

OSHRC Unanimously Vacates Machine-Guarding Citation, and then Two More

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On September 21, 2020, the Occupational Safety and Health Review Commission (OSHRC) unanimously vacated a machine-guarding citation on the ground that the injured operator had deliberately bypassed the guard that the employer had installed.

In [*Aerospace Testing Alliance*](#), No. 16-1167 (September 21, 2020), the Commission reversed an administrative law judge's decision and vacated a citation under Section 1910.212(a)(1) that alleged a failure to guard the hold-down pistons of a power shear. Section 1910.212(a) states that "[o]ne or more methods of machine guarding shall be provided" to protect operators and other employees in the machine area from hazards such as those created by points of operation and rotating parts.

The case involved an aerospace engineering company that operated a sheet metal shop at Arnold Air Force Base in Tennessee. An experienced journeyman sheet metal worker suffered a serious hand injury while operating a power shear in the metal shop. The accident prompted the Occupational Safety and Health Administration (OSHA) to conduct an inspection and issue the company "a one-item serious citation."

To prove a violation of an OSHA standard, OSHA must prove (1) the cited standard applies, (2) there was a failure to comply with the standard, (3) employees were exposed to the violative condition, and (4) the employer knew or could have known of the violative condition with the exercise of reasonable diligence.

At issue was whether OSHA had established that the existing guard on the power shear's hold-down pistons was "inadequate to 'protect' employees from the crushing hazard." OSHA argued that machine guarding must physically prevent access to the hazard and that the employer cannot rely on employee behavior. The Commission rejected the argument because the guard was sufficient to prevent inadvertent contact with the pistons and because the principle that employers may not rely on correct employee behavior for safety does not apply when an employee deliberately bypasses an otherwise adequate guard.

Ultimately, the Commission concluded that based on how employees operated the machine, (1) it was not "reasonably predictable that employees [would] intentionally place their fingers underneath the guards" and (2) the record did not support a finding that the machine function[ed] or [was

operated] in way that would allow an employee's fingers to inadvertently slip underneath a hold-down piston guard."

A takeaway from the *Aerospace* decision is the Commission's observation concerning the overlap between the noncompliance and exposure elements that OSHA must prove to establish a machine guarding violation. While an employee injury may show exposure to a hazard, it does not necessarily establish that a failure to comply with the machine guarding standard.

Employers often find themselves facing a seemingly uphill battle when defending against a machine-guarding citation involving a serious injury. While the *Aerospace* decision is perhaps not a groundbreaking change in the law, the Commission emphasized that "the occurrence of the injury ... does not, by itself, establish that the guard was noncompliant with [29 C.F.R.] § 1910.212(a)(1)." According to the Commission, a machine guard can "nonetheless be compliant if the operator's actions [are] not reasonably predictable given the machine's normal operation."

In the days following the *Areospace* decision, OSHRC issued two more decisions vacating citations under 29 C.F.R. § 1910.212(a)(1). One decision focused on OSHA's failure to prove noncompliance, while the other decision involved OSHA's failure to prove exposure.

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