

SECRETARY OF LABOR,

Complainant,

v.

SOUTHERN FOODS d/b/a MEADOW GOLD
DAIRIES,

Respondent.

OSHRC DOCKET NO. 03-1928

APPEARANCES:

For the Complainant:

Oscar L. Hampton, III, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

E. Jaffeiy Stozy, Esq., Dallas, Texas

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 651-678; hereafter called the "Act").

Respondent, Southern Foods, d/b/a Meadow Gold Dairies (Meadow Gold), at all times relevant to this action maintained a place of business at 109 South Broadway, Billings, Montana, where it operated a milk processing plant. Meadow Golds admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 23, 2003, Respondent's employee was injured while he was clearing a jam on Meadow Gold's gallon jug trimmer. As a result, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Meadow Gold's Billings work site. As a result of that inspection, Meadow Gold was issued a citation alleging violations of the Act. By filing a timely notice of contest Meadow Gold brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On August 10, 2004, a hearing was held on this matter in Billings, Montana. At the hearing, the Secretary withdrew "willful" citation 2, items I a and 1 b, alleging violations of § 1910.147(d)(2) and (d)(3). The parties have submitted briefs on the items remaining at issue and this matter is ready for disposition.

Facts

The blow mold machine, cooling table and trimmer work together as an integrated system that manufactures gallon milk jugs. Plastic resin is molded in the blow mold; the resulting jug is sent to the trimmer, where the neck and tail flashing is cut off (Tr. 261; Exh. C-1, R-6, R-7). The untrimmed jug enters the lower nest of the trimmer, which moves up into the point of operation located in the fixed upper nest where the cutting takes place (Tr. 31; Exh. C-1). The finished jugs are then sent either to the plant to be filled, or to the bagger, located in the next room, where the jugs are counted and sealed into lots for later use (Tr. 29, 156-57; Exh. C-1).

The trimmer's points of operation, *i.e.*, the cutting heads, are guarded by plexiglass doors and a mechanical interlock. When the door is opened a roller arm moves up, breaking the electric circuit and shutting down the machine (Tr. 31-33, 39, 41; Exh. C-1, R-7). When the doors are closed, the roller is depressed, closing the circuit (Tr. 39). The machine can then be restarted only by depressing a reset button (Tr. 44, 59-60). The restart button is under the sole control of the operator (Tr. 206, 246).

Occasionally the jugs become misaligned and stick in the upper nest (Tr. 41). Jams can occur as often as every two minutes, or the trimmer may operate an entire shift without jamming (Tr. 184). Employees clear the jam by opening the plexiglass door and pushing the stuck jug out the other side (Tr. 42, 174, 195, 267). After clearing the jam the operator closes the plexiglass door and presses the reset to restart the trimmer (Tr. 44-45, 62-63).

At the time of the accident, Robin McCoy was a relief operator for Meadow Gold (Tr. 153). In addition to other equipment, McCoy ran the blow mold machine and trimmer when the regular operator was on vacation (Tr. 153). McCoy testified that when he arrived at work at 11 p.m. on April 22, 2003, the trimmer was down and Martin Reichert from maintenance was working on it (Tr. 155, 341). McCoy testified that the reset button was jerry-rigged with a copper pipe holding it in the depressed "on" position when he arrived (Tr. 166-67). He had never seen the switch purposely jammed in the on position prior to that night (Tr. 166-67, 184). According to McCoy, they got the machine running between two and three in the morning and he began sending trimmed milk jugs to the bagger (Tr. 155-56). Around four o'clock, Terry Roberts from maintenance came in and opened the trimmer's control panel. After finishing with the control panel, Roberts removed the copper pipe that had been jammed under the trimmer's restart button (Tr. 158-59). Roberts restarted the trimmer; however, after running for a short time, the trimmer would shut down, compelling Roberts to press the restart button again and again. Finally, Roberts replaced the copper pipe that held the restart button in the "on" position and left (Tr. 159-60). **Roberts told CO Funke** that he believed the restart switch was faulty; Martin Reichert had been unable to fix it during the previous shift and so had jammed the pipe against the restart button

so that the trimmer would not keep shutting off (Exh. R-16, p. 9). At approximately five in the morning, a jug turned sideways on the belt and became jammed in the trimmer (Tr. 160). McCoy opened the plexiglass door and reached into the trimmer (Tr. 42, 160-61). McCoy believed that he placed his elbow on the interlock's roller, completing the electrical circuit. The machine cycled once, amputating McCoy's finger (Tr. 42, 45, 161).

Robert Jones, a blow mold operator for Meadow Gold, testified that on Monday, April 21, the mechanical interlock on the trimmer was not working consistently (Tr. 55, 189). Jones stated that in the week preceding the accident the interlock only worked sporadically (Tr. 193, 195). Sometimes the trimmer would shut down when he opened the plexiglass doors; other times it would not (Tr. 189-90). If the interlock didn't work when Jones opened the doors to clear a jam, he would hit the emergency stop button on the side of the machine (Tr. 191, 205). Jones did not tell his supervisor, Michael Ragsdale, that the interlock was not working; he did report it to maintenance (Tr. 206-07). Roberts confirmed to **CO Funke** that he learned about the problem with the trimmer about a week prior to the accident (Exh. C-16, p. 10). Jones testified, however, that every time he opened the plexiglass doors on the Monday and Tuesday preceding McCoy's accident, the trimmer would shut off (Tr. 184).

Jones testified that he saw the reset button jerry-rigged in the "on" position twice beginning on the Monday night approximately a week prior to McCoy's accident (Tr. 193-94, 199, 203, *see also* testimony of **CO Funke**, Tr. 104-05). Jones had seen the button both taped down with scotch tape, and propped in the "on" position with a copper pipe, when he arrived to relieve Chris Fousha (Tr. 197, 202). Jones testified that Ragsdale was not on duty when he came on shift, and that he did not report the jerry-rigging to him (Tr. 202-03).

The OSHA Compliance Officer (CO), Jeffery Funke, testified that another of the trimmer's operators, Cheryle Green, told him that, prior to April 23, 2003, she operated the trimmer when the interlock was not operational (Tr. 102-03). Specifically, Green told him that the trimmer continued to cycle after she opened the plexiglass doors (Tr. 55).

Chris Fousha testified that he discovered that the trimmer's mechanical interlock was not working at all when he arrived for his shift on April 21, 2003 (Tr. 52, 315). Fousha reported the deficiency to his supervisor, Michael Ragsdale (Tr. 52). According to Fousha, there were several occasions when he experienced problems with the interlock; however, he had never reported the problems prior to the incident in April 2003 (Tr. 314-15).

Michael Ragsdale, Meadow Gold's plant manager (Tr. 209), testified that around April 17, 2003, Chris Fousha came into his office and told him that the mechanical interlock on the trimmer was not

working (Tr. 224-25, 230). According to Ragsdale, he followed Fousha back to the trimmer and shut off the equipment (Tr. 226). He and Fousha looked in the trimmer's electrical cabinet, where they noticed a disconnected wire (Tr. 226). Ragsdale immediately contacted Martin Reichert, the last maintenance man on shift that day (Tr. 226-27). Reichert told Ragsdale which terminal the wire should be connected to (Tr. 227). After Ragsdale reconnected the wire, he pushed the reset button, and the trimmer started up (Tr. 228-29). When he lifted the plexiglass guard, the machine stopped (Tr. 229). When Ragsdale checked with Reichert and Roberts the next morning, they told him that the interlock was working fine (Tr. 229-30, 275). Ragsdale received no other reports that the trimmer's interlock wasn't working properly (Tr. 231). Ragsdale stated that he did not know that the reset button for the trimmer was being jerry-rigged (Tr. 223-25). Had he been informed that employees were bypassing the mechanical interlock, he would have rectified the situation immediately (Tr. 225).

Alleged Violation of § 1910.147(c)(4)(ii)(B)

Serious citation 1, item 1 alleges:

29 CFR **1910.147(c)(4)(ii)(B)**: **The energy control procedures did not clearly** and specifically outline the steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy:

(a) Blow mold room: The specific written lockout procedure for the blow mold and peripheral machinery including but not limited to the cooling table and trimmer did not address all energy sources including but not limited to thermal, hydraulic, pneumatic, and gravity.

The cited standard requires the employer to develop, document and utilize procedures for the control of potentially hazardous energy when employees are engaged in the activities covered by this §1910.147, including:

Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;

Facts

Meadow Gold has a lockout/tagout program, which includes procedures addressing the means of shutting down the blow mold, bottle bagger and trimmer (Tr. 64-67; C-4). In addition, Meadow Gold provided more detailed procedures specifically addressing the blow mold (Tr. 74; Exh. C-3). CO Funke testified that the general procedures for the trimmer do not address either pneumatic energy or gravity as energy sources (Tr. 70). The detailed lockout procedures for the blow mold do not address hydraulic energy, though hydraulic energy is addressed in the general procedures (Tr. 75, 264, 266; Exh. C-3). Ragsdale admitted that the detailed shutdown procedures applicable to the blow mold were incomplete (Tr.266). In addition, Funke stated, none of the procedures included a step requiring that the equipment be tested to ensure that lockout resulted in a zero energy state (Tr. 71-74).

On cross examination, Funke admitted that neither pneumatic energy nor gravity drives the cutting heads on the trimmer (Tr. 146, 150-51). Air is used only to push the jugs through the system, and does not drive the trimmer (Tr. 150, 238). The top nest, where the cutting heads are located, is stationary; gravity could not drive the lower nest upwards (Tr. 150, 238).

Discussion

It is undisputed that maintenance employees at Respondent's plant perform service and maintenance (other than unjamming) on the blow mold and peripheral machinery, triggering the application of the cited standard. Although the Secretary introduced evidence tending to establish that Meadow Gold's lockout/tagout procedures did not address required features of a complete lockout/tagout program, *i.e.*, the means of verifying the isolation of the equipment,¹ the citation's language limits the scope of the citation, so that the only inquiry here is whether Meadow Gold's lockout/tagout procedures addressed each source of energy for the blow mold and peripheral equipment, including the cooling table and trimmer. The Secretary introduced no evidence relating to the cooling table. At the hearing, it was established that the cutting heads on the trimmer ran solely on electrical energy; the blow mold utilized both electrical and hydraulic.

Page 76 of Exhibit C-4 identifies electrical energy as the source of power for the bottle trimmer. Lockout is accomplished by utilizing normal shut down procedures, and moving the electrical cut-off switch on the main panel above the trimmer to the "off" position. The switch is then locked and tagged out. Page 77 of Exhibit C-4 addresses power sources for the blow mold machine, including electrical, hydraulic and compressed ammonia. The instructions direct the user to shut down the electrical and hydraulic systems by pulling down the breaker switch on the north side of the machine and locking out the panel doors. The air is then shut off using hand valves on the north upper west end. Because the only sources of hazardous energy, electrical and hydraulic, to the trimmer and blow mold are addressed by Meadow Gold's lockout/tagout procedures, the citation, as it is written, must be dismissed.

Alleged Violation of §1910.147(c)(6)(ii)

Serious citation 1, item 2 alleges:

29 CFR 1910.147 (c)(6)(ii): The employer had not certified that periodic inspections of the energy control procedures had been performed:

¹§1910.147(c)(4)(ij)(D) addresses isolation, requiring:
Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices and other energy control measures.

(a) Blow mold room: Employees performing lockout on equipment including but not limited to the blow mold, cooling table, and trimmer.

Subparagraph (c)(6) requires that annual inspections are performed to ensure that the procedures and requirements of the Lockout/tagout standard are being followed. Specifically, subparagraph (c)(6)(ii) requires that:

The employer shall certify that the periodic inspections have been performed. The certification shall identify the machine or equipment on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection and the person performing the inspection.

Facts

Mr. Ragsdale admitted that Meadow Gold had no documents certifying that the periodic lockout/tagout inspections required under § 1910.147 (c)(6)(ii) were performed (Tr. 260). Ragsdale further testified that had such documents existed, Meadow Gold would have produced them (Tr. 260). Meadow Gold did, however, produce documents at the hearing indicating that periodic reviews were performed in January 2001, April 2002, and June 2003 (Tr. 81-82; Exh. R-2). CO Funke testified that the reviews, which were conducted 14 months apart, indicate neither which equipment, nor which employees were included in the review (Tr. 82). Only deficiencies in the program were specifically noted on the review sheets (Exh.R-2).

Discussion

As noted above, the lockout/tagout standard applies to the blow mold and peripheral machinery generally, triggering the annual audit requirement. The evidence does not establish that Meadow Gold failed to audit its lockout/tagout program. It does show that Respondent conducted its audits 14 rather than 12 months apart and that Respondent failed to include the required information on its certifications. The Secretary has, therefore, made out her *prima fade* case, and the citation is affirmed. In the absence of any evidence that the audits failed to identify serious deficiencies in the lockout/tagout program, however, this judge cannot find that the violative condition or practice gave rise to a “substantial probability” of death or serious physical harm. The citation will be affirmed an “other than serious” violation of the Act.

Penalty

_____ In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer’s good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Meadow Gold is a large company, with more than 250 employees (Tr. 77). According to CO Funke, Respondent had received serious citations

as a result of a comprehensive, wall-to-wall inspection which took place approximately two months prior to this inspection, however, none of the citations involved the lockout/tagout standards (Tr. 77, 86-87). Respondent had instituted a lockout/tagout program, and required inspections were performed, pursuant to the cited standard (Tr. 77, 93). Employees had been trained in, and were familiar with lockout/tagout procedures (Tr. 77-78, 88). Taking into account the relevant factors, a penalty of \$50.00 is assessed.

Alleged Violation of § 1910.147(d)(4)(i)

Willful citation 2, item ic alleges:

29 CFR 1910.147(d)(4)(i): Lockout or tagout devices were not affixed to each energy isolating device by authorized employees:

- (a) On or about April 23, 2003, and at times prior thereto, employees cleared a jam in the Uniloy Trimmer Model #10039 without locking out the machine.

Facts

The facts relevant to this item are as set forth above, and are not disputed.

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 Commission has recognized that the scope of the lockout/tagout standard is limited to 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. *General Motors Corp., Delco Chassis Division*, 1995 CCH OSHD ¶30,793 (Nos. 91-2973, 91-3116 & 91-3117, 1995), *aff'd* 89 F.3d 313 (6th Cir. 1996). If employees are performing servicing or maintenance tasks that do not expose them to the unexpected release of hazardous energy, the standard does not apply. The record establishes that the cited bottle trimmer was designed to shut off when employees opened the plexiglass doors to perform routine unjamming procedures. The trimmer could not be restarted unless the operator closed the plexiglass door, thereby activating the interlock switch that supplied electricity to the trimmer, and then pressed the reset button. There was, therefore, no risk that the machine could become energized unexpectedly. The lockout/tagout standard, by its own terms,

does not apply to the specific type of servicing cited in this matter.²

This conclusion is not altered by the occurrence of the April 2003 accident. It would be unreasonable to hold the employer responsible for developing and implementing an otherwise inapplicable lockout/tagout program in anticipation that employees will deliberately bypass built-in safeguards intended to prevent the unexpected startup of machinery. Because the Secretary has not proven that § 1910.147 applies in the cited circumstances, “willful” citation 2, item 1(c) is vacated.

Alleged Violation of §1910.212(a)(3)(ii)

Willful citation 2, item 1d alleges:

29 CFR 1910.212(a)(3)(ii): 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) Blow Mold Room, Uniloy Model #10039: On or about April 21, 2003 and at times prior thereto and thereafter, employees were exposed to the hazard of amputation and crushing from the shearing action between the upper and lower nest, because the mechanical and magnetic limit switches were disconnected.

(b) Blow Mold Room, Uniloy Model #10039: On or about April 23, 2003 and at times prior thereto, employees were exposed to the hazard of amputation and crushing from the shearing action between the upper and lower nest, because the trimmer button was deliberately held in the on position with a piece of copper pipe secured with plastic wire ties.

Facts

The magnetic interlock was meant to replace and to serve the same function as the mechanical interlock, *i.e.*, to stop the trimmer when the plexiglass barrier was raised.

In regard to the magnetic limit switch, the record establishes that Mike Ragsdale received a copy of a July 5, 2001 memo from Gregg Jones, Meadow Gold’s regional safety manager, which was originally directed to Tim Dietz, Meadow Gold’s Human resources manager (Tr. 99-100, 242-3; Exh. C-2). The memo consisted of a subject line, “Re: Required Blow mold Guarding,” and an attached price quote for magnetic interlock switches (Tr. 99-10 1; Exh. C-2). Tim Dietz had added a note asking Ragsdale if they were in compliance with the required guarding. Ragsdale testified that he understood

² This judge notes that even were the Lockout/Tagout standard found to apply to clearing jams, the cited activity would be excepted under the NOTE to subparagraph (a)(2)(ii), which states that normal production operations, where employees are required to place part of their bodies into the point of operation, are exempted if the work is performed using effective alternative measures pursuant to subpart 0, **Machinery and Machine Guarding**. The plexiglass barrier, interlock, and restart button on the bottle trimmer provided an effective means of protection until they were circumvented by employees deliberately and improperly wiring the restart button in the “on” position. The guarding issue is properly addressed under subpart 0’s §1910.212(a), which is applicable, and which was cited at citation 2, item 1(d).

the memo was intended merely as an inquiry, and to bring a new product to his attention (Tr. 243). Ragsdale testified that the existing mechanical interlock constituted adequate guarding (Tr. 243-44, 250). At the hearing, Gregg Jones testified that he had no reason to believe that the blow mold machine in Billings was inadequately guarded (Tr. 291). In his opinion, the original mechanical guarding was adequate (Tr. 292). According to Jones, the July 5, 2001 memo was purely informational in nature (Tr. 289-93).

Ragsdale, nonetheless, asked Terry Roberts to order the magnetic switch for the blow mold trimmer (Tr. 250). In a note on the Jones memo, Ragsdale directed Roberts to use the existing wiring from the current switch interlock for its installation (Exh. C-2). The magnetic switch was subsequently ordered from Excel Electric and installed on the trimmer (Tr. 101). Both Ragsdale and CO Funke testified that the magnetic interlock was suspected of causing the trimmer to shut down unexpectedly, and so was removed around November 2002 (Tr. 102, 250). After that date the mechanical interlock was used.

As discussed above, that interlock was also disabled for some period (Tr. 226). Terry Roberts told CO Funke that he had bypassed the interlock in an attempt to determine why the trimmer kept turning off (Tr. 325-26; Exh. R-16, p. 11). When Chris Fousha complained that the interlock was not working, Ragsdale shut the trimmer down until the interlock was reconnected (Tr. 224-29). At the time of the accident, the bottle trimmer's point of operation was guarded by the plexiglass barrier, the restart button, and the mechanical interlock, which had been reconnected at least two days before the accident (Tr. 336, 342).

Nonetheless, at the time of the accident, and on occasions during the preceding week, the reset button on the control panel had been taped or propped in the "on" position, compromising the mechanical interlock so that it no longer eliminated the possibility of accidental start-up (Tr. 166-67, 193-94, 197-99, 203). At least five Meadow Gold employees were aware of the jerry-rigging, Chris Fousha, Robert Jones, Robin McCoy, Martin Reichert and Terry Roberts (Tr. 158-60, 166-67, 193-94, 197-99, 202-203). None of the employees alerted their supervisor, Mike Ragsdale, to the problem (Tr. 203). According to Jones, Ragsdale was never in the plant at night during his shift (Tr. 202). Ragsdale testified that he "probably wore too many hats;" he had no assistant plant operations manager, and he had to rely on the employees to let him know if something wasn't working right (Tr. 269, 277).

Meadow Gold has a safety program, which includes a written program, new employee and annual training and progressive disciplinary procedures (Tr. 210-13; Exh. R- 1). Terry Roberts, Robin McCoy and Cheryl Green signed documents indicating that they understood Meadow Gold's general safety rules, which included a prohibition against operating "any equipment without the proper safety

systems or guards in place.” (Tr. 168-69, 258, 301; Exh. **R-1, R-3, R-10, R-11**). Ragsdale testified that he is in the plant every day (Tr. 268). The plant is inspected once a month; the safety committee meets once a month to discuss safety issues (Tr. 216, 298-300). Employees have been disciplined for violating safety rules (Tr. 217, 220-21; Exh. R-5). Specifically, in October 1999, a blow mold operator, Elmer Heidt, received a warning letter for circumventing an interlock device on the same blow mold trimmer involved in the cited accident (Tr. 219, 272-73; Exh. R-5, p 1). Terry Roberts was suspended following the April 2003 accident based on his knowledge of the modification to the reset switch on the trimmer (Tr. 221-23, Exh. R-5, p. 5).

Discussion

It is undisputed that the cutting heads of the cited bottle trimmer pose a hazard requiring guarding under the cited standard. The evidence further establishes that the cited trimmer was adequately guarded until the employees tampered with its components. Incidental access to the zone of danger was blocked by the plexiglass barrier. If the barrier was raised, power to the trimmer was interrupted by the mechanical interlock. Reactivation of the trimmer could not occur until the operator pressed the reset button, which was positioned far enough away from the point of operation that the operator could not reset the trimmer until he had removed his hands from the zone of danger. These three safety features, satisfied the cited guarding standard prior to the week immediately preceding the accident.

However, not all features of the required guarding were in place continuously during the week prior to April 23, 2003. At times the mechanical interlock was disconnected. At other times the reset switch was tampered with, rendering the interlock mechanism partially ineffective. The Secretary, however, has not established, by a preponderance of the evidence, that Meadow Gold knew of the cited condition.

Knowledge. In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). The record establishes that Meadow Gold had an adequate safety program addressing the cited condition. Nonetheless, despite safety rules prohibiting the operation of equipment without proper safety systems or guards in place, maintenance personnel, at various times, both disabled the trimmer’s limit switch, and wired the reset button into the “on” position to keep the trimmer running. Operators ran the trimmer with the jerry-rigged reset button rather than notifying supervisory personnel or bringing it to the attention of the safety committee. There has been no showing that the plant manager, Ragsdale, was aware of the intermittent tampering with the reset button. The one time he was told that

the interlock was not working **he** immediately took steps to fix it. Nor has the Secretary shown that he should have discovered it during his regular inspections of the plant. Given the adequacy of its work rules and training, as well as the regular inspections of the plant, there was no reason for Respondent to foresee that employees would disregard a basic tenet of their machine safety program, and disable guards intended for their protection. *See Donahue Industries Inc.*, 20 BNA OSHC 1346, 2002 CCH OSHD ¶32,679 (No. 99-0191,2003). Finally, the Secretary has not suggested additional measures Meadow Gold should have taken to discover the cited violation, making it impossible for this judge to find constructive knowledge. *See; Precision Concrete Construction*, 19 BNA OSHC 1404, 2001 CCH OSHD ¶32,331 (No. 99-0707, 2001), *citing Trinity Marine Nashville, Inc.*, 19 BNA OSHC 1015, 2000 CCH OSHC ¶32,158 (No. 98-0144, 2000), *rev 'don other grounds*, 275 F.3d 423 (5th Cir. 2001). Because the Secretary failed to make her prima facie case, citation 2, item id is vacated.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1910. 147(c)(4)(ii)(B) is VACATED.

2. Citation 1, item 2, alleging violation of 29 CFR § 1910.1 47(c)(6)(ii) is AFFIRMED as an “other than serious violation; a penalty of \$50.00 is ASSESSED.

3. Citation 2, item 1 c, alleging violation of 29 CFR § 1910.1 47(d)(4)(i) is VACATED.

4. Citation 2, item id, alleging violation of 29 CFR §1910.212(a)(3)(ii) is VACATED.

/s/
James H. Barkley
Judge, OSHRC

Dated: November 15, 2004