

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Buckeye Ready Mix, Inc.,

Respondent.

OSHRC Docket No. **05-1548**

Appearances:

Patrick L. Depace, Esquire, Cleveland, Ohio 44199
For Complainant

Ronald L. Mason, Esquire, Dublin, Ohio 43017
For Respondent

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

DECISION AND ORDER

Buckeye Ready Mix, Inc., manufactures and delivers ready-mix concrete to customers in the central Ohio area. On August 8, 2005, Occupational Safety and Health Administration (OSHA) compliance officer Bruce Bingham inspected Buckeye's plant on Taylor Road in Reynoldsburg, Ohio, in response to Buckeye's report of an employee fatality. As a result of Bingham's inspection, the Secretary issued a Citation to Buckeye on September 8, 2005, alleging four serious violations of the Occupational Safety and Health Act of 1970 (Act).

Prior to the hearing, the Secretary withdrew Item 1 of the Citation, which alleged a violation of 29 C.F.R. § 1910.132(a). Item 2 alleges a violation of 29 C.F.R. § 1910.147(c)(4)(ii) for failing to specifically outline the lockout procedure for a concrete-mixer drum. Item 3 alleges a violation of 29 C.F.R. § 1910.147(f)(1) for failing to follow the prescribed sequence of actions when positioning the mixer drum with the lockout devices temporarily removed. Item 4 alleges a violation of 29 C.F.R. § 1910.147(f)(3)(i) for failing to use a procedure by which each employee uses his own personal lockout device.¹

¹The Secretary originally cited Item 4 as a violation of 29 C.F.R. § 1910.147(f)(3)(ii)(D). The Secretary moved to amend Item 4 prior to the hearing. The Judge granted the motion at the beginning of the hearing (Tr. 3).

The Judge held a hearing in this matter on March 22, 2006, in Columbus, Ohio. The parties have filed post-hearing briefs. Buckeye contends it complied with the terms of 29 C.F.R. § 1910.147(c)(4)(ii), cited in Item 2 of the Citation. Buckeye asserts the affirmative defense of unpreventable employee misconduct with respect to Items 3 and 4 of the Citation.

For the reasons explained more fully below, Items 2 and 4 of the Citation are affirmed and Item 3 is vacated.

Background

Buckeye operates 18 batch plants and owns 140 trucks it uses to deliver ready-mix concrete to its customers in central Ohio. The company operates two types of batch plants. In one, the employees weigh batches of material and load them into concrete-mixer trucks. Buckeye's employees then mix the concrete in the trucks and deliver it to the customers. In central mix plants (the type at issue here), the employees load the materials into a large central mixer drum, mix them, and dispense the resulting mixture into trucks for delivery. Mixing at a central mixing plant is faster and more efficient, but more costly, than mixing in the trucks.

Residue from the concrete builds up inside the mixer drum over time. The buildup of concrete puts stress on the mixer's bearings. Eventually the buildup throws the mixer out of its proper rotation, causing it to vibrate. Every three or four months, a crew is required to enter the central mixing drum and clean out the old concrete. If the concrete is "green," i.e., relatively new, the cleaning process can be done quickly, in thirty minutes to an hour. If the concrete is older and has set harder, the process can take three or four hours.

Jeffrey Tyson was Buckeye's operations manager for Plant 6, a central mix plant on Taylor Road in Reynoldsburg, Ohio. In early August 2005, Tyson instructed plant operator Gary Lowe to clean out the central mixer drum. Tyson told Lowe he could clean it out the evening of Friday, August 5, 2005, or he could wait until Saturday, August 6, 2005. Lowe decided to go ahead and clean the drum Friday night.

Lowe assembled a crew for the drum cleaning consisting of loader operator Mark Hall and drivers Chad Owens and Brent Sherburn. Lowe, Hall, and Owens cleaned out the drum on a regular basis. Sherburn volunteered to help that night after he finished his day shift. He had helped clean out a mixer drum only once previously, approximately 15 years prior to August 5, 2005.

Lowe and Hall, who were childhood friends, worked together on the periodic cleaning of the drum, sharing responsibility for completing the task and trading duties. Generally, Lowe would use the hydraulic controls to tilt the drum so that an opening large enough for the crew to enter and exit was created between the mixer drum and the hopper chute connected to it. Hall would watch the drum and tell Lowe when it was in the correct position. Lowe would then turn off the hydraulics, and one of them would go downstairs to the electrical room and turn off the four circuit breakers connected to the mixer. He would then place four locks provided by Buckeye on the breakers and pocket the keys.

On the evening of August 5, 2005, Lowe used the hydraulic controls to tilt the drum, turned off the hydraulics, and then went downstairs to the electrical room to turn off the circuit breakers and lock them out. When he went upstairs, Hall said, “Hey, go down and unlock it. We’re going to fire the hydraulics back up. . . . I went down a little far, and it’s going to be tight” (Tr. 30). For the first time in Lowe’s memory, the drum had to be repositioned after the breakers were locked out.

Lowe removed the locks from the circuit breakers, went to the office to turn the hydraulics back on, and repositioned the drum. Instead of returning to the electrical room and de-energizing the circuit breakers and locking them out again, Lowe complied with Hall’s request to help bring up the hoses used in cleaning out the drum. By the time Lowe returned with the hoses, Hall was already in the drum and asking for more equipment to be handed to him. Owens and Sherburn also entered the drum and proceeded with the cleaning, which went fairly quickly. After completing the job, Owen and Sherburn exited the drum. Hall stayed inside, handing equipment out of the opening to Lowe. Lowe and Sherburn dragged some equipment to the rear of the drum. They heard a whirring noise, indicative of the drum’s hydraulics starting up. Lowe ran to the controls, but by the time he got to them, the mixer had already closed, crushing Hall. He died instantly.

Compliance officer Bruce Bingham arrived at the plant on August 8, 2005, and conducted an investigation of the accident. As a result of his inspection, the Secretary issued the Citation that gave rise to this proceeding.

Discussion

The Secretary has the burden of proving the violation by a preponderance of the evidence.

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., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Alleged Serious Violation of 29 C.F.R. §1910.147(c)(4)(ii)

In item 2 of the Citation the Secretary alleges (capitalization in the original):

The energy control procedures did not clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, items A-D of this section:

- a. The TWELVE STEPS FOR PLANT MIXER DRUMS for LOCKOUT/TAGOUT, step 7, says to TEST ALL CONTROLS but does not specify what controls, where they are located and how they are to be tested.
- b. The TWELVE STEPS FOR PLANT MIXER DRUMS for LOCKOUT/TAGOUT, step 5, says to LOCKOUT/TAGOUT THE CIRCUIT BREAKER and step 3 says to REMOVE KEY AND PUT IN ENTRANT'S POCKET, but does not specify which circuits are to be locked out, how many circuits, where they are located, who locks them out, who has the locks/keys, and who supervises the lockout procedure.

The standard at 29 C.F.R. § 1910.147(c)(4)(ii) provides:

The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the following:

- (A) A specific statement of the intended use of the procedure;
- (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
- (C) Specific procedural steps for the placement, removal and transfer of lockout devices and the responsibility for them; and
- (D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

The application section of the standard states at 29 C.F.R. § 1910.147(a)(1)(i): “This standard covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment could cause injury to employees.” Buckeye does not dispute the cited standard applies to the cited conditions.

In her first request for admissions, the Secretary made the following request, which Buckeye admitted (Exh. C-1, Admission #4):

Admit that the document entitled “Lockout/Tagout: Twelve Steps For Plant Mixer Drums” provided by Respondent to OSHA during the investigation describes Respondent’s procedure for Lockout/Tagout of the Plant Mixer Drums that was in place in August 2005.

The document referred to is a one-page list of twelve steps, which states in its entirety (Exh. C-2):

LOCKOUT/TAGOUT

TWELVE STEPS FOR PLANT MIXER DRUMS:

- 1. COMPLETE AN “ENTRY NOTICE” AND NOTIFY PEOPLE AFFECTED. POST “ENTRY NOTICE” NEAR THE DRUM;**
- 2. SHUT OFF ALL CONTROLS AT CIRCUIT BREAKER;**
- 3. REMOVE KEY AND PUT IN ENTRANT’S POCKET;**
- 4. PUT “OUT OF SERVICE” SIGN OVER CONTROL PANEL;**
- 5. LOCK OUT/TAG OUT THE CIRCUIT BREAKER;**
- 6. SECURE THE DRUM WITH STRAPS OR BLOCKING, IF APPLICABLE;**
- 7. TEST ALL CONTROLS;**
- 8. USE PROPER TOOLS AND PERSONAL PROTECTIVE GEAR;
Hard hat, safety glasses, gloves dust mask and ear plugs**
- 9. COMPLETE WORK, CLEAN UP AREA and CHECK FOR TOOLS;**

10. REMOVE THE DRUM STRAPS OR BLOCKING, IF APPLICABLE, AND CHECK AREA;
11. REMOVE THE TAG FROM THE CIRCUIT BREAKER;
12. REMOVE THE “OUT OF SERVICE” SIGN.

ALL LOCKOUT/TAGOUT EQUIPMENT IS TO BE PUT BACK IN STORAGE AREA IMMEDIATELY AFTER COMPLETING THE JOB.

NOTICE OF ENTRY MUST BE RETURNED TO THE SUPERVISOR WHEN THE JOB IS COMPLETED.

Despite this admission, Buckeye argues its energy control procedure comprises three separate units, which must be viewed collectively to accurately understand its lockout/tagout (LOTO) program. In addition to the list of twelve steps, Buckeye also gives its employees a copy of “Lockout/Tagout Guidelines,” a three-page document which generally outlines the scope of Buckeye’s LOTO program (Exh. C-12). Buckeye also shows its employees a videotape (“Module 3 Lockout/Tagout”) on an annual basis as part of its training in LOTO procedures (Exh. R-3). Taken together, Buckeye argues, the two documents and the videotape constitute an energy control program that meets the requirements of 29 C.F.R. § 1910.147(c)(4)(ii).

The Secretary argues that, even with the addition of the “Lockout/Tagout Guidelines” document and the videotape, Buckeye’s energy control program is still inadequate to meet the requirements of 29 C.F.R. § 1910.147(c)(4)(ii). She claims the program is not specific enough to inform employees of the “scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance.” She cites three of Buckeye’s rules as evidence of the program’s lack of specificity (Exh. C-2):

3. REMOVE KEY AND PUT IN ENTRANT’S POCKET;
- ...
5. LOCKOUT/TAGOUT THE CIRCUIT BREAKERS;
- ...
7. TEST ALL CONTROLS[.]

The Secretary faults these three rules because they fail to specify who locks out the circuit breakers, who has possession of the locks and keys, who supervises the lockout procedure, which

circuits are to be locked out, how many circuits are to be locked out, where the circuits are located, what controls are to be tested, where the controls are located, and how the controls are to be tested.

In the preamble to the final standard, the Secretary addresses the inclusion of the word “specific” in the language of 29 C.F.R. § 1910.147(c)(4)(ii) (54 Fed. Reg. 36644):

Two of these commenters . . . objected to the use of the word “specific” when defining the elements of the procedure while one commenter interpreted the requirement as mandating a generalized procedure for each plant, as well as a specific procedure for every machine or piece of equipment.

. . .

In this final standard, OSHA has retained the word “specific” when detailing the elements of the procedure. This was done to emphasize the need to have a detailed procedure, one which clearly and specifically outlines the steps to be followed. Overgeneralization can result in a document which has little or no utility to the employee who must follow the procedure.

Appendix A to 29 C.F.R. § 1910.147 gives an example of what is captioned a “Typical Minimal Lockout Procedure.” A comparison between Appendix A and Buckeye’s procedure demonstrates Buckeye’s lack of specificity.

Step 7 of Buckeye’s program is “Test all controls.” The corresponding step in Appendix A, which is a *minimal* procedure, states:

(7) Ensure that the equipment is disconnected from the energy source(s) by first checking that no personnel are exposed, then verify the isolation of the equipment by operating the push button or other normal operating control(s) or by testing to make certain the equipment will not operate.

Appendix A provides a detailed procedure for returning equipment to service. The equivalent step of Buckeye’s procedure is boldfaced in brackets:

Restoring Equipment to Service. When the servicing or maintenance is completed and the machine or equipment is ready to return to normal operating condition, the following steps shall be taken.

(1) Check the machine or equipment and the immediate area around the machine or equipment to ensure that nonessential items have been removed and that the machine or equipment components are operationally intact.

[9. COMPLETE WORK, CLEAN UP AREA and CHECK FOR TOOLS]

(2) Check the work area to ensure that all employees have been safely positioned or removed from the area.

[No equivalent step.]

(3) Verify that the controls are in neutral.

[No equivalent step.]

(4) Remove the lockout devices and reenergize the machine or equipment.

[11. REMOVE THE TAG² FROM THE CIRCUIT BREAKER]

(5) Notify affected employees that the servicing or maintenance is completed and the machine or equipment is ready for use.

[12. REMOVE THE “OUT OF SERVICE” SIGN]

Buckeye argues its energy control procedure is rounded out by the “Lockout/Tagout Guidelines” and the videotape. The document entitled “Lockout/Tagout Guidelines” provides a general outline of the training employees are to receive in LOTO, but the only specific procedure addressed is “Motor Vehicle Lockout/Tagout Procedure” (Exh. C-12). Similarly, the videotape addresses safety and LOTO in general terms, but provides detailed information only on the LOTO procedure for truck mixer drums; it is silent on the topic of plant mixer drums. The procedure for locking out a motor vehicle, which has a battery for its power source, differs significantly from locking out a plant mixer drum, which has circuit breakers as its energy source.

Buckeye contends (Buckeye’s brief, p. 7):

OSHA previously reviewed the same procedure at issue here and implicitly approved it as adequate. On January 15, 2004, OSHA Inspector Jeff See inspected Buckeye Ready Mix and reviewed its procedures regarding lockout/tagout procedures and guidelines. R-11, R-12, and R-13). Those guidelines OSHA reviewed are practically identical to the guidelines at issue here.(C-2 and C-12). Upon a thorough investigation, Investigator See found none of the problems with these procedures that OSHA now claims. (Tr. 170-185).

Buckeye’s contention fails on two counts. First, Buckeye is operating under the misconception that if an OSHA compliance officer fails to cite an employer for a violative condition, then OSHA is forever barred from citing that employer for the same violative condition observed in any future inspections. “The Secretary’s failure to issue a citation for a violation of a standard does not immunize an employer from future enforcement of that standard.” *Cardinal Industries, Inc.*, 14 BNA OSHC 1008, 1013 (No. 82-427, 1989).

Second, Buckeye is disingenuous in its argument that compliance officer See reviewed documents “practically identical” to the documents at issue here. Exhibit R-11, like Exhibit C-2,

² Step 11 of Buckeye’s procedure instructs the employees to remove the “tag” and not the “lock” from the circuit breaker. This appears to be a mistake in Buckeye’s procedure. Lowe testified Buckeye never uses a tagout procedure: “We always used a lock” (Tr. 34).

lists twelve steps for a LOTO procedure. But Exhibit R-11 is the LOTO procedure for *truck* mixer drums. The equipment is different, the energy source is different, and the controls are different. See's "implicit" approval of the LOTO procedure for truck mixer drums is irrelevant to the LOTO procedure at issue here. Buckeye misrepresents the results of See's inspection, then cites the entire 15 pages of his testimony, without quoting one specific phrase or sentence that actually supports its position.

The terms of 29 C.F.R. § 1910.147(c)(ii) were not met by Buckeye. Each of its employees were exposed to the hazards created by having an inadequate energy control procedure. Management personnel developed, maintained, and administered the energy control procedures for its employees. Thus, Buckeye knew of the inadequacies of the program. An inadequate energy control procedure for employees entering mixing drums can result in energization or start up of the equipment causing death or serious physical harm.

The Secretary has established a serious violation of 29 C.F.R. § 1910.147(c)(ii).

Alleged Serious Violation of 29 C. F. R. § 1910.147(f)(1)

The Secretary charges Buckeye with the violation of 29 C. F. R § 1910.147(f)(1).

In item 3 of the Citation the Secretary alleges:

When lockout or tagout devices temporarily were removed from the energy isolating device and the machine or equipment was energized to test or position the machine, equipment or component thereof, the sequence of actions were not followed in accordance with 29 CFR 1910.147(f)(1)(i) through (v):

- a. In the Electrical Room, locks were not reapplied to the circuit breakers to prevent movement of the mixer drum after it was positioned so that employees could enter it to chip out the old concrete exposing the employees to a caught between hazard.

The standard at 29 C. F. R. § 1910.147(f)(1) provides in pertinent part:

In situations in which lockout or tagout devices must be temporarily removed from the energy isolating device and the machine or equipment energized to test or position the machine, equipment or component thereof, the following sequence of actions shall be followed:

...

- (v) Deenergize all systems and reapply energy control measures in accordance with paragraph (d) of this section to continue the servicing and/or maintenance.

Buckeye does not dispute the cited standard applies to the cited conditions. It admits in its answer to the Secretary's first request for admissions that on "August 5, 2005, in the Electrical Room, locks were not reapplied to the circuit breakers after they had been temporarily removed" (Exh. C-1, admission no. 5). In light of Hall's death, it is clear that the failure to comply with the cited standard exposed employees to death and serious physical injury.

The Secretary has failed, however, to establish Buckeye had knowledge of Lowe's failure to comply with 29 C. F. R. § 1910.147(f)(1). No supervisory personnel were present the night of Hall's death. The crew cleaned out the drum after normal work hours were over, with only the plant operator and maintenance employees present. Lowe had properly locked out the circuit breakers for the plant mixer drum after positioning the drum for entry by the work crew. For the first time in memory, the drum needed to be repositioned after it was locked out. After repositioning the drum, Lowe was distracted by requests by Hall for help with equipment, and he forgot to lock out the circuit breakers again. Lowe's inadvertent oversight was tragic, but Buckeye had neither actual nor constructive knowledge that the crew would need to reposition the drum, or that after having done so, Lowe would forget to lock out the circuit breakers a second time. Item 3 is vacated.

Alleged Serious Violation of § 1910.147(f)(3)(i)

In Item 4 of the citation [which was amended from alleging a violation of § 1910.147(f)(3)(ii)(D)] the Secretary alleges:

- a. In the Plant Mixer Drum, each employee chipping out old concrete did not apply their [sic] own lock to the circuit breaker switches so the mixer drum could not move until all exposed employees were out of the drum.

The standard at 29 C. F. R § 1910.147(f)(3)(i) provides:

When servicing and/or maintenance is performed by a crew, craft, department or other group, they shall utilize a procedure which affords the employees a level of protection equivalent to that provided by the implementation of a personal lockout or tagout device.

Buckeye admits in its answer the Secretary's first request for admissions that on "August 5, 2005, in the Plant Mixer Drum each employee chipping out old concrete did not apply their [sic] own lock to the circuit breaker switches" (Exh. C-1, admission no. 6).³ Buckeye does not dispute application of the standard and employee exposure. The company argues its LOTO procedure incorporates the use of individual locks by each crew member, but Lowe and Hall unilaterally decided to change the procedure. Buckeye argues it had no knowledge its employees had altered its LOTO procedure, but the record establishes the company had constructive knowledge of the violative conduct.

Lowe testified that either he or Hall kept the keys to all four locks because the hydraulics on the drum were defective and would "leak off," causing the drum to drift shut.⁴ Lowe and Hall were

³In the preamble to the LOTO standard, the Secretary explains the importance of using individual locks for each member of a crew or group (54 Fed. Reg. 36644):

The proposed requirement for group lockout specified that the authorized employee would have a primary lock, which is affixed when the equipment is deenergized, and is removed when the job is completed. It did not provide for the use of individual locks or tags by the individual employees in the group. The proposal would have allowed this system, with the authorized employee being responsible for the safety of all the employees in the group, if that program provided the same degree of safety as personal lockout or tagout.

Based on the record (Ex. 2-27, 2-29, 2-32, 2-44, 2-63, 2-99, 2-106, 51, 56, 60, Tr. pg. W1-142), OSHA has reexamined the issue of group lockout and has concluded that an additional element is necessary for the safety of the servicing employees: each employee in the group needs to be able to affix his/her personal lockout or tagout system device as part of the group lockout. This is necessary for several reasons: first, the placement of a personal lockout or tagout system device enable that employee to have a degree of control over his/her own protection, rather than having to depend completely upon other people; second, the use of a personal device will enable each servicing employee to verify that the equipment has been properly deenergized in accordance with the energy control procedure, and to affix his/her device to indicate that verification; third, the presence of an employee's lockout or tagout system device will inform all other persons, including the other servicing employees and supervisors, that the employee is still working on the equipment; fourth, as long as that device remains attached, the authorized person in charge of the group lockout or tagout knows that the job is not completed and that it is not safe to reenergize the equipment; and, fifth, the servicing employee will continue to be protected by the presence of his/her device until he/she removes it. The authorized employee in charge of the group lockout or tagout does not remove the group lockout device until each employee in the group has removed his/her personal device, indicating that employees are no longer exposed to the hazards from the servicing operation. OSHA is convinced that the use of individual lockout or tagout system devices to supplement the group lockout device is crucial.

⁴ Robert Brockmeyer, Buckeye's expert witness in LOTO, testified the hydraulics were not "leaking," but "dumping," which occurs when the power backs off and the machinery moves (Tr. 254-255). Brockmeyer testified the problem can be remedied by blocking the hydraulics, a method adopted by Buckeye after the accident (Tr. 69, 254).

concerned that if members of the crew had keys to individual locks with them, they would be trapped inside the drum. Lowe and Hall decided the better method was for one of them to stay outside the drum while the rest of the crew was inside cleaning.⁵ Whichever of the two stayed outside the drum retained possession of the keys. Lowe stated (Tr. 54):

We locked the box with one lock because whoever had to be outside had that lock and turned the hydraulics back on and tilted it down so people could get out. If you [were] in there and hour, it would drift maybe a couple of inches and get back out. If you [were] in there a couple of hours chipping, it was too far shut to get out. If you worked for four hours, you could barely just reach your hand inside.

Lowe stated the plant mixer drum was approximately 10 years old and that its hydraulics had started leaking approximately a year after it was installed in the plant. Buckeye's management personnel were aware of the problem (Tr. 79):

Q. Did you ever tell anybody about this [leak]?

Lowe: They knew it would leak shut, I'm sure, yes.

Q. "They" who?

Lowe: It would have been [operations manager] Jeff [Tyson], I guess, on the leakage.

Q. How did he know?

Lowe: See, I don't know—he knows it would drip some. I don't know if he knew much of anything.

Q. How do you know this?

Lowe: Well, he's been up there too when we've had it up and it's dropped down when we weren't in it or something, we were in another dryer or something, it would drop down a little bit, and you could see where it had dropped. I mean, as to how much, I have no idea if he knew or anything like that.

⁵ Buckeye introduced a copy of a 1995 letter from OSHA's regional office in Chicago (Exh. R-18). The letter addresses a question about the use of multiple locks and states, under certain circumstances, single locks may be used to protect multiple workers. Brockmeyer interprets this to mean employers do not have to comply with 29 C. F. R. § 1910.147(f)(3)(i) if they "have a written procedure" (Tr. 240). The letter does not support Brockmeyer's interpretation. It refers to the need for multiple locks for complex lockout situations, and notes the key is, "Is the protection of workers assured?" (Exh. R-18).

Lowe testified he and Hall never explicitly told management they had changed the lockout procedure (Tr. 81-82):

Q. So, you didn't talk to anybody about your procedure you came up with?

Lowe: No, Mark and I came up with that as the only way we could get in and out, yes, because if it was to drift shut, you're shut. You can't get back out.

Q. Did you ever tell Jeff about this?

Lowe: No, I don't recall saying anything.

Q. Was he ever out there when the chipping operation was—

Lowe: He had been out there when we were chipping, yes.

Q. Now, you say you had done this kind of procedure for like three or four months?

Lowe: About every three or four months. That's an average. I mean, it depends on how much concrete you run. . . .

Q. How long were you doing the procedure of you keeping the keys?

Lowe: Well, it would be Mark part of the time. If I went in, Mark would hold the keys. It was just whoever was outside.

Q. How long was that going on; that kind of procedure?

Lowe: Probably, eight, nine years.

Although there is no evidence Buckeye had received direct information that the members of the crew cleaning out the mixer drum did not have individual locks, there is evidence Buckeye had constructive knowledge of this fact. To prove constructive knowledge, the Secretary must show that the employer could have discovered the violative condition with the exercise of reasonable diligence. "Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1349 (No. 99-0191).

Lowe and Hall had been using their improvised procedure for eight to nine years, three or four times a year. At least two dozen times over the course of at least eight years a crew of four people (and not always the same four people) failed to follow OSHA regulation and company procedure. Jeff Tyson, Buckeye's supervisor of this plant, was present during the chipping operation on at least one occasion during that eight year period. A company exercising reasonable diligence would have, at some point, discovered the change in procedure. Worse, the reason Lowe and Hall changed the procedure in the first place was out of their concern for safety when cleaning out a mixer drum that drifted dangerously. Adequate supervision would have detected both the change in procedure and the underlying problem that occasioned the change. See *Carlisle Equip. Co. v. United States Secretary of Labor*, 24 F.3d 790, 794 (6th Cir. 1994) ("reasonable diligence implies effort, attention, and action not mere reliance upon the action of another"). The Secretary has established constructive knowledge and, with it, Buckeye's violation of the cited standard. Respondent failed to require employees to apply their own locks to circuit breaker switches or to utilize a procedure that provided employees equivalent protection so the mixer drum could not move. That failure could cause death or serious physical harm if employees were in the mixer when it began to move.

Buckeye argues its crew's failure to comply with the terms of 29 C. F. R. § 1910.147(f)(3)(i) resulted from the unpreventable employee misconduct of Lowe and Hall. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997).

Buckeye does not have a written work rule designed to prevent the violation of 29 C. F. R. § 1910.147(f)(3)(i). Step 3 of its LOTO procedure states (Exh. C-2): "Remove key and put in entrant's pocket." There is no further information on how multiple entrants are supposed to coordinate the lockout procedure. Buckeye's videotape does not address group lockout in any detail. It is questionable just how "established" a work rule can be when it has not been observed for the last eight years.

Assuming, for the sake of argument, that Step Three constitutes an established work rule, the record is clear it was not adequately communicated to its employees. Lowe testified he did not know he had violated any company safety rules until speaking with counsel for Buckeye, several days before the hearing (approximately seven months after the accident). When asked at the hearing if he had violated a company safety rule the day of the accident, Chad Owens replied, “No, not that I recognize” (Tr. 101). Larry Randles, Buckeye’s vice president of operations, stated that only Lowe had violated company procedure, specifically Step 2 (“Shut off all controls at circuit breaker”) and Step 5 (“Lockout/tagout the circuit breaker”). Randles did not mention Step 3, or the other members of the crew failing to use multiple locks.

Buckeye took no steps to discover the violation. The modified procedure had been ongoing for eight to nine years, without anyone in management noticing. Tyson, the plant supervisor, had been present on at least one occasion when Lowe and Hall were cleaning out the drum.

No one was disciplined for the accident that resulted in Hall’s death. Buckeye argues that disciplining the three members of the crew would have been pointless. They were traumatized by Hall’s death. He was a close friend to all of them, as well as a co-worker. The court is sympathetic to Buckeye’s position, but just as the Secretary is required to prove each and every element of her case, the employer is required to prove each and every element of its affirmative defense. Buckeye has failed to prove this element, as it failed with the other three. The employee misconduct defense is rejected.

The Secretary has established a serious violation of 29 C. F.R. § 1910.147(f)(3)(i).

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer’s business, history of previous violations, the employer’s good faith, and the gravity of the violation. Gravity is generally the principal factor to be considered.

Buckeye employs approximately 250 employees. OSHA had inspected and cited the company for “other” violations in 2004. Buckeye demonstrated good faith in its handling of this proceeding.

The gravity of the violation of 29 C. F. R. § 1910.147(c)(4)(ii) (Item 2) is high. The energy control program is the employee's first resource for information regarding LOTO procedure. If the program is incomplete, vague, or scattered over several parts, the employee is at risk for receiving inadequate or incorrect information. It is determined the appropriate penalty for Item 2 is \$ 4,000.00.

The gravity of the violation of 29 C. F. R. § 1910.147(f)(3)(i) is very high. In this instance, if every crew member used his own lock, the chances are greatly increased that at least one of them would have remembered to lockout the circuit breakers after they were re-energized to reposition the mixer drum. As stated in the preamble, "the placement of a personal lockout or tagout system device enables that employee to have a degree of control over his/her own protection, rather than having to depend completely upon other people." Lowe testified that locking out the circuit breakers again slipped his mind once he started helping with the equipment. A penalty of \$ 4,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the citation, alleging a violation of § 29 C.F.R. 1910.132(a), is withdrawn by the Secretary and no penalty is assessed;
2. Item 2 of the citation, alleging a violation of § 29 C.F.R. 1910-147(c)(4)(ii), is affirmed and a penalty of \$ 4,000.00 is assessed;
3. Item 3 of the citation, alleging a violation of § 29 C.F.R. 1910.147(c)(1), is vacated and no penalty is assessed, and
4. Item 4 of the citation, alleging a violation of § 29 C.F.R. 1910.147(f)(3)(i), is affirmed and a penalty of \$4,000.00 is assessed.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: October 16, 2006