

SECRETARY OF LABOR,
Complainant,
v.
TOPS MARKETS, INC.,
Respondent.

OSHRC Docket No. 94-2527

DECISION

Before: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

Tops Markets, Inc., operates a supermarket and specialty bakery in Amherst, New York. The Occupational Safety and Health Administration (“OSHA”) inspected the bakery in May of 1994 after a Tops’ employee seriously injured his finger on a Benier Kaiser Roll machine that started up unexpectedly while he was changing a die. The machine had not been unplugged. The OSHA inspection also revealed that Tops’ employees did not unplug a Benier Overhead Proofer machine before unjamming dough from it. The unexpected energization or start up of this machine could crush, severely bruise, or lacerate the employees’ fingers or hands.

OSHA contends that Tops violated three lockout/tagout (“LOTO”) standards that require employers to make periodic evaluations of the LOTO procedures in use in their plants, to train their employees in the LOTO requirements, and to ensure that all LOTO devices on their machines are operated or used to isolate the machines from their energy

sources.¹ Tops counters that the two machines were exempt from the LOTO standards pursuant to an exemption at § 1910.147(a)(2)(iii)(A):

This [LOTO] standard does not apply to . . . [w]ork on cord and plug connected electric equipment for which exposure to hazards of unexpected energization or start up of the equipment is controlled by the unplugging of the equipment from the energy source and by the plug being under the exclusive control of the employee performing the servicing or maintenance.

Tops reads the exemption to mean that a cord and plug connected machine is not covered by the LOTO standards if unplugging it would prevent its unexpected energization and the employee can retain exclusive control of the plug during his work. Tops does not read the exemption to hinge on whether the machine is actually unplugged and controlled during machine servicing and maintenance.

OSHA's position, however, is that the exemption only applies to machines that are actually unplugged with the plug under the exclusive control of the servicing and maintenance employees. Administrative Law Judge Robert A. Yetman found in favor of

¹The pertinent parts of 29 C.F.R. § 1910.147 are:

(c) *General*—

. . . .

(6) *Periodic inspection.* (i) The employer shall conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirements of this standard are being followed.

. . . .

(7) *Training and communication.* (i) The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. . . .

. . . .

(d) *Application of control.*

. . . .

(3) *Machine or equipment isolation.* All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s).

OSHA and therefore affirmed the three serious citation items. He assessed penalties in the amounts of \$900, \$2,250, and \$2,250.

II. Analysis

The language of the exemption to the LOTO standard is ambiguous. The Secretary argues that “[w]ork . . . for which exposure to hazards . . . is controlled by the unplugging” suggests not only that unplugging be possible but also that it must be done during the work.² However, the complete wording of the exemption refers to “[w]ork on cord and plug connected electric *equipment for which* exposure . . . is controlled by the unplugging” (emphasis added). As Tops points out, the verb form “is controlled by” more usually refers to “an examination of an ongoing status” or “a characteristic” that is “unchanging.” This reading suggests that “is controlled by the unplugging” points to an existing safety feature of the cord and plug equipment.³

When a standard is ambiguous, we turn to the legislative history. *See, e.g., Nooter Constr. Co.*, 16 BNA OSHC 1572, 1574, 1993-95 CCH OSHD ¶ 30,345, pp. 41,837-38 (No. 91-237, 1994). The preamble to the Secretary’s LOTO standard plainly states: “OSHA has decided that the lockout/tagout requirements of the standard will not apply to cord and plug connected equipment *if the equipment is unplugged* and the plug is in the exclusive control of the employee who is performing the servicing or maintenance of that equipment.” 54 Fed.Reg. 36663 (1989) (emphasis added). This shows that the Secretary intended to limit the

²The Secretary notes that the exemption might implicitly require employers to undertake some minimal and simple program, training, and inspection duties in order to ensure that their employees actually unplug the equipment and retain control of the plugs, but if these two things are accomplished, the employers have none of the more formal and detailed LOTO program, training and inspection duties.

³Tops also points out that some cord and plug machines are not controlled by simply unplugging them, *i.e.*, there are some machines that store energy and that can still operate after being unplugged. In Tops’ view, this explains the exemption’s language specifying “cord and plug connected electric *equipment for which* exposure to hazards of unexpected energization or start up of the equipment *is controlled by the unplugging* of the equipment” (emphasis added).

exemption's applicability to situations where the cord and plug equipment is unplugged. As we have previously stated, we find the preamble to be persuasive evidence of the intent of the regulation.⁴ *See American Sterilizer Co.*, 15 BNA OSHC 1476, 1478, 1991-93 CCH OSHD ¶ 29,575, p. 40,015-16 (No. 86-1179, 1992) (preamble as "best and most authoritative statement of the Secretary's legislative intent" for standard susceptible to different interpretations).

Accordingly, we find the LOTO exemption to be inapplicable to Tops' operations because its machines were not unplugged. Thus we affirm the judge's decision.⁵

III. Order

The parties have stipulated that, if the exemption is inapplicable, the three citation items should be affirmed as serious violations and penalties in the amounts of \$900, \$2,250,

⁴Given the clarity with which the Secretary stated this rule in the preamble, Commissioner Montoya is perplexed that the standard as issued is so open to interpretation.

⁵Tops asserts that "it is entirely possible" that the plugged-in machines had safety devices to prevent or warn of possible start-up, and that the Secretary therefore failed to prove that the machines presented a hazard of "unexpected" start up. *See General Motors Corp.*, 17 BNA OSHC 1217, 1993-95 CCH OSHD ¶ 30,793 (No. 91-2973, 1995), *aff'd*, 89 F.3d 313 (6th Cir. 1996). We find otherwise, however. One machine actually caused an injury by unexpectedly starting up while plugged in, and on review Tops does not specifically assert that there were safety devices on either machine. Moreover, Tops stipulated that "the unexpected energization or start up" of plugged-in machines "could cause injury to employees during servicing and maintenance."

and \$2,250 should be assessed. Accordingly, we affirm the citation items as serious violations and assess the stipulated penalties.

/s/
Stuart E. Weisberg
Chairman

/s/
Velma Montoya
Commissioner

/s/
Daniel Guttman
Commissioner

Dated: March 3, 1997