United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant,	:	
v.	:	
THE TIMKEN COMPANY, Respondent.	:	OSHRC Docket No. 97-1457
USWA, GOLDEN LODGE, LOCAL NO. 1123, Authorized Employee Representative.	:	

DECISION

Before: RAILTON, Chairman; ROGERS, Commissioner.*

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("the Act"). At issue is whether Timken violated two requirements under the hazardous energy control ("lockout/tagout") standard, 29 C.F.R. § 1910.147, at Timken's steel plant on Gambrinus Avenue in Canton, Ohio.

* Commissioner Stephens has recused himself from participation in this case.

The case arose from an inspection of that facility by the Secretary of Labor's Occupational Safety and Health Administration ("OSHA"), following a serious injury to Thomas Lawson, a mechanical maintenance employee at the Piercing Mill in Tube Mill No. 3. Timken was engaged in manufacturing and producing tapered rolling bearings and alloy steels at the plant. Red hot steel billets were converted into tubes at the Piercing Mill. The basic process performed at the mill was that a billet arrives from a center punch and was rolled down into a trough in front of the mill. The billet was then passed through the mill, where a water-cooled ram was plunged through the middle of the billet to form it into a tube.

On March 12, 1997, Lawson and his fellow employee Ernie Young responded to a troubleshooting whistle at the mill. They found that a hydraulic hose adjacent to the trough and mill was leaking. Young turned the switch for the mill's hydraulic system off, placed his lock on it, and pushed the emergency stop button on the console of the mill operator's pulpit. Lawson and Young had determined that this was going to be a simple repair, which would take approximately five minutes. Lawson was not able to reach the bottom of the hose while standing on the floor, so he stood on the gorge adjust shaft, which was 10-12 inches off the floor.[1] Mr. Young stood nearby on a spindle. As Mr. Lawson stood there, the plugger operator, who could not see Lawson or Young from his operating position and was apparently unaware that the servicing work was in process, activated the gorge adjust shaft to adjust the rolls. When the shaft began rotating, Lawson's leg went over it, causing his clothes to become wrapped around it, and causing serious injuries.

The Secretary alleged in item 1(a) of her citation to Timken that at Tube Mill No. 3, "authorized employees were not properly advised in the recognition of applicable

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[1] The function of the gorge adjust was to adjust the size of the rolls that were attached to the spindles. It traveled horizontally, in and out from the center line of the mill.

hazardous energy in that the proper lockout procedures were not applied so that all parts of the piercing mill were adequately locked out," in violation of section 1910.147(c)(7)(i).[2] Citation item 1(b) alleged a violation of section 1910.147(d)(2)[3] in the following manner: "Equipment at the #3 tube mill was not completely locked out, the rod and shaft were still activated exposing employees to injury."

Commission Administrative Law Judge Covette Rooney affirmed serious violations of the employee training requirement at section 1910.147(c)(7)(i) and the lockout application requirement at section 1910.147(d)(4).[4] She assessed the Secretary's proposed combined penalty of $5000 for those violations. Timken petitioned for review on the grounds: (1) that the injured employee had been properly trained but chose to take shortcuts on the repairs at issue, and he was properly disciplined for that mistake; (2) that

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[2] Section 1910.147(c)(7)(i) states:

> 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. The training shall include the following:
>
> (A) 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. . . .

[3] Section 1910.147(d)(2) states:

> The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment. An orderly shutdown must be utilized to avoid any additional or increased hazard(s) to employees as a result of the equipment stoppage.

[4] The Secretary moved to amend the citation to allege a violation of section 1910.147(d)(4) in a reply brief filed with the judge after Timken challenged the applicability of section 1910.147(d)(2) in its post-hearing brief. The judge found an amendment appropriate.

Timken was prejudiced by the post-hearing amendment, which for the first time alleged a violation of section 1910.147(d)(4); and (3) that that provision "has nothing to do with the implementation of a lockout/tagout procedure."

The two participating Commission members are divided on the appropriate disposition of this case on the merits. However, section 12(f) of the Act, 29 U.S.C. § 661(e), requires that official action of the Commission must have the affirmative vote of two members. To resolve this impasse, the Commission herein vacates the direction for review, thereby allowing the judge's decision and order to become the final appealable order of the Commission with the precedential value of an unreviewed judge's decision. *See, e.g., Texaco, Inc.*, 8 BNA OSHC 1758, 1760, 1980 CCH OSHD ¶ 24,634, p. 30, 218 (Nos. 77-3040 & 77-3542, 1980); *see Rust Engineering Co.*, 11 BNA OSHC 2203, 2205, 1984-85 CCH OSHD ¶ 27,023, p. 34,777 (No. 79-2090, 1984). *See also* sections 10(c), 11(a) and (b), and 12(j) of the Act, 29 U.S.C. §§ 659(c), 660(a) and (b), and 661(i). Accordingly, the direction for review is vacated.[5] However, the separate opinions of the two participating Commission members follow.

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[5] Notwithstanding our action vacating the direction for review in this case, as the separate opinions of the Commission members make clear, this was an appropriate case for review. The order vacating the direction for review is entered in order to allow the parties to bring finality to this case. The decisions of some United States courts of appeals have rejected alternative forms of dispositions of our cases when only two members are available to decide cases. *See, e.g., Cox Brothers v. Secretary of Labor*, 574 F.2d 465 (9th Cir. 1978); *Shaw Construction, Inc. v. OSHRC*, 534 F.2d 1183 (5th Cir. 1976).

It is so ordered.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

Dated: November 15, 2004_____

Separate Opinion of Chairman Railton

A. Timken Complied with the Training Requirements of the Lockout/Tagout Standard

I would vacate item 1(a) of the citation. In that item, the Secretary alleged that Timken failed to train authorized employees -- mechanical maintainers -- in the "proper lockout procedures . . . so that all parts of the piercing mill were adequately locked out," in violation of section 1910.147(c)(7)(i)(A). The charge relates to specific machines in the plant. As such, the charge implies that section 1910.147(c)(7)(i)(A) requires an employer to train its authorized maintenance employees on the proper lockout procedures for specific pieces of machinery wherever they perform their duties throughout the entire plant. In other words, it calls for machine-specific training. The regulatory history for the training provisions of the lockout/tagout (LOTO) standard does not, however, support training to the extent called for in this citation. Moreover, the lockout training Timken provided to its authorized employees was sufficient for compliance purposes under the cited standard.

The LOTO standard defines three categories of employees who may be exposed to conditions involving the lockout of hazardous energy sources. The standard requires that employers have a LOTO training program that ensures employees understand the program and have the knowledge and skills required for safe application, use, and removal of energy controls. This language is prefatory to three paragraphs that specify the kind of training that is to be given to each of the three categories of employees.

One category consists of "authorized employees."[1] These workers perform service

[1] Section 1910.147(b) states that an authorized employee is a "person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. . . ."

and maintenance duties under the LOTO standard. They are the workers who participate in the deenergization of machinery or equipment and who have to apply locks or tags to machinery or equipment to protect against unexpected reenergization during service and maintenance work. *See General Motors Corp., Delco Chassis Div.*, 17 BNA OSHC 1217, 1993-95 CCH OSHD ¶ 30,793 (No. 91-2973, 1995)(consolidated), *aff'd*, 89 F.3d 313 (6th Cir. 1996) ("*GM-Delco*"). The other two categories consist of "affected employees" and a catchall category of "all other employees."[2] As the preamble to the final LOTO standard explains, affected and all other employees need to be trained to levels such that they recognize and honor locks and tags applied by authorized employees and understand their purpose. Simply put, they must know to leave the machinery or equipment alone and more particularly not to remove locks, tags, or reenergize the machinery or equipment. *See* OSHA, *Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule,* 54 Fed. Reg. 36644, 36665/3, 36674/2 (Sept. 1, 1989), as corrected by 55 Fed. Reg. 38677, 38680/1 (Sept. 20, 1990).

According to subparagraph (A) of section 1910.147(c)(7)(i), "[e]ach 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 question in this case is whether Timken's authorized employees, specifically Lawson and Young, were trained according to the terms of the cited standard.

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[2] Section 1910.147(b) states that an "affected employee" is "[a]n employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed." Section 1910.147(b) does not define "all other employees," but section 1910.147(c)(7)(i)(C) states that they are "employees whose work operations are or may be in an area where energy control procedures may be utilized . . . ."

The language used in section 1910.147(c)(7)(i) and subparagraph (A) is broad, as it must be for a standard to apply to many different industries and many different situations. As the Secretary stated when she promulgated the standard, "OSHA believes that the training program under this standard needs to be performance-oriented, in order to deal with the wide range of workplaces covered by the standard." 54 Fed. Reg. at 36673/3. She went on to explain that "[c]onsiderable latitude is given to employers in the development and conduct of the required training for authorized, affected and other employees." 54 Fed. Reg. at 36674/1, as corrected by 55 Fed. Reg. at 38682/1.

My colleague focuses narrowly on these broad terms, as did the judge in this case, and parses the presentation of evidence into prima facie and rebuttal cases. She concludes that Timken did not adequately rebut the prima facie evidence.[3] I believe that that focus is too narrow for at least two reasons. First, it relies only on an analysis of the terms of the cited standard, overlooks the regulatory scheme used in the standard for training authorized employees, and ignores the regulatory history of the standard. Second, the evidentiary focus should be on the record as a whole rather than a compartmentalization of the evidence as presented by the parties. *See, e.g., Capeway Roofing Systems, Inc.*, 20 BNA OSHC 1331, 1342, 2002 CCH OSHD ¶ 32,695, p. 51,624 (No. 00-1968, 2003), *pet. for rev. filed,* No. 03-2373 (1st Cir., Oct. 8, 2003).

The Regulatory Scheme and History

The provision cited against Timken is what the Secretary characterizes as the "initial" training provision. 54 Fed. Reg. at 36673/3, 36675/1. Other sections of the LOTO standard require that "authorized employees" be provided with followup training when any of several triggering events demonstrate that authorized employees lack the

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[3] In effect, my colleague and the judge have shifted the burden onto Timken to disprove the alleged training violation.

knowledge or skills to successfully deenergize hazardous energy sources using lockout/tagout.[4]

The primary triggering event to discover and determine which authorized employees requires additional training is specified in section 1910.147(c)(6)(i).[5] According to this section, employers are required to conduct periodic inspections "at least annually to ensure that the procedure and the requirements of [the] standard are being followed." The inspection is to be carried out "by an authorized employee other than the one(s) utilizing the energy control procedure being inspected." It is to be conducted to correct any "deviations or inadequacies identified," and it is to include a review between the inspector and the authorized employee being inspected regarding the latter's responsibilities under the lockout procedures that are being inspected. According to paragraph (B) of section 1910.147(c)(7)(iii), "[a]dditional retraining shall . . . be conducted whenever a periodic inspection under paragraph (c)(6) of this section reveals . . . that there are deviations from or inadequacies in the employee's knowledge or use of the energy control procedures."

Paragraph (A) of section 1910.147(c)(7)(iii) also provides that retraining of authorized and affected employees "shall be provided . . . whenever there is a change in their job assignments, a change in machines, equipment or processes that present a new hazard, or when there is a change in the energy control procedures." And paragraph (B)

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[4] These other training provisions of the LOTO standard apply only to authorized employees. The standard does not contain retraining provisions for affected and all other employees when lockout is used. It does, however, call for review of the procedures with affected employees if tagout is used. § 1910.147(c)(6)(i)(D).

[5] That provision states:

> 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.

of section 1910.147(c)(7)(iii) provides that retraining shall also be conducted whenever the employer has reason to believe that there are deviations from, or inadequacies in, the employee's knowledge or use of the procedures. Thus, beyond initial training, the LOTO standard contemplates five separate and different events that will require employers to retrain authorized employees. Retraining of these employees is required:

1. When the employer has reason to believe the employee needs retraining;
2. When a periodic inspection reveals that an employee needs retraining because he/she lacks knowledge or skills in the use of energy control procedures;
3. When there is a change in the employee's job assignment;
4. When there is a change in energy control procedures; or,
5. When there is a change in machines, equipment or processes that presents a new hazard.

OSHA explained the need for retraining in the Preamble to the final LOTO standard, as follows:

> OSHA believes that the effectiveness of training diminishes as the time from the last training session increases. Without the imposition of a requirement for periodic retraining of the employees who are critical to the success of the energy control program, that is, the persons who must utilize the procedure, the overall effectiveness of the energy control program will diminish over an extended period of time.

54 Fed. Reg. at 36674/3.[6] The LOTO standard thus contains a number of provisions that are designed to ensure that authorized employees have the knowledge and the skills

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[6] The original Preamble indicated that retraining was to be given at least annually. 54 Fed. Reg. at 36674/2.The terms of the final LOTO standard do not, however, impose that as a requirement. The correction document indicates that the retraining need not be conducted on an annual basis unless deviations or inadequacies are revealed through the annual inspections required by section 1910.147(c)(6). *See, e.g.*, 55 Fed. Reg. at 38682/1.

required for the safe application, usage, and removal of energy controls as these words are used in 1910.147(c)(7)(i). However, the question of what is required in the way of initial training is not answered directly by the terms of the standard, nor is it answered by the Preamble. It can, however, be discerned from the regulatory history of the standard, including the Regulatory Impact Analysis.

The LOTO standard as proposed on April 29, 1988, included training and periodic inspection provisions much like those that appear in the final standard. OSHA, *The Control of Hazardous Energy Sources (Lockout/Tagout): Proposed Rule,* 53 Fed. Reg. 15496 (April 29, 1988). It also designated three classes of employees who would require training, including "authorized employees."[7] The language used in the proposed standard as section 1910.147(c)(5)(i) is as broadly worded as the final provision adopted as section 1910.147(c)(7)(i). Indeed, there is no essential difference between the two provisions.[8]

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[7] The term "authorized employee" as set forth in the proposed standard also included the term "qualified person." 53 Fed. Reg. at 15518/1. The combination of the terms essentially describe the authorized employee as defined in the final standard.

[8] Proposed section 1910.147(c)(5)(i) used the following terms:

> *Training and communication*. (i) The employer shall provide training to ensure that the purpose and function of the energy control procedures are understood by employees and that the knowledge and skills required for the safe application and removal of energy controls are available as needed. The training shall include the following:
>
> (A) Authorized employees shall receive training in the recognition of applicable hazardous energy sources and in the use of adequate methods and means for energy isolation and control.
>
> (B) Affected employees shall be instructed in the purpose and use of the energy control procedure.
>
> (C) All other employees whose work operations are or may be affected by the energy control procedure shall be instructed about the procedure and how it affects their work operations.

Similarly, the periodic inspection and retraining provisions of the proposed standard called for retraining when authorized employees fail the periodic inspection and when the employer has reason to believe that there are inadequacies in its program. Proposed sections 1910.147(c)(4) and (c)(5)(ii), 53 Fed. Reg. at 15518/3, 15519/1.

The Preamble to the proposed standard was no more specific as to what is intended by the broad terms used in the final standard than was the explanation provided on publication of the final standard. I therefore turn to the Regulatory Impact Analysis (RIA). OSHA, *Regulatory Impact and Regulatory Flexibility Analysis of 29 CFR 1910.147 (The Control of Hazardous Energy Sources – Lockout/Tagout)* (August 1989). The RIA contains cost estimates based upon a study performed for OSHA by the Eastern Research Group, Inc. (ERG). ERG, *Industry Profile Study of a Standard for Control of Hazardous Energy Sources Including Lockout/Tagout Procedures* (May 1985) ("ERG Study"). I note that OSHA relied upon the ERG Study in its explanation of the final standard upon publication (54 Fed. Reg. at 36683), and in the RIA. *E.g.,* RIA at ch. VI, p. 1 ("OSHA's cost estimates were primarily based on a report prepared by Eastern Research Group") (citing ERG Study); *id.,* ch. VI, pp. 42-44 (estimated training costs were based on ERG Study). In a Supplemental Statement of Reasons submitted to the U.S. Court of Appeals for the District of Columbia Circuit, OSHA again relied on the RIA's cost estimates primarily based on the ERG study. OSHA, *Supplemental Statement of Reasons; Control of Hazardous Energy Sources (Lockout/Tagout)*, 58 Fed. Reg. 16612 (March 30, 1993).

Based on the ERG Study, OSHA estimated in its analysis of costs of the proposal that initial training for authorized employees would take an average of two hours per

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53 Fed. Reg. at 15519/1.

employee (one hour per employee in very small establishments). RIA, ch. VI, p. 42. Supervisors were assumed to train up to ten authorized employees at a time, and workers were assumed to undergo retraining at least once every five years. *Id.*

According to the ERG Study, maintenance workers in the low-impact establishments were assumed to need one-half hour of initial lockout/tagout training the first year and one-half hour of retraining every five years. ERG Study at 7-116. *See* RIA, ch. VI, p. 43. The ERG study even includes language for a standard much like that OSHA adopted in the final standard. The study states:

> Paragraph (c)(4) of the draft standard describes the training and communication portions of the lockout/tagout procedures. The requirements are:
>
> (i) The employer shall provide training to ensure that the purpose and function of the procedures . . . are understood and that the knowledge and skills required . . . are available as needed.
>
> (A) Authorized and qualified employees shall receive training . . .
>
> (B) Affected employees shall be instructed in the purpose and use of the lockout/tagout procedures.
>
> (C) All other employees shall be specifically informed of the . . . procedures.
>
> (ii) Periodic retraining shall be provided . . .
>
> (iii) The employer shall certify that training has been provided.

ERG Study at 7-90. It seems clear from the cost and time estimates OSHA and its contractor made that OSHA's expectations concerning initial training must have included training workers had already received. Certainly, two hours of training by itself does not suggest a training program containing extensive studies of lockout methods. Given the content of the LOTO standard as a whole and the broad language employed in section 1910.147(c)(7)(i)(A), two hours of training is clearly not enough to give authorized

employees an in-depth understanding of their duties under the standard, deenergization procedures, lockout usage, and release from lockout. More to the point, two hours of training is clearly not enough to familiarize authorized employees with each and every specific machine or piece of equipment they must service or maintain.

The record in this case makes it plain that the two mechanical maintainers, Lawson and Young, had received what I believe to be sufficient "initial" training to meet the requirements of section 1910.147(c)(7)(i)(A). They received lockout training in 1985 when they were shown a video directed specifically to lockout.[9] They were provided with lockout training under OSHA's Subpart S electrical standards in 1995 and also during their training for compliance with OSHA's confined space standard in 1993. While Lawson exhibited little ability to recall training he had received, he did recall that he had been given a lock to use while he was an apprentice, indicating that he likely received on-the-job training as an apprentice.

Lawson's actions and that of his coworker, Young, clearly demonstrate that both were knowledgeable about some aspects of the need to lockout energy sources. They did lock out the hydraulic energy. They used the emergency stop button, even though Lawson was aware that it was not a lockable device. Lawson had worked weekends and was aware on those occasions that an electrical maintainer would lock out all power to the piercing mill from the electrical substation. In these circumstances, the record as a whole indicates that both Lawson and Young were trained at least to the extent required by the initial training provision of the standard cited against Timken.

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[9] It is apparent from the RIA that OSHA must have considered training given before the standard took effect in 1990 as relevant to compliance with the initial training requirements of the cited standard.

This is not to say, however, that Timken's lockout/tagout procedures were without fault. I note, in this regard, that Lawson and Young apparently lacked the authority or ability to deenergize and lock out all the electrical power to the piercing mill without the assistance of an electrical worker, who would lock it out from the substation. If Lawson and Young were not able to affix their personal lockout devices to the energy isolating device, Timken's procedure may well violate some other provision of the standard, but it does not indicate a violation of the training requirement cited here. I also note that Lawson testified that supervisors were aware of his failure to use LOTO procedures. The record fails to indicate, however, whether notice of this kind occurred before or after the effective date of the standard. Of course if it had occurred after the effective date, then the retraining provisions of the standard would appear to be relevant to the situation.

My colleague and the judge both state that Lawson and Young were not adequately supervised. There is nothing in the record other than Lawson's broad statement that indicates who the supervisors were, when they might have seen him fail to follow Timken's lockout procedures, and what equipment he was working on when he observed. These factors are important in LOTO cases. Lawson's testimony spanned his entire work experience at Timken, i.e., some nineteen years. Most of that period was before the standard became effective in 1990. For all we know, his testimony may have gone to work he performed as an apprentice. However, even if it is assumed that some of the incidents he described occurred after the effective date of the standard, his testimony is still not sufficient to show he lacked "initial" training.

We do not know, for example, whether the machinery he was working on when observed by the supervisors was subject to unexpected energization. *See GM-Delco,* 89 F.3d at 313 (lockout/tagout standard "covers only those machines that do not provide servicing workers sufficient advance notice of startup to avoid injury"). We also do not know whether he was actually performing service or maintenance work during that time.

Moreover, the standard has exemptions such as those for cord and plug-connected equipment, as well as for minor servicing activities. Sections 1910.147(a)(2)(ii)(B) (NOTE), (iii)(A). We do not know what equipment he was working on. Beyond that, we have no idea whether the supervisors he refers to were persons charged with responsibility for supervising his use of lockout, such as maintenance supervisors.[10] In these circumstances, the evidence of record warrants that Item 1(a) of the citation be vacated for a lack of proof.

The Post Trial Amendment of the Pleadings Was Improper

I believe that the judge erred by allowing the Secretary to amend the pleadings long after the record had been closed. My colleague's acquiescence, as stated in her opinion, compounds that error. However, even if it can be said that the amendment was only a technicality, my colleague goes much too far in concluding that the Secretary carried her burden of proof regarding the knowledge issue.

At the outset, I note that the motion to amend was made in a post-hearing brief contrary to our Rules of Procedure. Commission Rule 40(a), 29 C.F.R. § 2200.40(a), clearly states that "[a] motion shall not be included in another document, such as a *brief* . . . , but shall be made in a separate document." (Emphasis added.) Technically, one can argue that the motion was not before the judge and should have been ignored. She granted the improper motion rather than ignoring it and thus erred.

It is also wrong to suggest, as my colleague does, that the Secretary lacked notice of the problem associated with her original theory of prosecution.[11] Timken's

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[10] Of course if the supervisors were those having authority to correct his actions involving LOTO, the appropriate standard is not the initial training standard but rather a retraining provision.

[11] My colleague appears to believe that Timken committed an error of sorts by not notifying the Secretary prior to the filing of its post-hearing brief that section

questioning of the Secretary's compliance officer concerning her understanding of section 1910.147(d)(2) raised a red flag on the issue whether the Secretary was proceeding under the appropriate standard. Nevertheless, the Secretary continued in her post-hearing brief to argue that the charge as laid in the citation should be affirmed. Indeed, she continued to argue for that result in her reply brief, but in the alternative asked that the citation be affirmed under section 1910.147(d)(4). In other words, the Secretary essentially left it to the judge to pick the proper manner for affirming the citation. We have been slow to grant motions of this kind when filed this late in the proceedings, particularly when they cloud the factual picture. *See e.g., Worldwide Mfg., Inc.*, 19 BNA OSHC 1023, 1025-26, 2000 CCH OSHD ¶ 32,163, pp. 48,551-52 (No.97-1381, 2000), *aff'd without published opinion,* 22 Fed.Appx. 684 (8th Cir. Dec. 6, 2001); *Lancaster Enterprises Inc.*, 19 BNA OSHC 1033, 1034-36 and n. 6, 2000 CCH OSHD ¶ 32,181, pp. 48,632-33 and n.6 (No. 97-0771, 2000); *Seward Motor Freight Inc.*, 13 BNA OSHC 2230, 2234-35, 1987-90 CCH OSHD ¶ 28,506, pp. 37,787-89 (No. 86-1691, 1989); *Krause Milling Co.*, 12 OSHC 1795, 1986-87 CCH OSHD ¶ 27,566 (No. 78-2307, 1986).

In this regard, Timken advises it would have submitted additional evidence, had it

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1910.147(d)(2) was not appropriate. As we have said in many decisions, however, it is the Secretary's job to prove the applicability of the standard cited against the employer. *See Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1186-87 and n. 8, 2002 CCH OSHD ¶ 32,667, p. 51,420 and n. 8 (No. 96-1043, 2003); *Donohue Industries, Inc.,* 20 BNA OSHC 1346, 1348, 2002 CCH OSHD ¶ 32,679, p. 51,499 (No. 99-0191, 2003). *See also, e.g., Gary Concrete Prods. Inc.,* 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991); *A.H. Beck Found. Co.*, 13 BNA OSHC 1040, 1041, 1986-87 CCH OSHD ¶ 27,797, p. 36,354 (No. 83-928, 1987). I know of no rule or any trial practice manual that suggests a party defending a case has an obligation to inform the prosecutor that the charges are wrong. Of course I suspect that it is done all the time and that prosecutors usually cock a jaundiced eye to such protestations.

known that the Secretary was going to move to amend the complaint in her reply brief. I find it troubling that my colleague sees fit to speculate about how counsel for Timken would have used the energy isolation lists and that she faults Timken for not introducing them to support her notion of the evidentiary burden each party bears. Regarding item 1(a), the training violation, Timken might well have thought the energy isolation lists to be cumulative and unnecessary, given the state of the evidentiary record demonstrating classroom instruction and the like.

Timken argues that the lists and additional evidence would bear on the subject of its knowledge regarding the work Lawson and Young had performed. My colleague states that the documents were relevant and crucial to Timken's defense of employee misconduct. I do not see it that way.

The Secretary Failed to Prove Employer Knowledge Regarding Items 1(a) and (b)

The issue here is whether the Secretary established that the employer had actual or constructive knowledge of the alleged violations. In this matter, the Secretary argued in her post-hearing brief that she does not have to prove employer knowledge as part of her case. In the alternative, presumably recognizing that her position has never been adopted by the Commission or the reviewing courts, she relied on the testimony of Lawson that supervisors had observed his failure to follow Timken's LOTO procedures. As I indicated above, that broad testimony was not sufficient to prove lack of initial training. It is also not sufficient to prove that Timken had constructive knowledge that its training program was inadequate, nor was it sufficient to establish that the employer had constructive knowledge of the specific event cited under item 1(b), regardless whether Lawson and Young failed to shut down the piercing mill as originally charged, or whether they failed to completely lock out the mill under the amended charge.

Insofar as the employer knowledge is concerned, the facts in this case are similar

to the facts in *New York State Electric & Gas Corp. v. Secretary of Labor*, 88 F.3d 98 (2nd Cir. 1996). In that case, two workmen were unsupervised while performing their work, much like Timken's mechanical maintainers Lawson and Young were unsupervised while performing their work. In both cases, the Commission's judges concluded that the Secretary proved her prima facie case of constructive knowledge by the employer in view of the lack of supervision, and also held that the employer failed to prove its employee misconduct defense. The Commission affirmed the judge's finding that New York State Electric failed to demonstrate sufficient supervision,[12] and the court of appeals reversed and remanded.

The Court noted that the issue concerning the burden of proof in an alleged employee misconduct case has split the circuits. 88 F.3d at 106. Indeed, it quoted Justice White's comment: "There is a confusing patchwork of conflicting approaches to this issue." *Id.* at 106-07 (quoting *L.E. Myers Co. v. Secretary of Labor*, 484 U.S. 989 (1987) (White, J., dissenting from denial of certiorari)). The Second Circuit went on to describe the three different views of the several circuits. 88 F.3d at 107. It noted that the Commission could clear up the confusion and invited it to do just that. *Id.* at 108. However, the Commission did not address the issue on remand and instead vacated the citation by reversing its earlier decision. *New York State Electric & Gas Corp.,* 19 BNA OSHC 1227, 2000 CCH OSHD ¶ 32,217 (No. 91-2897, 2000). It concluded that the employer's supervision was adequate. 19 BNA OSHC at 1231, 2000 CCH OSHD at p. 48,874. The "confusing patchwork" continues to exist to this day. Indeed, rather than resolving the issue, the Commission has in subsequent decisions continued to apply the law of the circuit in which the case arose. *See e.g., Arcon, Inc.*, 20 BNA OSHC 1760,

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[12] *New York State Electric & Gas Corp.,* 17 BNA OSHC 1129, 1133-34, 1993-95 CCH OSHD ¶ 30,745, pp. 42,710-12 (No. 91-2897, 1995).

1767, 2002 CCH OSHD ¶ 32,728, p. 51,899 (No. 99-1707, 2004), *pet. for rev. filed,* No. 04-2073 (4th Cir. Aug.26, 2004); *Trinity Industries Inc.*, 20 BNA OSHC 1051, 1061-62, 2002 CCH OSHD ¶ 32,666, pp. 51,407-08 (No. 95-1597, 2003), *aff'd without published opinion,* No. 03-60511 (5th Cir. July 23, 2004); *North Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1473 and n. 8, 2001 CCH OSHD ¶ 32,391, pp. 49,814-15 and n. 8 (No. 96-0721, 2001); *American Wrecking Corp.*, 19 BNA OSHC 1703, 1710 and n. 7, 2001 CCH OSHD ¶ 32,504, pp. 50,402-03 and n. 7 (Nos. 96-1330 and 96-1331, 2001), *rev'd in part on other grounds,* 351 F.3d 1254 (D.C. Cir. 2003).

Clearly the Commission has an obligation to resolve the problem for the benefit of the regulated community, the Secretary, and the reviewing courts. It is my view that the Commission's decisions taken with the diehard litigation position of the Secretary are the cause of the patchwork and the Commission at least should resolve them.

The Commission and the courts of appeal have for more than thirty years held that the Secretary has the burden of proof on the issue of employer knowledge. As the Court of Appeals noted in *New York Electric*, the Secretary has the burden of persuasion and that burden does not change -- it remains with the Secretary. 88 F.3d at 107 ("the Commission effectively ignored the usual rule it has followed that the Secretary must establish by a preponderance of the evidence that the employer knew or constructively knew of the violation"). The confusion arises, in my view, because the Commission developed the employee misconduct defense and articulated it as an affirmative defense. As such, the burden of persuasion to establish the defense is with the employer. However, as the Court of Appeals noted, the burdens of the parties overlap under the decisional law in those situations where each must rely on the employer's safety program to persuade the Commission either that the employer did or did not have constructive knowledge of the alleged violation. 88 F.3d at 106.

The Court suggested that the problem could be resolved by resorting to a rule

which shifts the burden of going forward with evidence. *Id.* at 108. In other words, the Secretary would have to make out a prima facie case at which point the burden of going forward with rebuttal evidence switches to the employer. The Commission's decision would be based upon the preponderant evidence of the record considered as a whole with the burden of persuasion remaining with the Secretary.

My colleague essentially throws the burden of persuasion on the employer to demonstrate that it lacked constructive knowledge. Thus she finds that Mr. Beels, the supervisor having responsibility for managing and directing maintenance of the piercing mill, should have known that the mechanical maintainers were not adequately trained under her construction of the requirements of section 1910.147(c)(1). She would impute his knowledge to Timken.

As I have already discussed, her view of the requirements of the cited training standard does not accord with OSHA's views as shown by the regulatory history of the standard. Mr. Beels' testimony, which was credited by the ALJ, demonstrates that the mechanical maintainers were in fact trained in LOTO notwithstanding Mr. Lawson's lack of memory. Mr. Beels was one of the trainers.

My colleague also relies on Mr. Lawson's lack of memory and his general testimony to the effect that supervisors observed his activities and therefore must have known that he was not using LOTO. As I mentioned above, this testimony is far too general in the context of the LOTO standard. Assuming, as my colleague does, that these observations took place after the standard became effective, they do not demonstrate that LOTO was required, they say nothing about the work Mr. Lawson was performing, and they assume Mr. Lawson's supervisors actually saw him disobey Timken's LOTO procedures. Had that been the case, the LOTO standard requires that the disobeying employee be retrained because of the supervisor's observation. See section 1910.147(c)(7)(iii)(B).

Mr. Lawson also testified that he was not taken to task for his disobedience, nor was he disciplined. I infer from that testimony that the supervisors he testified about whoever they were, did not observe his admitted disobedient acts. Indeed, it is significant that he did not name Mr. Beels nor his immediate supervisor, Mr. Vaughn, as the persons who observed his LOTO practices. While it is true that the Commission has in the past found that failure to supervise employees is sufficient unto itself to make out a prima facie case of constructive knowledge, the LOTO standard has built-in guidelines concerning what an employer must do to determine whether an employee needs retraining. At the very least, the employer must conduct an annual inspection of its authorized employees under section 1910.147(c)(6) and retrain those whose skills fail to pass. Section 1910.147(c)(7)(iii)(B). The Secretary has not charged Timken with violations of these provisions and the record seems to indicate that Timken complied. In these circumstances, it is error to conclude Timken had constructive knowledge that its LOTO training was deficient.

Similarly, the record as a whole does not establish by a preponderance of the evidence that Timken had constructive knowledge of Lawson's failure either to fully deenergize or lock out the piercing mill. I note that my colleague relies on precisely the same evidence she relied on to find that the Secretary made out a prima facie case for allegation 1a, to support her decision that the Secretary also made out a prima facie case of constructive knowledge for this charge. There is no evidence that the failures by Lawson and Young were known to supervisors. and it would be error to find that the knowledge of a supervisor can be imputed to the employer in order to conclude that Timken had constructive knowledge of the failure to fully deenergize or lockout.

In her post-trial brief, the Secretary suggested that since a plant bell indicated that Lawson and Young were going to perform maintenance work, a supervisor should have tagged along to observe their LOTO practices. There are two things wrong with the

argument. First, the Commission has not held that one-on-one supervision of hourly workers is required to ensure that they work safely. Second, the suggestion that journeymen mechanics need one-on-one supervision is not only unrealistic, it is unworkable. These workers are trained and trusted to perform their jobs unsupervised. As the Court of Appeals in *New York Electric* noted, "[i]nsisting that each employee be under continual supervisor surveillance is a patently unworkable burden on employers." 88 F.3d at 109. *See also, e.g., Capital Elec. Line Bldrs., Inc. v. Marshall,* 678 F.2d 128 (10th Cir. 1982); *Horne Plumbing & Heating Co., v. OSHRC*, 528 F.2d 564, 569 (5th Cir. 1976); *Cape & Vineyard Div. v. OSHRC,* 512 F.2d 1148, 1155 (1st Cir. 1975); *Brennan v. OSHRC [Canrad Precision Industries]*, 502 F.2d 946, 949 (3d Cir 1974); *National Realty & Construction Co. v. OSHRC,* 489 F.2d 1257, 1266-67 (D.C. Cir. 1973).

I also believe my decision is in accord with the decisions of the U.S. Court of Appeals for the Sixth Circuit, a Court to which Timken may appeal this decision. In *New York Electric*, the court noted that the Sixth Circuit is one of those courts which have adopted the rule that employee misconduct is an affirmative defense, where the burden is on the employer to demonstrate the effectiveness of its safety program. 88 F.3d at 107 (citing *Brock v. L. E. Myers Co.*, 818 F.2d 1270, 1276-77 (6th Cir.), *cert. denied,* 484 U.S. 989 (1987)). *See also, e.g., Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805, 812 (6th Cir. 2003) (relying, *inter alia,* on *L. E. Myers*). In these two decisions and others, the Court has explained that "the Secretary makes out a prima facie case . . . upon the introduction of proof of the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions." *Danis-Shook,* 319 F.3d at 811 (quoting *A/C Elec. Co. v. OSHRC*, 956 F.2d 530, 535 (6th Cir. 1991)). That simply was not done in this case. There is no question that Lawson and Young had the equipment and training to properly lock out and deenergize the mill. As for supervision, this case is unlike *L.E.Myers* and *Danis-Shook*. In both of those cases,

foremen were on the scene. There is no substantial evidence of record that supervision of the two mechanical maintainers was inadequate. It would have been easy enough for the Secretary to have pursued this subject during the hearing. Mr. Beels, who managed the mill's supervisors, testified, and the Secretary had sufficient opportunity to question him on the subject while he was on the stand.

Moreover, the Secretary cannot complain that the burden of developing evidence concerning the employer's safety program is more than she can bear. She has powerful tools to use during her investigations. Section 8(b) of the Act, 29 U.S.C. § 657(b), empowers her to subpoena testimony and other evidence in making her inspections and investigations. She also can employ the discovery tools provided by the Commission's Rules of Procedure after a citation has been contested. Thus, she can ask for admissions, obtain the employer's documents, serve interrogatories, and depose witnesses. Commission Rules 52-56, 29 C.F.R. §§ 2200.52-56. She also may compel testimony at Commission hearings through the use of subpoenas. Commission Rule 57, 29 C.F.R. § 2200.57.

There simply is no excuse for the Secretary to rely on general statements as she did in this case. While I do not doubt that Mr. Lawson felt the supervision was lax, I doubt that he was in any position to opine on the subject. In my view, that testimony standing by itself is not sufficient to carry the Secretary's burden of persuasion, nor was it sufficient to shift the burden of going forward onto Respondent. There should have been more in the Secretary's case. Finding insufficient evidence, I conclude that the Secretary failed to carry her burden of proving constructive knowledge, and I would vacate both items.

Separate Opinion of Commissioner Rogers

Commissioner Rogers agrees with the conclusion of the judge who tried this case that the Secretary established violations of both the training and lockout application provisions cited here.

I

Item 1(a), the training item, presents two questions: (1) whether Timken complied with the cited provision, section 1910.147(c)(7)(i);[1] and (2) whether Timken had knowledge of the violative condition (either actual or constructive) and thus should be charged with responsibility for Lawson's actions on the day of his accident.[2] As to the first question, the record supports the judge's finding that, although the authorized employees received some lockout/tagout training, it was insufficient to meet the

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[1] That provision states:

> 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. The training shall include the following:
>
> (A) 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. . . .

[2] The other elements of the Secretary's prima facie case of the violation were established and are not at issue. *See Astra Pharmaceutical Prods*., 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982) (Secretary must establish applicability of cited standard, noncompliance with the terms of the standard, employee exposure to the hazard, and employer knowledge of the hazard).

requirements of the cited provision.[3] Judge Rooney relied on unequivocal testimony by Lawson, the employee who was injured while attempting those repairs, that he: (1) had never received training on how to lock out any of the machines and equipment in the plant; and (2) did not know how they were supposed to lock out the complex Piercing Mill ("PM") for the repairs involved here.[4] Perry, the OSHA compliance officer who conducted the inspection, testified that Young, the employee who was assisting Lawson during those repairs, told her he had gotten no specific training on lockout/tagout

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[3] The Chairman argues that my focus is "too narrow" because my analysis "relies only on an analysis of the terms of the cited standard, overlooks the regulatory scheme used in the standard for training authorized employees, and ignores the regulatory history of the standard." However, it is well-settled that the starting point for analysis of a regulatory provision is its text. *See Unarco Commercial Prod.*, 16 BNA OSHRC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993). In the circumstances of this rather uncomplicated case, where the issues are primarily factual in nature and the standard itself provides the answer, it is unnecessary – as the Chairman does - to delve into an exhaustive analysis of the regulatory history of the standard or to rely on the Regulatory Impact Analysis or the so-called ERG Study. I would also note that neither of these documents is in the record and neither document is raised by the parties.

[4] The PM involved a complex interaction of machinery and equipment, which were powered by various forms of energy and had different lockout points. The immediate mill area where Lawson was working used all those forms of energy (pneumatic power for the ram, hydraulic power to set the angle of the rolls (Tr. 31), and electric power for equipment such as the gorge adjust, spindles, etc.). The plugger operator, who controlled the gorge adjust shaft on which Lawson stood, worked on the opposite side of the mill from Lawson and Young, and he could not see them from his operator's position.

Yet all of the machinery and equipment worked together to produce tubes from steel billets. It is undisputed that it all should have been locked out for the hydraulic hose repairs at issue here. *Cf. Timken Co.,* 20 BNA OSHC 1070, 2002 CCH OSHD ¶ 32,658 (No. 97-970, 2003) (both sitting Commissioners affirmed Judge Rooney's finding that movement of switching track ("traverser") was completely independent of employee repairs performed on railcar on separate track, and thus lockout/tagout standard did not apply to traverser during those repairs).

procedures.[5]

This evidence regarding Lawson and Young was corroborated by the facts regarding the accident. Neither employee locked out anything but the hydraulic system to the PM. Thus, the gorge adjust shaft on which Lawson worked, and the nearby spindle on which Young was standing, were not locked out as required. Lawson testified that he thought at that time that activating the emergency kill switch would disable all power to the PM.

Timken argues vigorously that Lawson's testimony is not credible, because it is internally inconsistent and because it was motivated by animus against the company, due to discipline the company imposed on him after the accident. However, the judge carefully evaluated Lawson's testimony, including his demeanor and manner of testifying, and found it consistent and credible. She found that his answers were forthright, that he displayed no animus toward Timken, and that he ultimately had accepted the modified discipline Timken imposed on him. Lawson admitted making

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[5] This is not a case of mere lack of recollection of training by the employees. It is true that Lawson admittedly did not recall many specifics about his lockout/tagout training; that he did not always read written materials he was given; and that he didn't pay much attention to lockout/tagout procedures before his accident. However, he did remember numerous things he had been told about lockout before the accident (including the requirement to lock out the specific equipment on which he worked, and the preference for locking out the entire PM from the electrical substation for long repairs or weekend repairs, when the machinery was shut down anyway).

Lawson's testimony -- and Young's statement to which CO Perry testified -- that they never had been trained in locking out the actual machinery in the plant, was definite. It was not a mere failure to recall whether or not they had had such training. Lawson's testimony that he did not know what Timken's procedure was for locking out the PM for the short repairs at issue here was just as definite. Any conclusion that Lawson and Young were fully trained on all necessary matters under the cited provision, merely because they admittedly had been told *a few* of the necessary matters, would be totally unwarranted, given their direct testimony to the contrary.

serious mistakes of his own leading to the accident, notwithstanding the flaws in his training. The judge analyzed alleged inconsistencies in his testimony and explained why they were unfounded.[6]

When a judge's credibility finding is based on the judge's observation of a witness' demeanor and is clearly stated and explained, the Commission generally accepts that finding. *E.g., Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,257 (No. 89-433, 1993). *Cf. Hackney, Inc.*, 15 BNA OSHC 1520, 1522, 1991-93 CCH OSHD ¶ 29,618, pp. 40,106-07 (No. 88-391, 1992) ("to warrant Commission deference, the finding must specifically resolve conflicting testimony or doubts as to credibility.") *See also, e.g., First National Monetary Corp. v. A. J. Weinberger*, 819 F.2d 1334, 1339 (6th Cir. 1987) (credibility determinations "are generally not to be set aside unless found to be inherently incredible or patently unreasonable;" but "reviewing court must consider evidence which fairly detracts from the weight of the credibility determination . . . .") The judge's credibility findings

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[6] Timken's renewed allegations of material inconsistencies in Lawson's testimony are not borne out by the transcript. He never testified that he knew he *always* was supposed to lock out the entire PM when working on any part of it. For short repairs such as those at issue here, he testified that "what I've been shown over the years [and] what I've always done" is to lock out the particular equipment on which he is working – not the entire PM. Thus, based on the evidence, Lawson was not breaking company rules. Rather, he and Young were doing what they thought Timken wanted – minimizing the repair time and getting the PM back into production.

Although Lawson testified to different practices he has followed at Timken, the transcript indicates that those differences relate to different periods of time – (1) his first years as a millwright helper (starting about 1978); (2) the period since he became a mechanical maintainer (about 1985), until the accident; and (3) the period since the accident. Similarly, Lawson's testimony does not show that he knew, before the accident, that the emergency stop button on the PM console was not an energy isolating device capable of being locked out.

contain the necessary specifics and explanation, and there is no basis for overturning them.

Thus, Commissioner Rogers would find that the Secretary has made a *prima facie* showing that Lawson and Young did not receive adequate training under the cited provision. Specifically, that evidence indicates that Timken's training did not give the employees the "knowledge and skills required for the safe application, usage, and removal of the energy controls" involved, and that they were not given adequate training in: (i) the recognition of applicable hazardous energy sources; (ii) the type and magnitude of the energy available in the workplace; and (iii) the methods and means necessary for energy isolation and control. As the Preamble to the standard explains, authorized employees "need extensive training in aspects of the procedure and its proper utilization, together with all relevant information about the equipment being serviced." OSHA, *Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule*, 54 Fed. Reg. 36,644, 36,674/1 (1989), as corrected by 55 Fed. Reg. 38,677 (Sept. 20, 1990).

In attempting to rebut the Secretary's evidence of noncompliance, Timken showed that it had provided substantial lockout/tagout training to its employees -- as to electrical energy sources. However, it did not present evidence that it trained its authorized employees on non-electrical energy sources, such as the hydraulic and pneumatic devices at the PM. It also did not present evidence that its training actually met any of the specific requirements for training authorized employees, even as to electrical energy sources.

Lawson and Young did receive some general lockout/tagout training. Timken's training records indicate that in 1995, they received a full day of electrical safety training based on Subpart S of OSHA's general industry standards, which includes certain lockout/tagout requirements for electrical work. However, Subpart S does not address non-electrical power sources, such as the hydraulic and pneumatic mechanisms at the

PM, at issue here.[7] There is no indication that those power sources were covered in that training.

The training records also show that in 1993, Lawson and Young attended a full day of safety training on work in confined spaces. The only available evidence about the program's content is Lawson's recollection of a brief discussion of lockout/tagout requirements, from which he got the idea that Timken would implement a formal lockout/tagout program in the future. However, he further testified that he never was informed subsequently that such a program was in effect.

Michael Beels, Timken's Unit Manager of Piercing Reliability at the plant, testified that during the mid-1980's, all the employees were shown a video that stressed "the importance of lockout/tagout and how it's to be done, visually[.]" The video was made several years before OSHA's lockout/tagout standard was promulgated, however, and the evidence does not indicate that it presented the training of authorized employees in any of the specific matters required by the cited provision. Lawson and Young also received on-the-job ("OJT") training from experienced maintainers, when they started their jobs. As the judge found, however, the record does not show the content of the OJT.

Commissioner Rogers would find that, based on this rebuttal evidence (and the record as a whole), Timken has not shown that its authorized employees were ever trained in the "recognition of applicable hazardous energy sources" other than electrical. Also, there is no evidence that those employees were informed of the "magnitude of the energy available in the workplace," as explicitly required by that provision. Nor is there

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[7] Beels testified that it covered the consequences of failure to lock out electrical power properly, the differences between qualified and non-qualified persons, and topics such as mechanical lockout devices (including gang lockouts and valve covers).

evidence that they were trained in "the methods and means necessary for energy isolation and control," except perhaps as to electrical energy. The evidence does not rebut Lawson's testimony to the effect that Timken's training did not give him the "knowledge and skills required for the safe application, usage, and removal of the energy controls" with which he was working. All the quoted passages are explicit requirements of the cited provision. Timken's evidence is inadequate to rebut the Secretary's *prima facie* evidence that it failed to provide sufficient training on those matters.

Timken argues the mere fact that the employees here did not know some essential things about locking out the PM does not show that they were not trained in them. The judge did not rely on the mere fact of the employees' ignorance, however, but on the credible and definite testimony that they had not been trained in locking out the machinery and equipment in the plant. *See supra* note 5. Timken failed to rebut the *prima facie* evidence that it did not give the employees the required training.[8]

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[8] The validity of the training charge here does not rest on the absence of machine-by-machine lockout/tagout instructions. There is no need to reach the issue of whether the standard's training provisions require specific, step-by-step instructions on the specific procedure for each machine and piece of equipment in the workplace. Timken failed to provide sufficient training on various matters explicitly enumerated in the cited training provision. That alone warrants the judge's affirmance of the citation. *Cf.* section 1910.147(d)(1) (before shutting down machinery, authorized employee "shall have knowledge of the type and magnitude of the energy, the hazards of the energy to be controlled, and the method or means to control the energy." *See, e.g., Trinity Indus.*, 20 BNA OSHC 1051, 1064, 2002 CCH OSHD ¶ 32,666, p. 51,410 (No. 95-1597, 2003) (Commission affirmed violation of provision requiring that employees who enter enclosed spaces be trained to "[r]ecognize the adverse health effects that may be caused by the exposure to a hazard," because two welders had not been told about eye and skin irritation hazards of chemical they encountered in confined space). *See also, e.g., Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 2016-18, 1991-93 CCH OSHD ¶ 29,902, pp. 40,811-13 (No. 90-2668, 1992) (even under broadly-worded training requirement such as 29 C.F.R. § 1926.21(b)(2), employer must address "matters specific

Considering the record as a whole, the evidence preponderates that Timken failed to provide the requisite training.

II

As to employer knowledge, Beels was familiar with – and ultimately responsible for – the employees' training. Beels knew or reasonably could have known that it was inadequate. A supervisor's "knowledge of his own actions or inactions may be imputed to his employer." *Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 2018, 1991-93 CCH OSHD ¶ 29,902, p. 40,813 (No. 90-2668, 1992). *See also Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983) (supervisor's actions and knowledge generally are imputed to the employer).

Judge Rooney also found that:

> Mr. Lawson's failure to use proper lockout in the past had been tacitly condoned by management. He presented unrebutted testimony that he had never been told he was doing anything improper or disciplined, despite having failed to follow proper procedures in the presence of management.

Thus, she inferred from Lawson's testimony that Timken managers had had a reasonable opportunity to learn that he was failing to use proper lockout and that he had been trained

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to this worksite about which a reasonably prudent employer would have instructed its employees," and must "make at least some effort to assure that the employees did, in fact, understand the instructions").

The situation in this case is different from ones where the employer shows that it gave training on the general topic in which the Secretary alleges employees were not trained. *E.g., Trinity*, 20 BNA OSHC at 1063-64, 2003 CCH OSHD at pp. 51,409-10 (training citation vacated where employer trained employees generally to "[a]nticipate and be aware of the hazards that may be faced during entry" into enclosed space, as required by one cited provision, and Secretary did not explain what information employer left out). *See also, e.g., N&N Contractors Inc.*, 18 BNA OSHC 2121, 2128, 2000 CCH OSHD ¶ 32,101, p. 48,244 (No. 96-606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001) (absence of direct employee testimony that they did not receive training was critical to Secretary's failure to show violation).

inadequately. That finding is well supported, and the judge properly inferred that Lawson's testimony included the period after the effective date of the lockout/tagout standard. He testified that "over the years," up to the time of his injury, no supervisor ever told him to lock out a machine, even though he never followed the proper lockout procedure before the accident, and even though a foreman would oversee Lawson's big jobs.[9] Lawson testified that lockout procedures were never implemented or enforced before his accident.

Timken notes that Lawson gave no specifics about the alleged incidents where supervisors were present. However, Timken, which adduced Lawson's testimony on the subject, had the opportunity to ask him for specifics, so that it could investigate and present counter-evidence (if there were any). Lawson's testimony establishes that Timken reasonably could have discovered that Lawson (and other employees) were not applying lockout when required under the lockout/tagout standard.

Timken submitted no evidence that its supervisors did any monitoring of the employees' lockout/tagout practices. The Commission has required an employer who attempts to rebut *prima facie* evidence of constructive knowledge to "demonstrate that it took action to discover violations of work rules by implementing measures to monitor its employees' adherence to safety rules." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993).[10] The Secretary has shown

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[9] Lawson's testimony on the subject was sufficiently definite. He testified that before his accident, "I can't honestly tell you of a foreman telling me, make sure you put a lock on this machine. Before this [accident] happened, that didn't occur, that – not from day one do I remember that." (Tr. 64) In essence, he testified to the best of his knowledge and belief, which is sufficiently definite to be probative, substantial evidence.

[10] Section 147(c)(7)(iii)(B) requires retraining "whenever the employer has reason to believe, that there are deviations from or inadequacies in the employee's knowledge or use of the energy control procedures." Timken was not cited for noncompliance with that

that Timken had constructive knowledge of the training deficiencies.[11]

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provision. However, it makes explicit that improper lockout/tagout practices should alert the employer to the need for further training. Timken notes that Lawson did not say that supervisors ever saw him fail to use lockout when required *at the PM*. However, supervisors were on constructive notice that his training might be inadequate if they failed to monitor his lockout/tagout procedures properly at *other* machines.

Timken alleges that "employee misconduct applies to both of the violations affirmed by the ALJ," and thus those alleged violations should be vacated. In the Sixth Circuit, to establish UEM the employer must show that "due to the existence of a thorough and adequate safety program which is communicated and enforced as written, the conduct of its employee(s) in violating that policy was idiosyncratic and unforeseeable." *L. E. Myers Co., High Voltage Systems Div.*, 818 F.2d 1270, 1277 (6th Cir., 1986), *cert. denied*, 484 U.S. 989 (1987). Because the Secretary established that Timken's training was wanting under the standard and that lockout was not enforced in the workplace, its UEM claim cannot be sustained. *See also CMC Electric, Inc.*, 18 BNA OSHC 1737, 1738-39, 1999 CCH OSHD ¶ 31,817, p. 46,744 (No. 96-0169, 1999) (to establish that training violation was result of unpreventable employee misconduct, employer must show that person assigned to instruct failed to give instruction), *aff'd in relevant part*, 221 F.3d 861, 865-66 (6th Cir. 2000).

[11] Because my analysis assumes that the burden of proof of employer knowledge remains on the Secretary, there is no need to delay this decision to consider whether or not that burden of proof is the correct one. (The judge also found that the Secretary affirmatively proved employer knowledge, and she then analyzed Timken's proffered affirmative defense of unpreventable employee misconduct, which is well-recognized by Commission and court precedent.)

In his separate opinion, Chairman Railton argues that he and I should resolve in this case the difficult, long-standing issues surrounding the "conflicting approaches" among courts to the burden of proof of employer knowledge. *New York State Electric & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 107 (2nd Cir. 1996) ("*NYSEG*") (quoting *L.E. Myers Co. v. Brock*, 484 U.S. 989 (1987) (White, J., dissenting from denial of *certiorari*). As grounds, the Chairman argues that the facts here are similar to those in *NYSEG*, where the Second Circuit recently described those "conflicting approaches."

In my view the facts here are easily distinguishable from *NYSEG* regarding the supervisors' opportunity to monitor safety compliance. *NYSEG* involved two newly-

hired utility company employees, neither one determined by the Commission to be a supervisor, who worked by themselves on a city street far from their employer's premises one day, "tying in" a section of newly-laid natural gas pipe. 88 F.3d at 101. There is no indication that the jobsite there lasted longer than that day. That situation is far different from Timken's fixed plant, where employees worked daily, for purposes of assessing whether a supervisor had a reasonable opportunity to observe the employees' work practices. Also, *NYSEG* had a thoroughly adequate safety program (work rules, communication, monitoring for compliance, and discipline when violations were discovered). In contrast, as discussed above, Timken's lockout/tagout safety program was deficient in all of those respects.

Further, Timken's workplace is in a jurisdiction where the circuit law is clear on the burden of proof issue. *E.g., L. E. Myers Co,* 818 F.2d 1270 (6th Cir.), *cert. denied,* 484 U.S. 989 (1987) (claim of unforeseeable employee misconduct is affirmative defense to be proved by employer, after the Secretary has made out prima facie case of violation, including prima facie evidence of employer knowledge). The Commission's long-standing policy is to apply the precedent of such a Circuit. *E.g., Trinity Industries Inc.,* 20 BNA OSHC 1051, 1061-62, 2003 CCH OSHD ¶ 32,666, pp. 51,407-08 (No. 95-1597, 2003), *aff'd without published opinion,* No. 03-60511 (5th Cir. July 23, 2004). *See also, e.g., AJP Construction, Inc. v. Secy. of Labor,* 357 F.3d 70, 75 (D.C. Cir. 2004) ("constructive knowledge or mere negligence suffices for a non-willful violation") (citing *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1261, (D.C. Cir. 2003)).

In addition, my views on the general burden of proof issue raised by *NYSEG* are a matter of record. *Southwestern Bell Telephone Co.,* 19 BNA OSHC 1097, 1100 n.5, 2000 CCH OSHD ¶ 32,198, p. 48,749 n.5 (No. 98-1748, 2000), *aff'd without published opinion,* www.ca5.uscourts.gov, No. 00-60814 (5th Cir. 2001) (disagreeing with burden-shifting approach to employer knowledge questions in OSHA contests *generally,* that *NYSEG* suggested Commission might consider).

Finally, as discussed above, regardless of which party bears the burden of persuasion of employer knowledge in the circumstances, the weight of the evidence clearly establishes that the employer knew or should have known that its relevant safety training was inadequate. *See Southwestern Bell.* Thus, I agree with the judge that the Secretary affirmatively proved employer knowledge here.

III

Commissioner Rogers also finds that the judge properly amended Item 1(b), to charge a violation of the lockout application provision at section 1910.147(d)(4),[12] and that she properly affirmed that violation. Subitem 1(b) originally cited the provision that requires proper shutdown of equipment prior to lockout (section 1910.147(d)(2)).[13] However, both parties tried the case on the assumption that the alleged violation was for failure to actually lock out the machinery. The citation alleged that "[e]quipment at the #3 tube mill was *not completely locked out, the rod and shaft were still activated* exposing employees to injury" (emphasis added). At the hearing, Timken's counsel asked OSHA's compliance officer what she thought the cited provision requires, and she testified that it "requires that machine[s] and equipment be locked out from . . . all energy sources." Timken's counsel further asked her for the basis for her recommendation to issue the citation, and she testified that it was Timken's failure to completely lock out the PM. (Tr. 98)

Therefore, the parties squarely recognized at the hearing that failure to lock out the machinery was the alleged violation, and it is undisputed that Lawson and Young failed

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[12] That provision states in pertinent part that "lockout or tagout devices shall be affixed to each energy isolating device authorized employees."

[13] That provision states:

> *Machine or equipment shutdown*. The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment. An orderly shutdown must be utilized to avoid any additional or increased hazard(s) to employees as a result of the equipment stoppage.

The available evidence tends to show that the PM's equipment generally had been turned off or shut down before the repairs began. However, the evidence does not establish whether or not it was shut down "using the procedures established for the machine or equipment" as required, because Timken's machine-specific lockout/tagout procedure for the PM was not offered in evidence.

to lock out the energy sources other than the hydraulic system. The provision that is specifically applicable is section 1910.147(d)(4). In its initial Post-Hearing Brief to the judge, Timken for the first time raised the inapplicability of section 1910.147(d)(2) to actual lockout of machinery, and Timken asked that Item 1(b) be vacated as a result. In her reply brief to the judge, the Secretary moved to amend Item 1(b) to allege a violation of section 1910.147(d)(4), in the alternative.[14] There is no indication on this record that the Secretary's counsel realized, before Timken raised the issue post-hearing, that the originally cited provision does not address actual lockout of machinery.

The judge properly considered the amendment appropriate. Amendments are permissible where, as here, they merely add an alternative legal theory, but do not alter the essential factual allegations of the citation. *See, e.g., C. T. Taylor Co.*, 20 BNA OSHC 1083, 1086 n. 5, 2002 CCH OSHD ¶ 32,659, p. 51,340 n. 5 (No. 94-3241, 2003) (consolidated) (citing *A.L. Baumgartner Constr.*, 16 BNA OSHC 1995, 1997, 1993-95 CCH OSHD ¶ 30,554, p. 42,272 (No. 92-1022, 1994)). The proffered amendment here does not expand the factual allegations of the citation – it merely corrects the cited subsection of 1910.147(d). The only relevant factual issue in dispute is whether Timken should be held responsible for the employees' failure to lock out the entire PM. Thus, the amendment would change only the legal theory of the violation, and would be permissible. *See also, e.g., Advance Bronze, Inc. v. Dole*, 917 F.2d 944, 955 (6th Cir. 1990) (post-hearing amendment permitted; an "employer . . . does not have any vested right to go to trial on the specific charge mentioned in the [Secretary's] citation") (quoting *Long Mfg. Co. v.* OSHRC, 554 F.2d 903, 907 (8th Cir. 1977)).[15]

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[14] At the hearing, and also in a post-hearing order, the judge expressly permitted reply briefs in this case. Both parties filed a post-hearing reply brief.

[15] The Chairman argues that the judge erroneously considered the Secretary's motion to

Timken objected to the amendment on the ground that the Secretary's failure to raise the applicability of section 147(d)(4) earlier in the proceeding caused prejudice to its case.[16] Timken's asserted basis is that if it had known at the hearing that section 147(d)(4) was in issue, it would have presented its energy isolation lists ("EIL's"), to show that it had proper workrules. The EIL's contained Timken's lockout procedures for specific machines in the plant. Timken expected the employees to familiarize themselves with the EIL for a particular machine or piece of equipment before performing maintenance on it.

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amend her legal theory on this item. However, the judge did not mention the Secretary's motion and did not purport to specifically grant it. Further, if the judge had ignored the applicable legal theory, pointed out by both parties, that would have been a serious mistake.

What the judge did was to follow the applicable Federal Rule of Civil Procedure ("FRCP"), Rule 15(b), which states: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Even failure of a party to properly move to amend "does not affect the result of the trial of those issues." *Id.* "In assessing whether the pleadings should [be amended to] conform to the proof, the pivotal question is whether prejudice would result." *NYSEG,* 88 F.3d at 104 (citing *Usery v. Marquette Cement Mfg. Co*., 568 F.2d 902, 907 (2d Cir. 1977)). *NYSEG* held that the Commission had properly amended pleadings *sua sponte* on review of an ALJ's decision, to charge violation of a specific standard, based on the employer's contention that that standard was applicable.

The Secretary's failure to follow the Commission's Rule 40(a), 29 C.F.R. § 2200.40(a), which requires a motion to amend apart from the party's brief, is technical and inconsequential in the circumstances here. In fact, the Chairman raises the issue regarding that rule *sua sponte*, because Timken has not raised this particular issue on review.

[16] "'Prejudice' in this context means a lack of opportunity to prepare to meet the unpleaded issue." *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1931, 1999 CCH OSHD ¶ 31,935, p. 47,387 (No. 94-3121, 1999) (citations omitted).

However, the EIL's were relevant to issues that were in the case from the beginning, including: (1) Timken's affirmative defense of unpreventable employee misconduct ("UEM") to all of the alleged violations, including the originally cited item 1(b) with respect to the failure to shut down, and (2) whether it had constructive knowledge of either alleged violation. For example, Timken relied on the fact that Lawson failed to request the EIL for the PM on the day of the accident, in order to show that the employees' actions constituted UEM. Lawson's failure to request that EIL would not help Timken unless the EIL contained all the necessary information on how to lock out the PM for the type of repairs at issue here. Thus, it was crucial to Timken's defenses at the hearing to submit the EIL in evidence – if it supported Timken's claims. Timken must bear the responsibility for the fact that no EIL's are in the record, in the circumstances. Thus, Timken was not prejudiced by the amendment of Item 1(b), and it is permissible.[17]

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[17] As to the Chairman's views regarding when a party's pleadings may be amended after the hearing on the merits, I note that his opinions here and in two other cases on the subject appear inconsistent and at odds with the guidance of the courts of appeals and with Commission precedent.

In the first other case, he decided that it was appropriate for the judge to raise an issue *sua sponte* after the hearing that had not been mentioned by anyone, and to decide in the employer's favor on that issue. *C. T. Taylor Co. ,* 20 BNA OSHC 1083, 1086 n.5, 2002 CCH OSHD ¶ 32,659, p. 51,340 n.5 (No. 94-3241) (consolidated). He relied on *A.L Baumgartner Constr., Inc*., 16 BNA OSHC 1995, 1997, 1993-95 CCH OSHD ¶ 30,554, p. 42,272 (92-1022, 1994), for the proposition that "amendments to a complaint are routinely permissible where they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation."

Here, however, where both Timken and the Secretary pointed out in post-hearing briefs that the Secretary's original legal theory was incorrect, and that the applicable legal theory would be that Timken violated section 1910.147(d)(4), the Chairman appears to

say that the judge erred in allowing that legal theory to be considered. These opinions appear inconsistent.

The other case in which the Chairman has addressed the propriety of a post-hearing amendment of pleadings is *Safeway, Inc.,* 20 BNA OSHC 1021 (No. 99-0316, 2003), *aff'd,* 382 F.3d 1189 (10th Cir. 2004). The Chairman concluded that the Secretary failed to prove that the cited standard applied to the facts of this case. "That failure occurred because the Secretary failed to prove that a more specific standard relating to propane did not apply to the facts." 20 BNA OSHC at 1026. However, he essentially declined to permit the pleadings to be amended so that abatement of what the Tenth Circuit termed "an obviously hazardous condition" (382 F.3d at 1192 n.4) could be required under whichever provision he considered the most specifically applicable. He defended his approach on the ground that "[i]t is undoubtedly not the province of the Commission to elect the theory of prosecution." 20 BNA OSHC at 1028 n.4 (Railton, Chairman, separate opinion) However, in *C. T. Taylor* he allowed the Commission to create post-hearing theories for the defense.

I noted the inconsistency between the Chairman's approaches in *Safeway* and *C. T. Taylor* in the latter decision. *C. T. Taylor*, 20 BNA OSHC at 1095 and n.3, 2003 CCH OSHD at p. 51,348 and n.3 (Rogers, Commissioner, dissenting). The Chairman defended the different results in *Safeway* and *C. T. Taylor* by arguing that in *Safeway* the Secretary had "refused to prosecute" under the standards on which the Chairman relied, and that in *C. T. Taylor* the post-hearing amendment was warranted because the issue was one of "statutory jurisdiction." *C. T. Taylor*, 20 BNA OSHC at 1084-85 n.4, 2002 CCH OSHD at p. 51,338 n.4. His "statutory jurisdiction" assertion was erroneous, because: (1) the issue in *C. T. Taylor* was merely whether two related corporate employers should be considered a "single employer" based on facts developed at the hearing on the merits; and (2) each cited entity admitted employer status in its pleadings and never raised any jurisdictional issue.

As to the Chairman's reasons for sidestepping amending the pleadings in *Safeway,* the Tenth Circuit unanimously rejected the same theory the Chairman had advanced – that the Secretary must, in effect, disprove the applicability of every relevant provision other than the one she cites, in order to prove a violation. "According to Safeway, the Secretary would be required to survey the regulations and demonstrate the inapplicability of any regulation that might be relevant to the cited condition. The regulations, however, suggest that the specific standards function as an affirmative defense." *Safeway,* 382

Because there is no dispute that section 147(d)(4) applies, that Lawson and Young failed to comply with it, and that they were exposed to the resulting hazards, the only element at issue is whether Timken reasonably could have known of the noncompliance. Because Timken failed to train the employees adequately (Item 1(a)), it reasonably could have known that they would not always lock out the PM properly for repairs. *See, e.g., Brock v. L.E. Myers Co.*, 818 F.2d 1276 (Secretary may show constructive knowledge that employee might work unsafely by proving that employer failed "to properly instruct its employees on necessary safety precautions") (citing, *inter alia*, *Danco Construction Co. v. OSHRC*, 586 F.2d 1243, 1246 (8th Cir. 1978) (employer may not "fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous working practices.")

Further, as mentioned, Judge Rooney properly found constructive knowledge based on Lawson's testimony that supervisors did not correct him when he failed to use proper lockout in their presence, during the years leading up to the accident. There is no evidence that Timken supervisors properly monitored the maintainers' compliance with lockout rules before that accident.[18] To rebut *prima facie* evidence of constructive

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F.3d at 1194. Because "Safeway cannot argue that compliance with any of the regulations would have permitted the cited condition," the court found that it "must examine" the provision cited by the Secretary. *Id.* That decision reaffirmed my own view of the matter. *Safeway,* 20 BNA OSHC at 1026 n.3 (Rogers, Commissioner, separate opinion) ("[t]o the extent either of the other two standards suggested by the Chairman applies, under our precedent, and consistent with [pleading principles], the Commission should amend the citation . . . to conform the pleadings to the proof").

[18] Timken's training records in evidence reflect that it performed its annual certification process for authorized employees, as required by section 1910.147(c)(6), only after Lawson's accident, with the possible exception of two employees. These employees were listed as having annual lockout/tagout certification on June 30, 1996, albeit with no

knowledge, the Commission has required the employer to show that it monitored its employees' compliance with safety rules. *E.g., Dover Elevator.*

Timken argues in effect that it reasonably could rely on Lawson and Young to use lockout properly, in light of their training and long job experience. However, the record supports the judge's findings to the contrary – that Timken could not rely on those employees, both because its lockout training was inadequate, and because its supervisors failed to monitor the employees actual on-the-job compliance adequately. "Employers cannot count on employees' common sense and experience to preclude the need for instructions." *Danis-Shook Joint Venture XXV v. Sec'y of Labor,* 319 F.3d 805, 811 (6th Cir. 2003). Because the Secretary affirmatively proved constructive knowledge, Timken's UEM argument is unavailing.

IV

In assessing penalties, the Commission considers the gravity of the violations, as well as the employer's size, good faith, and history of OSHA violations. *See* § 17(j), 19 U.S.C. § 666(j). *See, e.g., C. T. Taylor Co.*, 20 BNA OSHC at 1089-90, 2003 CCH OSHD at p. 51,343. In assessing the $5000 combined penalty proposed by the Secretary for Items 1(a) and (b), the judge noted that they involved similar hazards. She termed the severity of the hazards high, noting that "Mr. Lawson suffered serious bodily injury which resulted in time off from work and permanent scars." Further, the CO testified that there was a relatively high probability of an accident, apparently because of the employees' "[l]ack of knowledge" of the necessary procedures. Timken is a large employer, with about 900 employees at the Gambrinus Plant and 18,000 company-wide, and it had other OSHA citations within the prior three years.

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hours spent. Timken supervisors reviewed the JSD and a sample EIL with the employee during that process.

There are indications that Timken acted in subjective good faith – a factor that the Commission has found relevant in penalty assessment. *See, e.g., Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1956, 1995-97 CCH OSHD ¶ 31,289, p. 43, 960 (No. 92-3788, 1997). Lawson testified that lockout/tagout procedures were vigorously enforced after the accident, and that Timken takes more time for repairs. He also acknowledged that he had effective training following the accident. CO Perry testified that Timken cooperated fully with her inspection.

All things considered, the amount the judge assessed was appropriate, given the gravity of the hazards and the laxity of Timken's lockout program before the accident. Thus, I would affirm the judge's findings of violations and the $5000 penalty she assessed.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. THE TIMKEN COMPANY, Respondent, and USWA, GOLDEN LODGE, LOCAL NO. 1123, Authorized Employee Representative.	DOCKET NO. 97-1457

Appearances : For Complainant: Heather A. Joys, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, OH.; For Respondent : Shannon L. Shinaberry, Esq., Day, Ketterer, Raley, Wright & Rybolt, Ltd., Canton, OH.; Authorized Employee Representative For USWA, Local No. 1123: David Lewis

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, the Timken Company, at all times relevant to this action maintained at a worksite at the 2401 Gambrinus Avenue, S.W., Canton, OH., where it was engaged in the business of manufacturing and producing tapered rolling bearings and alloy steels. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

The record reveals that Safety Compliance Officer ("CO") Diane Perry was assigned to conduct a complaint generated inspection at the subject worksite on July 10, 1997 (Tr. 87; Ex. 7).[1] The complaint alleged that an accident had occurred on March 12, 1997. As a result of her inspection, on August 11, 1997, Respondent was issued a citation alleging three serious violations with a proposed total penalty in the amount of $6,500.00. By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on March 12, 1998. During the hearing, counsel notified the undersigned that the parties had reached a settlement with regard to Citation 1, Item 2. On March 13, 1998, the undersigned received a Partial Stipulation and Settlement Agreement with regard to Citation 1. An Order approving this settlement has been issued on this date. Accordingly, the undersigned has before her Citation 1, Items 1a and 1b with a proposed penalty in the amount of $5,000.00 . Counsel for the parties have

[1] "Tr." refers to the official transcript of the hearing. "Ex." refers to Exhibits introduced into evidence at the hearing.

submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

BACKGROUND

In response to a troubleshooting whistle at the Respondent's Piercing Mill on March 12, 1997, maintenance maintainers, Thomas Lawson and Ernie Young found that a hydraulic hose was leaking (Tr. 17).[2] Upon their arrival at the Piercing Mill, Mr. Young turned the switch for the Piercing Mill hydraulic system to the "off" position, and he placed his lock on it. Young also had pushed the emergency stop button in the operator's pulpit on the console of the piercing operator (Tr. 17, 49, 138). Both Messrs. Young and Lawson had determined that this was going to be a simple repair which would take approximately 5 minutes (Tr. 17). Mr. Lawson was not able to reach the bottom of the hose while standing on the floor, so he stood on a gorge adjust shaft which was 10-12 inches off the floor.[3] Mr. Young stood nearby on the spindle (Tr. 18,141-42; Exs. C-1 and R-O). As Mr. Lawson stood on the gorge shaft, the plugged operator on the opposite side of the mill activated the control device of the gorge shaft causing it to rotate. Mr. Lawson's leg went over the shaft, causing his clothes to become wrapped around the shaft and causing serious injuries (Tr. 18, 144-45).

The record reveals that the control device for the Piercing Mill was on the operator's console in the piercing mill pulpit (Tr. 27-28). It does not turn off the gorge adjust shaft (Tr. 133). The gorge shaft is controlled from the plugged's position which is at another location (Tr. 134-35; Ex. R-I). At the time of the accident, Mr. Lawson believed that the emergency stop button killed the power to everything in the Piercing Mill including the spindles of the gorge adjust shaft upon which he stood (Tr. 19-20, 34, 50-53). The record reveals that the emergency stop button was simply a push button, and could not deactivate or deenergize the gorge adjust shaft or spindle. It controlled the fingers on a roll down table, which could be engaged to remain in the "up" position in order to prevent product from rolling down into a trough that fed into the Piercing Mill (Tr. 145-46). This button did not control or isolate energy to the Piercing Mill and it could not be locked out. It was not a proper deenergization or isolation device (Tr. 109, 136-138).

Michael Beels, the Unit Manager of Piercing Reliability, whose responsibilities included managing and directing the maintenance of the Piercing Mills, provided testimony regarding the safety measures which should have been taken by Lawson and Young before commencing any repair work. He testified that they correctly pulled the switch to the "off" position on the hydraulic system of the Piercing Mill. Then, they both should have installed locks on the switch. Next, they should have closed and locked out with additional locks, the air valve for the Piercing Mill ram. They should have also pulled and locked out the switch for the gorge adjust shaft. Additionally, they could have notified the electrical maintainer to have deenergized and locked out the Piercing Mill main drive, which was located in the main substation across the mill (only electricians are authorized to enter this substation). This would have isolated all the power to the Piercing Mill. If this had been done the plugger would not have been able to have restarted the gorge adjust shaft without having

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[2] Hydraulics are needed to run different components of the Piercing Mill (Tr. 30-31).

[3] The gorge adjust shaft allows for the size setup for the position of the rolls that are attached to the spindles. It travels horizontally, in and out from the center line of the mill (Tr. 143-44; Ex. R-O).

had it unlocked. (Tr. 146-153).

SECRETARY'S BURDEN OF PROOF

> The Secretary has the burden of proving his case 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 (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). The record reveals that the Respondent does not dispute the applicability of the cited standards.

Citation 1, Item 1

§1910.147(c)(7)(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. The training shall include the following:

(A) 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.

. . .

a) At the #3 tube mill, authorized employees were not properly advised in the recognition of applicable hazardous energy in that the proper lockout procedures were not applied so that all parts of the piercing mill were adequately locked out.

The Secretary argues that the Respondent failed to train its maintenance employees in the purpose and function of its energy control program and to ensure that its maintenance employees had the knowledge and skill necessary to properly use those energy control methods (Secretary's Post Hearing Brief, p. 7). CO Perry testified that during her investigation she was provided training records for the employees and that she interviewed Messrs.. Lawson and Young and several other employees (Tr. 92, 95; Ex. C-6). She testified that Mr. Young had informed her that he had not been provided specific training on lockout/tagout procedures. Another employee, Ivan Webster informed her that two years ago he had received training from an outside contractor. The record indicates that this training had been conducted in January 1995. Ex. C-6 reveals that the training was Subpart S training - OSHA Electrical Safety-Related Work Practices (Ex. R-D).

The Secretary presented the testimony of Mr. Lawson and introduced into evidence Respondent's training records. Lawson testified that he had been employed at Timken as a maintenance maintainer for 19 years. His duties included fixing and repairing equipment as it broke down and performing preventative maintenance (Tr.7-8). During his employment, he had received on-the -job training from various millwrights as a millwright helper. He testified that he had received classroom training on various topics, such as confined spaces, hydraulics, electrical. He recalled that there had been a brief discussion on lockout/tagout procedures which were going to be implemented . He recalled that they were showed them some locks, but that there was no discussion with regard to specific machinery. It was his impression that this was something that was going to happen in the future, but he never knew if lockout tagout had been implemented(Tr. 50). He testified

that since his return to work from the accident he has become familiar with Timken's corporate lockout program and to implement it. (Tr. 10- 11).

He testified that on the day of the accident, he believed that the electric power had been turned off by the emergency stop. He had always assumed that the emergency kill wiped out everything.(Tr. 19, 36). He found out after the fact, that the energy source for the main drive was in the substation (Tr. 45). He stated that prior to the day of the accident, they usually killed what they were to work on,"if they had hydraulic problem, they killed the hydraulics"(Tr. 19-20). He had performed similar work on the hydraulic hoses in the past, and never thought about locking out the Piercing Mill or what he was standing on - he only had locked out the hoses (Tr. 57). He testified that prior to accident had performed this maintenance operation about six times over 12-13 years, and could not recall having shut down the machine any differently from what was done on the day of the accident. He further stated that no one had ever informed him what he was doing was improper, nor had he ever been disciplined for the way he had shut down machine before (Tr. 21). He testified that in the past, a supervisor had been with him when he didn't use a lock, and the supervisor had never told him to use a lock (Tr. 63-64). He testified that he had been given a lock when he was a millwright helper, but he had never seen a millwright use a lock nor had he ever used the lock. He testified that as a result of his "common sense", he learned how to use the lock (Tr. 23, 38-39). He stated that although not trained to do so, he knew to call an electrician if confronted with a situation in which he was unsure of or if something had to be thrown in the substation where he could not throw a manual switch (Tr. 45). He testified that he had never received any written instructions on locking out the piercing mill before the accident nor had he ever been tested the knowledge he had. He had heard of an energy isolation list for the machine before the accident, and had seen it on the computer. However, he is not adept to the computer but could get someone to get into it to show him. Prior to the accident, he had never retrieved an energy isolation list from the computer (Tr. 20-22). He also testified that he was aware that a "push button" was not an energy isolation device which did not accept a lock. However, he also testified that he could not definitively say that he knew this at the time of the accident (Tr. 53-54). He went on to explain that when performing a repair job, he attempts to keep the down time to a minimum. If he believed that he had a three or five minute job, he would not take twenty minutes to call an electrician to have him throw switches in the substation (Tr. 55). If the job on the day of the accident had been more substantial, e.g., removing a hydraulic motor, he would have take the time to have called an electrician.

Respondent alleges that it had provided its employees with adequate training within the meaning of the standard, and argues that Mr. Lawson's testimony supports its employee misconduct defense. Mr. Beels testified that Messrs.. Lawson and Young had received training through four different forums. He testified that they had initially received training as helpers from experienced mechanical maintainers (Tr. 156). He also testified that the company had presented a video in 1985 or 1986 which covered the subject of lockout/tagout. Although, there were no records of this video training, he testified that he presented the training to all of the employees at that time (Tr. 167-68). He assumed that Messrs.. Lawson and Young saw it because they were employed at the time. Mr. Beels also testified that during the Subpart S training conducted in January 1995, one of the topics discussed was lockout/tagout and what could happen if electricity was not properly isolated and locked out. He testified that the training covered electrical safety and the differences between qualified and non-qualified persons. It also reviewed topics such as mechanical lockout devices,

such as gang lockouts, and valve covers (Tr. 156-57). Additionally, he testified that as recently as January 24, 1997, Lawson and Young had received training during the course of their annual review of the Job Safety Description ("JSD") where topics such as confined spaces, hazardous material communication and lockout tagout. In support of its position, Respondent directs attention to the first paragraph of the lockout tagout portion of the JSD which sets forth:

> You are to become familiar with the Lockout/Tagout procedure. Copies are available in the manufacturing department in which the equipment is located and also from a master list that is located in the Maintenance Service or Operation Service Departments of the Plant.

(Ex. R-B).

The Preamble to the Lockout/Tagout standards explains that "OSHA considers the requirements [of paragraph (c)(7)] to be of critical importance in helping to ensure that the applicable provisions of the hazardous energy control procedure(s) are known, understood and strictly adhered to by employees." 54 Fed. Reg. 36,644, 36,673 (1989). The Preamble points out that "in order to provide adequate information, any training program under this standard will need to cover at least three areas: The employer's energy control program, the elements of the energy control procedure which are relevant to the employee's duties, and the requirements of this Final Rule." *Id.* The degree of knowledge required by employees is defined by their duties. The subject employees were "authorized employees" and as set forth in the preamble "[b]ecause [they are] charged with the responsibility for implementing energy control procedures, it is important that they receive training in recognizing and understanding all potentially hazardous energy source that they might be exposed to during their work assignments, and that they also be trained in the use of adequate methods and means for the control of such energy sources...[t]herefore, they need extensive training in aspects of the procedure and its proper utilization, together with all relevant information about the equipment being serviced."*Id.* The undersigned finds that the testimony of Mr. Lawson and the training provided, establish that Respondent failed to ensure that its employees acquired the knowledge and skills, and understood the purpose and function of the energy control program. The records of training indicate that at least eleven employees at the instant worksite were "authorized employees" (Tr. 74-81; Ex. C-6). The records for each employee, except for one, indicate that Lock/Out Tagout "annual certification" was recorded after March 12, 1997.[4] Mr. Beels testified that this was not training, only certification (Tr. 81). The undersigned finds that the January 1995 Subpart S training did not provide the training which the Lockout/Tagout standard mandates. As indicated upon the face of the training documents this course met the minimum requirements of "Electrical Safety Related Work Practices" and provided an explanation of the requirements of Lockout/Tagout. The objective of the course was not to ensure that "the purpose and function of the energy control program [were] understood by employees and that the knowledge and skills... of the energy controls [were] acquired by employees." The testimony of Mr. Lawson with regard to that the Subpart S training indicates that such an objective was not met - he recalled pictures of burnt bodies and nothing more (Tr. 62). The evidence presented with regard to the JSD discussions is also unpersuasive. On its face the JSD puts the responsibility of becoming familiar with the

[4] Annual Certification of Lockout/Tagout Training was recorded on February 9, 1996, for Edward W. Minto, Jr. (Ex. C-6, p. 31).

Lockout/Tagout procedure on the employee (Ex. R-B). Mr. Mr. Lawson 's testimony clearly indicated that he had no meaningful recall of this discussion (Tr. 62-63). The undersigned finds that the overall tenor of Mr. Lawson's testimony establishes that he lacked the knowledge and skills to deenergize and lockout the Piercing Mill. He possessed no understanding of what was required to kill the power upon the equipment on which and from which he was working. (e.g., Tr. 44-46, 49, 50-51, 52-53, 58, 60). His testimony also revealed that although he had some knowledge about lockout procedures, he did not fully understand its purpose. For example, he believed that it was not necessary for two locks to be placed on the hydraulic switch - he believed one would do it. He also was not clear on whether at the time of the accident two locks were required (Tr. 49-50, 67). He believed that the emergency kill switch deenergized the entire Piercing Mill including the ram (Tr. 53). The undersigned having observed the demeanor of Mr. Lawson finds his testimony credible. His answers were forthright and he displayed no biased towards the Respondent. He has since been back to work and the grievance over the discipline he received as a result of the accident had been resolved (Tr. 6, 23). The undersigned notes that Mr. Beels was also a credible witness, however, he had no personal knowledge whether employees had received the corporate lockout/tagout program or of the content of the training he alleged Messrs. Lawson and Young received on-the-job or during JSD discussions (Tr. 155, 165-66, 168) . Furthermore, his testimony did not show that the training he was knowledgeable of addressed applicable 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 undersigned finds that the occurrence of the March 12, 1997 accident establishes employee exposure. The record also establishes employer knowledge. Mr. Lawson's failure to use proper lockout in the past had been tacitly condoned by management. He presented unrebutted testimony that he had never been told he was doing anything improper or disciplined, despite having failed to follow proper procedures in the presence of management (Tr. 63-64). In light of the above the undersigned finds that the violation has been established.

Citation 1 Item 1b

§1910.147(d)(2) "Machine or equipment shutdown." The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment. An orderly shutdown must be utilized to avoid any additional or increased hazard(s) to employees as a result of the equipment stoppage.

a) Equipment at the #3 tube mill was not completely locked out, the rod and shaft were still activated exposing employees to injury.

Respondent does not dispute that the #3 tube mill was not properly locked out. Respondent sets forth that the issue was whether the equipment was not properly locked out due to employee misconduct. (Respondent's Pre-Hearing Statement dated February 26, 1998). Respondent also argues that in light of the fact that the citation was issued because "[e]quipment at the #3 tube mill was not completely *locked out*" (emphasis added), the allegation if true, would fall under paragraph (d)(4)[5] and not (d)(2). In support of this argument, Respondent states that Mr. Beels testimony established that the Piercing Mill had in fact been shut down by the Piercing Mill Operator (Tr. 132-33). He described the black handle on the console of the Piercing Mill Operator's pulpit which

[5] §1910.147(d)(4)(I) "*Lockout or tagout device application.*" Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.

was used to accomplish this function. However, this did not turn off or electrically isolate the gorge adjust shaft which was a part of the equipment which was within the piercing mill area (Tr. 26-30, 73, 153). The shaft was connected to a gear box which was approximately 10 feet away and directly beside it was a labeled switch which could have been locked out (Tr. 73, 150). Messrs.. Lawson and Young only followed one portion of the lockout procedure - they turned the hydraulic system switch to the "off" position and placed a lock. albeit one, on the switch. They failed to electrically isolate and lock out the gorge adjust shaft and the air valve for the spindle ram in the Piercing Mill (Tr. 138, 142-143, 147-50). The did not attempt to start the Piercing Mill prior to working in an attempt to find out if they had it isolated (Tr. 143). The accident happened when the electrical power was turned back on (Tr. 36). The undersigned finds that these facts as presented by both parties at the hearing establish a violation of the failure to take action to secure the energy isolating devices in a "safe" or "off" position with an appropriate lockout/tagout device to prevent reactivation of the equipment. These facts establish a violation of §1910.147(d)(4). An amendment of the cited standard to §1910.147(d)(4) is therefore appropriate. [*See* Fed.R.Civ.P. 15(b)].

The record establishes that employees Lawson and Young were exposed to the hazard posed by this violation. The undersigned finds that with the exercise of reasonable diligence, the Respondent could have discovered this violation. The fact that management referred to these employees as "self directed" did not absolve Respondent's duty to exercise reasonable diligence by providing adequate supervision. This would have led to the discovery that employees were not using proper lockout procedures.[6] In light of the above, the undersigned finds that the violation has been established.

The undersigned also finds that the Respondent has failed to establish the affirmative defense of employee misconduct. Review Commission precedent has established that to establish this affirmative defense, an employer must show that "it had established a work rule designed to prevent the violation, adequately communicated those work rules, and effectively enforced those work rules, when they were violated." *Centrex-Rooney Construction Co.*, 16 BNA OSHA 2127 (No. 92-0851, 1994) *Pride Oil Well Serv.*, 15 BNA OSHA 1809 (No. 87-692, 1992). The record is void of any written evidence which provides a detailed description of any procedures to be followed in the lockout/tagout procedures for the Piercing Mill. The record makes mention of an energy isolation list, however, this list was not introduced into the record, and its contents cannot be evaluated. Mr. Beels' testimony did not establish how, or if, the procedures he enumerated were communicated to

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[6] The Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

Id. at 1814.

employees. Furthermore, the undersigned's previous finding of a violation in Item 1a, negates a finding that the rules for the lockout/tagout program were adequately communicated. Additionally, other than the disciplinary action which resulted from the subject accident, the record is void of any evidence which establishes that the work rules were effectively enforced when violated.

Classification and Penalty

Section 17(k) of the Act, 29 U.S.C.. §666(k) of the Act, provides that a violation is "serious" if there is " a substantial probability that death of serious physical harm could result" from the violation. Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones, supra.*

The aforementioned violations were grouped for purposes of penalty because they involve similar hazards. The record establishes that the violations were high in gravity. The severity of injury was high - serious bodily injury or death. The record establishes a probability of greater in that Mr. Lawson suffered serious bodily injury which resulted in time off from work and permanent scars (Tr. 18-19, 149). Accordingly, this violation was appropriately classified as serious. Timken is a large employer (Tr. 71). In view of the gravity of this violation and in order to achieve the necessary deterrent effect, the undersigned finds that it is appropriate to make no adjustments to the gravity based penalty of $5,000.00.

Findings of Fact and Conclusions of Law

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

ORDER

1. Citation 1, Item 1a, alleging a Serious violation §1910.147(c)(7)(I) is Affirmed.
2. Citation 1, Item 1b, alleging a Serious violation §1910.147(d)(4), as amended, is Affirmed.
3. A grouped penalty in the amount of $5,000.00 is Assessed.

/s/
Covette Rooney
Judge, OSHRC

Dated: July 17, 1998 Washington, D.C.