

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant

v.

Reynolds Packaging KAMA, Inc.,

Respondent.

OSHRC Docket No. **08-1554**

**Appearances:**

Leonard A. Grossman, Esquire, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois  
For Complainant

Dana L. Rust, Esquire and Briton K. Nelson, Esquire, McGuire Woods, LLP, Richmond, Virginia  
For Respondent

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

**DECISION AND ORDER**

Reynolds Packaging KAMA, Inc., (Reynolds), manufactures oriented polystyrene sheet for use in food packaging at its facility in Manteno, Illinois. The company contests a citation issued by the Secretary on September 5, 2008, following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer Louise Carr, beginning on April 30, 2008.

The citation alleges Reynolds committed willful violations of two subsections of OSHA's lockout/tagout (LOTO) standard. Item 1a alleges a willful violation of 29 C. F. R. § 1910.147(c)(4)(i), for failing to develop, document, and utilize procedures for the control of potentially hazardous energy when employees cleaned and performed string up operations on a Machine Direction Orienter. Item 1b alleges a willful violation of 29 C. F. R. § 1910.147(c)(7)(i)(A), for failing to train each authorized employee in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control. The Secretary proposed a total penalty of \$ 70,000.00 for Items 1a and 1b.

Reynolds timely contested the citation. The court held a hearing in this matter on April 28, 2009, in Chicago, Illinois. Reynolds stipulated to jurisdiction and coverage in its pre-hearing statement. The parties have filed post-hearing briefs. Reynolds contends it was in compliance with the cited standards. If one or both of the violations is affirmed, Reynolds contends the violation or violations should be reduced from willful to serious.

For the reasons stated below, the court affirms Items 1a and 1b, reclassifies the violations as serious, and assesses a total penalty of \$ 7,000.00.

### **Background**

The facility at issue is located at 1050 Sycamore Street in Manteno, Illinois. In 1991, a company called Ivex Corporation operated the facility. It manufactured polystyrene sheet for food packaging, just as Reynolds does today. The facility runs three production lines, referred to as the M1, M2, and M3 lines. Each line includes a Machine Direction Orienter (MDO).

In 1991, Ivex employee Michael Murray was pinned between two segments of a MDO while cleaning plastic out of the machine. Murray missed 43 days of work as a result of the injuries he sustained. After Murray's accident, Ivex provided a 4x4 aluminum block to place on the floor of the machine between the open segments when employees were cleaning the MDO. The aluminum block prevents the segments from closing on an employee working between them. Reynolds was still using aluminum blocks (known to employees as "the Murray blocks") at the time of the hearing.

In 2003, OSHA inspected the facility. At that time, it was owned and operated by Alcoa. The Secretary issued a two-item citation to Alcoa. Item 1a of the citation alleged a violation of 29 C. F. R. § 1910.147(c)(4)(i), the same subsection cited in Item 1a of the present case, for failing to develop, document, and utilize a LOTO procedure for the M3 line. Alcoa entered into an informal agreement whereby it agreed to abate both cited items.

Reynolds acquired the Manteno facility in March 2008. One month later, on April 30, 2008, compliance officer Carr inspected the facility in response to an employee complaint. She found no grounds for the complaint item, but she believed Reynolds's operation of the MDOs on the three production lines violated the terms of 29 C. F. R. §§ 1910.147(c)(4)(i) and (7)(i)(A). Upon her recommendation, the Secretary issued the instant citation.

## **Operation of the MDOs**

Reynolds begins its manufacturing process by conveying plastic material in the form of pellets or flakes into an extruder mechanism. An extruder heats the plastic material into a molten state. A large screw pushes the molten plastic through a die. The die forces the plastic into a thin sheet. After the plastic sheet leaves the die, it passes through the MDO, where it is stretched or pulled in one direction. From the MDO, the sheet passes through the tenter oven, where it is stretched and pulled in another direction. After it leaves the tenter oven, it passes through a series of production equipment where the sheet is cut to varying widths, depending on customer specifications. After that, the finished product is wound on a machine into a large roll.

The MDOs on the three production lines each have several sections that can be opened on a linear rail to allow the operator access to each section of the machine. The system used to open and close the MDO is pneumatically powered.

At times, it is necessary for employees to separate segments of the MDOs to enter between the segments. The MDOs on the M1 and M2 line are similar. The MDO on the M3 line is a newer model. The MDOs on the M1 and M2 lines are equipped with two-hand trip devices. When an employee wants to open the M1 or M2 MDO, he or she must pull a chain that activates a mechanical locking device. The employee must also press and hold a button that activates the pneumatic tracking mechanism. To open or close the M3 MDO, an operator must use two hands to press separate buttons on an interlock control panel on the MDO. If the operator takes either hand off the interlock control panel, the MDO stops immediately.

Each MDO is equipped with a backstop feature. The MDO will open to its maximum width and stop at the backstop. When the operator releases the button on the control panel, the MDO automatically drops a pin, which acts as a locking mechanism and prevents the MDO from closing. The MDO will not close until the operator uses two hands to press the buttons on the interlock panel, which raises the pin.

There is a three second delay when an operator presses the button on the interlock control panel to activate the tractor system. During this delay and while the MDO is closing, an alarm sounds and lights flash to warn an employee inside the MDO that is closing.

Reynolds distinguishes between “invasive cleaning” (where maintenance workers disassemble the MDO and expose its inner gears, chains, and moving parts) and “production

cleaning” (where production operators enter between segments of the MDO to clean out plastic, polish the rolls, and perform string up activity). Production cleaning is the activity at issue in the present case.

Production on the three lines is routinely disrupted due to various reasons. The plastic feed stock converted to molten plastic may be contaminated. Condensation may enter the feed stream or drip onto the plastic sheet. Particles of dust, dirt, or grease can contaminate the plastic, causing the plastic sheet to weaken and break (referred to as a “burnout”). Production disruptions occur on a daily basis.

When a burnout occurs during normal production, the MDO must be reset. The line operators shut down the MDO, causing the extrusion screw to stop the flow of plastic. If the problem occurs within the MDO, the operator stops the MDO and removes any defective product. The operator must then polish the chrome rolls.

Using a computer in the control room, the operator sets the chrome rolls to turn at a speed of approximately 20 feet per minute. The operator sprays the chrome rolls with a cleaning agent, then uses a soft cloth to wipe off the cleaning agent. Because the rolls are hot (approximately 200 degrees Fahrenheit), operators wear welding jackets and fire resistant gloves and sleeves to protect themselves from burns.

After the operator cleans the MDO, he or she closes the machine, backs up and starts the extrusion screw, and re-threads the plastic through the MDO and tenter system, and into the wires. This is referred to as the string up operation .

Times vary for cleaning out and restarting the MDO. It can take as little as 5 minutes or as many as 45 to complete the process.

### **The Citation**

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).

**Item 1: Alleged Willful Violation of 29 C. F. R. § 1910.147(c)(4)(i)**

The Secretary alleges Reynolds committed a willful violation of 29 C. F. R. § 1910.147(c)(4)(i), which provides:

Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

The citation states:

29 CFR 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. [Between April 30, 2008, and August 15, 2008]<sup>1</sup>, employees (OPS production operators) were required to enter in-between segments of the Machine Direction Orienter (MDO) on Line M1, M2 & M3 on a regular basis for roll cleaning and string up operations. The employer had developed a written energy control procedure, (M1 Production Cleaning, Reference #0316) for the cleaning of the MDO machine rollers. The employer failed to ensure utilization and enforcement of the energy control procedure. The employees were thereby exposed to crushing injuries and thermal burn injuries.

**Applicability of the 29 C. F. R. § 1910.147(c)(4)(i) to the MDO**

The standard at 29 C. F. R. § 1910.147(a)(2)(i) provides the LOTO standard “applies to the control of energy during servicing and/or maintenance of machines and equipment.” The standard at 29 C. F. R. § 1910.147(a)(2)(ii) provides:

Normal production operations are not covered by this standard (See Subpart O of this Part). Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if:

- (A) An employee is required to remove or bypass a guard or other safety device; or
- (B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material

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<sup>1</sup> The original citation description for Items 1a and 1b began, “On or about June 17.” The parties stipulated to changing the language to, “Between April 30, 2008, and August 15, 2008.”

being processed (point of operation) or where an associated danger zone exists during a machine operating cycle.

Note: *Exception to paragraph (a)(2)(ii)*: Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See Subpart O of this Part).

Reynolds contends 29 C. F. R. § 1910.147(c)(4)(i) does not apply to the roll cleaning and string up operations employees perform on the MDOs. Reynolds argues these activities are exempt from the terms of 29 C. F. R. § 1910.147(c)(4)(i) because they constitute “minor servicing” that is routine, repetitive, and integral to the use of the MDO, and occurs during normal production operations. Reynolds argues it provides effective alternative protection with the aluminum block placed between the segments by employees when they open the MDOs.

The Secretary disagrees, arguing that when a burnout occurs, the MDO operator cannot clean it out and perform the string up operation without first stopping the machine. Therefore, she argues, any servicing of the MDO during that time is outside “normal production operations” and subject to the requirements of 29 C. F. R. § 1910.147(c)(4)(i). As the employer, Reynolds has the burden of proving it meets the requirements set out in the exception.

During the inspection, compliance officer Carr gave Reynolds a hard copy of a Power Point presentation developed by an alliance between OSHA and the Society of the Plastics Industry, Inc. Reynolds believes it finds support of its position on page 12 of the presentation (Exh. R-5, emphasis in original):

#### **Exception to LOTO**

Minor servicing activities that take place during normal production when **alternative effective protection is used.**

- The first thing to consider when determining an exception to LOTO is that the activities must be minor and have to take place during normal production.
- By definition, set-up work (except minor tool changes and adjustments) is not production.
- Some lubricating, cleaning, and un-jamming may meet the exception criteria.
- Determination of LOTO application should be made on a case-by-case basis.
- The key thing to remember is that when certain servicing and maintenance tasks meet all the exception criteria, and LOTO is not required, alternative effective protection must be in place.

Reynolds emphasizes the third bullet point, overlooking the contingent nature of the word “may” in “Some lubricating, cleaning, and un-jamming *may* meet the exception criteria.” Not all lubrication, cleaning, and un-jamming qualify as minor servicing activities. Determination of whether an activity constitutes minor servicing is made on a case-by-case basis.

Reynolds also seeks support in OSHA Instruction CPL 02-00-147, effective February 11, 2008. The OSHA Instruction provides (Exh. R-4, p. 3-27, emphasis in original):

The first set of criteria for determining the application of the minor servicing exception is whether the activity must take place during, and is inherent to, normal production operations. These servicing activities must be necessary to allow production to proceed without interruption. Additionally, the minor servicing activity must be:

A. Routine: The activity must be performed as part of a regular and prescribed course of procedure and be performed in accordance with established practices.

B. Repetitive: The activity must be repeated regularly as part of the production process or cycle.

C. Integral: The activity must be inherent to the production process.

The employer must also demonstrate that the alternative measures provide effective protection from the hazardous energy. Most importantly, this exception applies only if each and every element of the exception is met.

Reynolds contends the OSHA Instruction provides several examples in which activities meet the minor servicing exception even when the machine in question is shut off, and not in its normal production operation. Reynolds’s reliance on these examples is misplaced. The examples are given in the context of illustrating appropriate alternative effective protection. Prior to listing the examples, the OSHA Instruction states (Exh. R-4, p. 3-29, emphasis added): “To further illustrate the alternative methods of protection, with respect to the minor servicing exception, the following examples are provided. Each of the following examples address only the effectiveness of alternative protection and presumes the existence of all other elements in the minor servicing exception.”

While clearing the plastic and performing the string up operation may be routine and repetitive for MDO operators, Reynolds has failed to establish it is integral, or inherent to the

production process. The examples listed in the OSHA Instruction that Reynolds cites deal with un-jamming “stuck plastic containers” or a part “stuck (jammed) in a plastic injection molding,” or making adjustments to a belt drive. Reynolds cites *Quebecor World-Salem Division*, 19 BNA OSHC, 1627, 1630 (No. 01-0031, 2001), in which an ALJ held “changing rolls of film wrap, and re-threading film into the wrapper rollers” met the requirements of the exception to 29 C. F. R. § 1910.147(a)(2)(ii). All of these examples involve activities that are integral to the production process. When a machine jams on the product it is actually producing, it is part of the normal production operation.

In contrast, the burnouts that occur on the MDOs result not from the normal production operation, but from some contaminant not inherent to the process. Chris Meeks, Reynolds’s environmental health and safety manager, testified “upsets in the production process” could be caused by a “foreign particle or debris,” or “moisture” (Tr. 162-163). The burnouts result in a defective product that cannot be used. Theoretically, if no contaminants affected the process, the operators would not need to stop the MDOs and clear out the bad plastic. Reynolds has failed to establish cleaning the rolls and performing the string up operations are integral to the normal production operation of the MDO.

Even if Reynolds had established the cleaning and string up operations met the minor servicing requirements, Reynolds failed to prove it provided alternative effective protection to its employees. Reynolds argues the Murray blocks provide effective protection to employees entering the MDO. Prior to Carr’s inspection, Reynolds did not specify a particular place on the floor for employees to place the Murray blocks<sup>2</sup>. It was up to the employee to place the Murray block between the open segments. Carr testified, “[A]n employee could have gotten his foot caught if it had closed. You know, there’s space on either side [of the Murray block]. It wasn’t fitted. It’s potentially moveable” (Tr. 128). It was possible for an employee to omit using the Murray block entirely. The employee controlling the segments cannot see completely into the space between the open segments and cannot determine whether anyone is in the space while operating the two-handed controls that cause the segments to move or traverse.

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<sup>2</sup>After the inspection but prior to the hearing, Reynolds redesigned the MDO equipment so that the pneumatic power to the MDO could be locked out.

Reynolds has failed to establish its cleaning and string up operations on the MDO met the minor servicing exception to 29 C. F. R. § 1910.147(a)(2)(ii). The section at 29 C. F. R. § 1910.147(c)(4)(i) applies.

### **Noncompliance with the Terms of the Standard**

The cited standard requires employers to develop, document, and utilize procedures for the control of potentially hazardous energy when employees are engaged in covered activities. Although Reynolds had a written LOTO procedure in place for invasive cleaning of the MDOs, Reynolds concedes it has never had a LOTO procedure for roll polishing or string up operations on the MDOs (Reynolds’s brief, p. 12). The company failed to comply with the terms of the standard.

### **Employee Exposure**

Reynolds stipulated, “The employees, OPS production operators, were required to enter in between segments of the Machine Direction Orienter, MDO, on Lines M1, M2, and M3 for roll cleaning and stringing up operations” (Tr. 6). MDO operators entered between the open segments of the MDOs. These employees were exposed to the hazard being crushed between the segments.

### **Employer Knowledge**

Reynolds’s management made a conscious decision not to implement LOTO procedures for roll polishing and string up operations on the MDOs. Reynolds had actual knowledge of the violation.

The Secretary has established the four elements of the violation. Item 1a is affirmed.

### **Item 1b: Alleged Willful Violation of 29 C. F. R. § 1910.147(c)(7)(i)(A)**

The Secretary alleges Reynolds committed a willful violation of 29 C. F. R. § 1910.147(c)(7)(i)(a), which provides:

Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

The citation states:

29 C. F. R. § 1910.147(c)(7)(i)(A): Each authorized employee(s) did not receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control:

[Between April 30, 2008, and August 15, 2008], employees (OPS production operators) required to enter in-between segments of the Machine Direction Orienter (MDO) on Lines M1, M2 & M3 on a regular basis for roll cleaning and string up operations were not trained in lockout/tagout specific to the MDO. The employees were thereby exposed to crushing injuries and thermal burn injuries.

Having erroneously determined roll cleaning and string up operations on the MDOs were exempt from the LOTO standard, Reynolds never trained its operators in LOTO procedures specific to the MDOs. The cited standard applies. Reynolds failed to train its MDO operators in LOTO procedures for cleaning and string up operations and the operators were exposed to the hazard of being crushed between the segments. Reynolds had actual knowledge of its failure to train the employees.

Item 1b is affirmed.

### **Willful Classification**

The Secretary classifies Items 1a and 1b of the Citation as willful.

A willful violation is one “committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff’d* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer’s heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 C.C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

*A.E. Staley Manufacturing Co.*, 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

The basis for the Secretary’s charge of willfulness lies in the history of the Manteno facility. The Secretary argues management at the Manteno facility knew since 1991, when Ivex employee Murray was caught between the segments of one of the MDOs, that the MDOs presented crushing hazards when opened for cleaning and string up operations. The Secretary also argues management at the Manteno facility were put on notice of deficiencies in its LOTO program in 2003, when the

Secretary issued a citation to Alcoa for violating 29 C. F. R. § 1910.147(c)(4)(i). The Secretary contends Alcoa and Reynolds shared “overlapping management,” and Reynolds “has retained many of the same employees, the same equipment, produces the same products, and the same long held policies and procedures” as Alcoa. Therefore, the Secretary argues, Reynolds can be charged with the knowledge of previous accidents and citations due to the “continuity of operations” at the Manteno facility (Secretary’s brief, p. 23).

Reynolds argues it has no connection to Ivex. While it acknowledges it retained some of the same employees who worked for Alcoa, Reynolds notes its key management personnel were not with Alcoa. Reynolds also points out the 2003 Citation issued to Alcoa addresses LOTO procedures for the tenter oven on the M3 Line, not the MDOs (Exh. C-1).

Knowledge of the history of previous safety violations cannot be imputed to Reynolds. Reynolds obtained ownership of the facility in March 2008 and was inspected by OSHA approximately one month later. Reynolds is a corporate entity separate from Ivex and from Alcoa. It is required to comply with OSHA’s standards, as are all employers within OSHA’s jurisdiction. Given the unique circumstances specific to this case, however, Reynolds is not accountable for the transgressions of its predecessors.

The Secretary contends Reynolds’s failure to comply with the cited standards manifests intentional disregard for the requirements of the Act. A willful violation is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer’s efforts were not entirely effective or complete. The test of good faith for these purposes is an objective one; whether the employer’s efforts were objectively reasonable even though they were not totally effective in eliminating the violative conditions. *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997).

Reynolds has a written safety program, including a written LOTO program for invasive cleaning of the MDOs (Exh. C-20). The company provides annual LOTO training to its employees. Meeks performs regular safety audits at the Manteno facility.

Meeks testified that when he first observed the roll cleaning and string up operations on the MDOs, he determined these were minor servicing activities that were exempt from the LOTO standard. Meeks testified the activities were routine and repetitive, and he believed they were

integral to the operation. While Meeks's conclusion was erroneous, it was not unreasonable. Reynolds continued to use the Murray blocks as a safeguard against the MDO segments closing on an employee working between them. Reynolds has not demonstrated plain indifference to employee safety or conscious disregard of the requirements of the Act. On the contrary, the company has made a good faith effort to comply with the requirements.

It is determined the Reynolds's violations of 29 C. F. R. §§ 1910.147(c)(4)(i) and (7)(i)(A) are not willful. The violative conduct could have resulted in death or serious physical harm if an employee was crushed between the segments of the MDO. The violations are classified as serious.

### **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.

Reynolds employed approximately 101 workers at its Manteno facility. Carr testified the Secretary had issued citations to Reynolds in the three years previous to her inspection. The Secretary did not adduce evidence showing less than good faith on the part of Reynolds.

The gravity of the violations is moderately high. The 1991 accident demonstrates an employee could be caught between the segments and seriously injured. The introduction of the Murray block, however, afforded some limited protection to employees working between the MDO segments. It is determined a total penalty of \$7,000.00 is appropriate for Items 1a and 1b.

