910.147(c)(5)(i), and 1910.147(c)(7)(i)

The Secretary in Citation No. 2, items 1a through 1d, alleges the following repeat violations:

Citation No. 2, Item 1a

29 C.F.R. § 1910.147(c)(1): The employer did not establish a program consisting of an energy control procedure and employee training to ensure that before an employee performed any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment would be isolated, and rendered inoperative in accordance with the specific procedures required by 29 C.F.R. § 1910.147(c)(4):

(a) In the Assembly, Welding and Press Department: a written energy control procedure was not developed for employees performing maintenance and repair of machines and equipment including, but not limited to the Federal mechanical power press, serial number 5612; the Niagara mechanical power press, no serial number; and the inclined Bliss mechanical power press, no serial number.

WORLDWIDE MANUFACTURING, INC., WAS CITED FOR A VIOLATION OF THE IDENTICAL OCCUPATIONAL SAFETY AND HEALTH STANDARD C.F.R. § 1910.147(c)(1) PER OSHA INSPECTION 113886188 CITATION NUMBER 1, ITEM NUMBER 1a, ISSUED ON 4/12/95 AT THE SAME FACILITY

Citation No. 2, Item 1b

29 C.F.R. § 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:

(a) In the Assembly, Welding and Press Department: a written machine specific lockout procedure was not developed for employees performing maintenance and repair of machines and equipment including, but not limited to the Federal mechanical power press, serial number 5612; the Niagara mechanical power press, no serial number; and the inclined Bliss mechanical power press, no serial number.

WORLDWIDE MANUFACTURING, INC., WAS CITED FOR A VIOLATION OF THE IDENTICAL OCCUPATIONAL SAFETY AND HEALTH STANDARD C.F.R. § 1910.147(c)(4)(i) PER OSHA INSPECTION 113886188 CITATION NUMBER 1, ITEM NUMBER 1b, ISSUED ON 4/12/95 AT THE SAME FACILITY.

Citation No. 2, Item 1c

29 C.F.R. § 1910.147(c)(5)(i): Locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware were not provided by the employer for isolating, securing, or blocking of machines or equipment from energy sources:

(a) In the Assembly, Welding and Press Department: no locks or other hardware were provided for employees performing maintenance and repair of machines and equipment including, but not limited to the Federal mechanical power press, serial number 5612; the Niagara mechanical power press, no serial number; and the inclined Bliss mechanical power press, no serial number.

WORLDWIDE MANUFACTURING, INC., WAS CITED FOR A VIOLATION OF THE IDENTICAL OCCUPATIONAL SAFETY AND HEALTH STANDARD C.F.R. § 1910.147(c)(5)(i) PER OSHA INSPECTION 113886188 CITATION NUMBER 1, ITEM NUMBER 1c, ISSUED ON 4/12/95 AT THE SAME FACILITY.

Citation No. 2, Item 1d

29 C.F.R. § 1910.147(c)(7)(i): The employer did not provide adequate training to ensure that the purpose and function of the energy control program was understood by employees:

(a) In the Assembly, Welding and Press Department: lockout training was not provided for employees performing maintenance and repair of machines and equipment including, but not limited to the Federal mechanical power press, serial number 5612; the Niagara mechanical power press, no serial number; and the inclined Bliss mechanical power press, no serial number.

WORLDWIDE MANUFACTURING, INC., WAS CITED FOR A VIOLATION OF THE IDENTICAL OCCUPATIONAL SAFETY AND HEALTH STANDARD C.F.R. § 1910.147(c)(7)(i) PER OSHA INSPECTION 113886188 CITATION NUMBER 1, ITEM NUMBER 1d, ISSUED ON 4/12/95 AT THE SAME FACILITY.

The compliance officer observed the conditions which are the basis for the violations alleged in Citation No. 2, items 1a through 1d. Her testimony was essentially uncontroverted at the hearing.

Items 1a and 1b

With regard to items 1a and 1b, OSHA's compliance officer testified that she observed a press operator reaching into the press to remove a stuck part without first turning off the press. He had previously been told by management to turn it off before removing parts. The plant manager gave varying methods as to how he would de-energize these machines. Respondent clearly had not established a written energy control procedure or specific lockout procedure for employees

performing maintenance. Employees received no training in such procedures. The plant manager, Mr. O'Brien, testified operators often removed materials from presses. While he told them to turn off the machines before removing parts, respondent did not establish a lockout/tagout procedure and provided no materials or training for employees on such procedures. Charles Mull, respondent's vice-president, testified that the respondent did not establish a written program until November 1997, nine months after this inspection. Respondent was cited for these violations in April 1995, in the same facility. Respondent violated 29 C.F.R. §§ 1910.147(c)(1) and 1910.147(c)(4)(i). These violations could result in death or serious injury.

Item 1c

The compliance officer testified that Mr. O'Brien admitted during the inspection that respondent had no locks in the plant. Mr. O'Brien testified that no locks or tags were available in the plant until February, 1998, one year after the inspection. Disconnect switches were not even capable of being locked out until that time. Respondent was cited for this violation in April 1995, in the same facility. Respondent violated 29 C.F.R. § 1910.147(c)(5)(i).

Item 1d

The compliance officer testified that Mr. O'Brien admitted during the inspection that no lockout training was provided to employees. He only talked to them about turning off the machines before removing parts or performing other maintenance. Mr. O'Brien also testified that no such training was provided. Respondent was cited for this violation at this facility in April 1995. Respondent violated 29 C.F.R. § 1910.147(c)(7)(i).

Citation No. 2, Item 2
Alleged Violation of 29 C.F.R. § 1910.217(b)(8)(i)

The Secretary in Repeat Citation No. 2, Item 2, alleges that:

> Power press control system(s) on mechanical power press(es) were not provided with main power disconnect switch(es), capable of being locked only in the off position:
>
> (a) In the Assembly, Welding and Press Department: for mechanical power presses including, but not limited to:
>
> (1) The Federal mechanical power press, serial number 5612.
> (2) The Niagara mechanical power press, no serial number.
> (3) The inclined Bliss mechanical power press, no serial number.

WORLDWIDE MANUFACTURING, INC., WAS CITED FOR A VIOLATION OF THE IDENTICAL OCCUPATIONAL SAFETY AND HEALTH STANDARD C.F.R. § 1910.217(b)(8)(i) PER OSHA INSPECTION 113886188 CITATION NUMBER 1, ITEM NUMBER 4, ISSUED ON 4/12/95 AT THE SAME FACILITY.

The compliance officer testified that she observed the mechanical power presses and found that they had no power disconnect switches capable of being locked in the off position. She testified that locks keep the machines from being energized. Mr. O'Brien admitted that there were no locks in the plant. Mr. O'Brien testified that the disconnect switches were not capable of being locked out until February 1998. Also, no locks or tags were available until that time, one year after the inspection in this case. Respondent was cited for this condition in this plant in April 1995. Respondent violated 29 C.F.R. § 1910.217(b)(8)(i).

Citation No. 2, Item 3
Alleged Violation of 29 C.F.R. § 1910.217(b)(8)(iii)

The Secretary in Repeat Citation No. 2, item 3, alleges that:

Mechanical power press control(s) did not incorporate a type of drive motor starter that would disconnect the drive motor from the power source in the event of control voltage or power source failure and require operation of the motor start button to restart the motor when voltage conditions were restored to normal:

(a) In the Assembly, Welding and Press Department: for mechanical power presses including, but not limited to:

(1) The Niagara mechanical power press, no serial number.
(2) The inclined Bliss mechanical power press, no serial number.

WORLDWIDE MANUFACTURING, INC., WAS CITED FOR A VIOLATION OF THE IDENTICAL OCCUPATIONAL SAFETY AND HEALTH STANDARD C.F.R. § 1910.147(b)(8)(iii) PER OSHA INSPECTION 113886188 CITATION NUMBER 1, ITEM NUMBER 5, ISSUED ON 4/12/95 AT THE SAME FACILITY.

The compliance officer testified that during her inspection, she found only one mechanical power press that had a drive motor starter that would disconnect the drive motor from the power source in the event of a power outage. She observed at least two other machines, the Niagara Press and the Bliss Press without this disconnect. This condition was cited at this facility in April 1995,

when no machines had starters with disconnects. Mr. O'Brien admitted during the inspection that respondent bought only one starter with a disconnect after that inspection. At the hearing, the compliance officer explained that the disconnect prevents the press from automatically re-starting when power is restored. This would prevent serious crushing injuries to employees. Respondent clearly violated this standard.

Citation No. 2, Item 4
Alleged Violation of 29 C.F.R. § 1910.217(c)(2)(i)(a)

The Secretary in Repeat Citation No. 2, item 4, alleges that:

> Point of operations guard(s) on mechanical power press(es) did not prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard(s):
>
> (a) In the Assembly, Welding and Press Department: for mechanical power presses including, but not limited to:
>
> (1) The Federal mechanical power press, serial number 5612.
> (2) The Niagara mechanical power press, no serial number.
> (3) The inclined Bliss mechanical power press, no serial number.
>
> WORLDWIDE MANUFACTURING, INC., WAS CITED FOR A SUBSTANTIALLY SIMILAR VIOLATION OF OCCUPATIONAL SAFETY AND HEALTH STANDARD C.F.R. § 1910.217(c)(2)(i)(a) PER OSHA INSPECTION 113886188 CITATION NUMBER 1, ITEM NUMBER 6, ISSUED ON 4/12/95 AT THE SAME FACILITY.

The compliance officer testified that the Federal, Niagara and Bliss mechanical power presses, at the time of inspection, had point of operation guards with large openings on top and sides that would allow entry of hands and fingers into the points-of-operation. Two had top gaps of 3 inches and one of 7 inches. On the sides, the gaps were 5 inches. This testimony is supported by the photographic evidence that clearly shows these openings. In April 1995, respondent was cited for having no point of operation guards on mechanical power presses. Here, while there are guards in place, they don't protect employee hands or fingers from contact with the same hazardous condition. The violative conditions are similar and the hazards are identical. The unguarded points of operation could result in serious injury, including crushed hands and fingers and amputation. Respondent violated 29 C.F.R. § 1910.217(c)(2)(i)(a).

Citation No. 3, Item 1
Alleged Violation of 29 C.F.R. § 1904.2(a)

The Secretary in Citation No. 3, item 1, alleges an "other" violation as follows:

> The log and summary of occupational injuries and illnesses (OSHA Form No. 200 or its equivalent) was not completed in the detail provided in the form and the instructions contained therein:
>
> (a) At Worldwide Manufacturing, Inc., the OSHA 200 logs for years 1995 and 1996 did not have descriptions of the injuries or illness in column (f) there were no totals at the bottom, and the 1996 OSHA 200 log was not posted in February 1997.

At the hearing, the compliance officer gave detailed testimony as to the deficiencies in respondent's log and summary of occupational injuries and illnesses. Specifically, after reviewing the original forms at respondent's plant, she found inaccurate descriptions of affected employees, no totals of injuries listed, no certification of accuracy and no signature. This testimony was uncontroverted and verified by review of the documentary evidence. Respondent violated this standard. No penalty was proposed for this "other" violation.

Complainant has proven all elements of the violations alleged in Citation Nos. 1, 2 and 3., including applicability of the standards, employer noncompliance, employee access and employer knowledge. The violations alleged in Citation No. 1, items 1 and 2, are found to be serious violations which could result in death or serious physical harm.

The violations alleged in Citation No. 2, items 1a through 1d, 2, 3 and 4, are found to be repeat violations in that respondent was cited at this plant in 1995 for the same or similar violations. Those 1995 citations became a final order of the Commission prior to this inspection.

> A violation is a repeated violation under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.,* 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28, 171 (No. 16183, 1979). Unless the violation involves a general standard, the Secretary established substantial similarity, prima facie, by showing that both violations are of the same standard. *Monitor Constr. Co.,* 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807).

The Secretary proved that the violations listed in items 1a through 1d, 2 and 3 of Citation No. 2 were of the same standards as those cited in this plant in 1995 referenced in those items, which became a final order of the Commission prior to the occurrence of the current violations.

> A violation is properly characterized as repeated if at the time of the alleged violation there was a Commission final order against the same employer for a substantially similar violation. If the previously cited standard is different, the Secretary has the burden of proving that there is substantially similar. The principal factor in establishing substantial similarity is the similarity of the hazards. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990).

The violation listed in item 4 of Citation No. 2 is substantially similar to the violation cited in 1995 referenced in item 4. In 1995, respondent was cited for no point of operation guards. In 1997, it was cited for inadequate guards. The hazard is the same, specifically hand and finger contact with the point-of-operation of the mechanical power presses.

Willfulness

The Secretary's motion to amend her complaint and citation to allege willful violations for Citation No. 2, items 1a through 1d, 2, 3 and 4, was granted. A determination must now be made as to whether those violations were, in fact, willful.

The Secretary contends that respondent willfully violated 29 C.F.R. §§ 1910.147(c)(1), 1910.147(c)(4)(i), 1910.147(c)(5)(i), 1910.147(c)(7)(i), 1910.217(b)(8)(i), 1910.217(b)(8)(iii) and 1910.217(c)(2)(i)(a).

> A willful violation of the Occupational Safety and Health Action of 1970, 29 U.S.C. §§ 651-678 ("the Act"), is one committed with an "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *L. E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, pp. 41, 123, 41,132 (*quoting Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). "It is differentiated from other types of violations by a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated).
>
> *Mobile Premix Concrete, Inc.*, 18 BNA OSHC 1010, 1013, 1997 CCH OSHD ¶ 31,416, p. 44,405 (No. 95-192, 1997).

In April 1995, respondent was cited for the same standards and violative conditions as those cited in this case in Citation No. 2, items 1a through 1d, 2 and 3. While it was cited previously for

violation of a standard subsection different than that found in item 4 of Citation No. 2, the hazardous conditions were the same. Respondent was aware of the requirements of all previously cited standards and was on notice that the violative conditions existed at least as early as April 1995.

Given this notice and awareness, respondent continued its refusal to comply with the standards or to correct the hazardous conditions. It never developed a lockout program or procedures or trained employees prior to the 1997 inspection. The plant manager, Mr. O'Brien, admitted during the 1997 inspection that there were no locks or tags in the plant. Mr. O'Brien testified there were no locks or tags available until February 1998, one year after the inspection in this case. He further testified that respondent's owner, Jerry Librach, made no attempt to comply with OSHA standards or protect employees until February 1998. Subsequent to the 1995 inspection, Mr. Librach made a conscious decision to place a disconnect on the drive motor starter of only one mechanical power press. All others had no such protection.

After the 1995 inspection, an employee's hand was caught in the point of operation of a punch press. Respondent took no action before or after this incident to guard this condition. Respondent tried to convey the appearance of compliance during plant inspections by insurance carriers and OSHA, but knowingly removed the guards when these visitors left. Mr. O'Brien, the plant manager, testified regarding respondent's attitude toward safety as follows:

> Q. Again, with respect to these mechanical power presses, and again during the time frame January of 1997 up until the OSHA inspection of February of 1997, were the mechanical power presses equipped with guards at the point of operation?
>
> A. After the February, January -- say it again.
>
> Q. 1997. Prior that time frame when the OSHA inspection occurred.
>
> A. I had fabricated guards for them, yes.
>
> Q. And were those guards ever removed?
>
> A. Yes
>
> Q. And under what circumstances were the guards removed?
>
> A. If there was going to be an insurance company or OSHA inspection, they were installed.

Q. So, during the normal course of production, were the guards in place:

A. No.

Q. And why was that the case?

A. That was Mr. Librach's order. He said guards would just slow down production.

Q. And so you were instructed to only put them on the machine when an OSHA inspector or Workers' Comp. insurance carrier was coming to do an inspection?

A. That is true.

Mr. Mull, respondent's vice-president, testified that respondent had no lockout/tagout program until November 1997. OSHA's compliance officer testified that even this program was deficient, being generic and not covering all plant machines.

Three days before hearing in this case, respondent hired a private consultant, Edward Kramer, to visit the plant and advise it regarding safety and help it come into compliance. Mr. Kramer testified that respondent had only the beginning of a safety and health program. While respondent's current attempts to comply are commendable, no such attitude was demonstrated during and prior to the occurrance of the violations now at issue.

Respondent knew of the requirements of the standards at least as early as April 1995. It demonstrated conscious disregard for the requirements of the Act and those standards by its knowing failure to comply with those standards over a prolonged period of time. These actions also show plain indifference to employee safety. For all of the above reasons, I conclude that respondent's violations of Citation No. 2, items 1a through 1d, 2, 3 and 4 are willful. These items were also determined above to be repeat violations. Given the degree of reckless disregard for the requirements of the Act and the plain indifference for employee safety by the respondent, I find that the repeat classification for these violations is included in and subsumed by the willful nature of the violations. I, therefore, conclude that these violations are willful.

Penalties

Under § 17(j) of the Act in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

At the time of the OSHA inspection, Worldwide had between 17 and 25 employees. Its average number of employees is 24. These violations are of high gravity. If violations occurred, the likely result would be serious injury including amputation and crushed fingers and hands. The classification of items 1a-1d, 2, 3, and 4 of Citation No. 2 as willful mitigates against a finding of good faith for those items. I also find no good faith relating to Citation No. 1, items 1 and 2. The standard requirements are clear and no attempt was made to guard the rivet machines or eliminate the flexible wiring even one year after the inspection.

Respondent has a history of previous violations as discussed above. The only evidence submitted at hearing relating to size of this employer is the number of employees. I must conclude that this is a small manufacturing employer. Upon due consideration of these factors, it is determined that the following penalties totaling $28,800.00 are appropriate:

For Citation No. 1, item 1, I find a penalty of $2,800.00 appropriate;

For Citation No. 1, item 2, I find a penalty of $1,000.00 appropriate;

For Citation No. 2, items 1a-1d, I find a grouped penalty of $7,000.00 appropriate;

For Citation No. 2, item 2, I find a penalty of $5,000.00 appropriate;

For Citation No. 2, item 3, I find a penalty of $5,000.00 appropriate;

For Citation No. 2, item 4, I find a penalty of $8,000.00 appropriate; and

For Citation No. 3, item 1, no penalty was proposed. I find that appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED:

The following violations are affirmed, as classified below, and the following penalties are assessed.

Citation No.	Item No.	Violation Classification	Standard Violated	Penalty Assessed
1	1	Serious	29 C.F.R. § 1910.212(a)(3)(ii)	$2,800.00
1	2	Serious	29 C.F.R. 1910.305(g)(1)(iii)	$1,000.00
2	1a	Willful	29 C.F.R. § 1910.147(c)(1)	
2	1b	Willful	29 C.F.R. § 1910.147(c)(4)(i)	
2	1c	Willful	29 C.F.R. § 1910.147(c)(5)(i)	
2	1d	Willful	29 C.F.R. § 1910.147(c)(7)(i)	Items 1a-1d $7,000.00
2	2	Willful	29 C.F.R. § 1910.217(b)(8)(i)	$5,000.00
2	3	Willful	29 C.F.R. § 1910.217(b)(8)(iii)	$5,000.00
2	4	Willful	29 C.F.R. § 1910.217(c)(2)(i)(a)	$8,000.00
3	1	Other	29 C.F.R. § 1904.2(a)	$-0-
			TOTAL	**$28,800.00**

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: August 10, 1998