SECRETARY OF LABOR, Complainant, v. EQUIPMENT DEPOT, LTD, and its successors, Respondent.	OSHRC DOCKET NO. 00-1970

APPEARANCES:

For the Complainant:
Madeleine Le, Esq., Regina H. Bartholomew, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Robert E. Rader, Jr., Esq., Lalon C. Peale, Esq., Rader & Campbell, Dallas, Texas

BEFORE: Administrative Law Judge: Stanley M. Schwartz

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). On April 17, 2000, Mr. Willie Overby, an employee of Respondent, Equipment Depot, Ltd. ("Respondent" or "Equipment Depot"), was injured during a service call at a facility of AGE Industries ("AGE") located in Belton, Texas.[1] Mr. Overby, who later died from his injuries, was at the facility pursuant to a planned maintenance contract between AGE and Equipment Depot. The Occupational Safety and Health Administration ("OSHA") investigated the accident from April 17 through 21, 2000, and, as a result, issued to Respondent citations alleging "serious" and "repeat" violations of the Act and proposing penalties therefor. Respondent filed a timely notice of contest, thereby bringing this case before the Commission. The hearing in this matter was held in Waco, Texas, on April 5 and 6, 2001. The parties have submitted briefs on the issues, and this matter is ready for disposition.[2]

Applicability of the Lockout/Tagout ("LOTO") Standard

[1]Respondent admits that it is an employer engaged in a business affecting commerce and that it is subject to the requirements of the Act.

[2]Although I presided over the April 2001 hearing, I am presently an administrative law judge at the Social Security Administration. However, the parties have agreed that I may decide this case based on the record established at the April 2001 hearing.

Several of the citation items in this case allege violations of OSHA's LOTO standard. Respondent contends that the LOTO standard does not apply in this case because Mr. Overby was not engaged in service or maintenance at the time he was working on a Hyster S50E forklift at the AGE facility. As written, the standard states that it applies to "the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees." *See* 29 CFR 1910.147(a)(1)(i). Respondent contends that the evidence establishes that Mr. Overby, its field technician, was dispatched to the AGE facility to measure the tires on the subject forklift and to obtain the forklift's serial number and mast type so that Equipment Depot could prepare a quote for replacing the tires and repairing a broken tilt cylinder. As Respondent notes in its brief, and as OSHA Compliance Officer ("CO") Scott Ketcham acknowledged, measuring the tires and obtaining the serial number and mast type of the forklift, standing alone, would not constitute "servicing and maintenance" within the meaning of the standard. (Tr. 116). The Secretary does not really dispute Respondent's contention that Mr. Overby was at the site to measure the tires, not to change them. The applicability of the LOTO standard to Mr. Overby's assignment at the AGE facility on April 17, 2000, therefore turns on the totality of the facts and circumstances surrounding the broken tilt cylinder on the subject forklift. With respect to the resolution of this issue, the testimony of AGE's Michael Coe and Respondent's Brad Blankenship, Mike Bailey and Kelly Kunka is set forth below.

Testimony of Kelly Kunka

Kelly Kunka, Respondent's chief operating officer since 1997, testified that Terry Clark, a field service technician for Equipment Depot, visited the AGE facility on April 4, 2000, as part of a planned maintenance call. Mr. Clark completed a checklist as to what he found wrong with the subject forklift. The checklist prompted Mr. Kunka's customer service representative, Brad Blankenship, to make a follow-up visit to AGE on Friday, April 14, 2000, to request that the repairs noted on the checklist be performed. After the accident, Mr. Kunka conducted his own in-house investigation to determine what Mr. Overby was supposed to do at the facility on April 17, 2000. He concluded that Mr. Overby had been dispatched to diagnose and gather information about the tires and tilt mast on the subject forklift and that Mr. Overby was not supposed to do any service or maintenance work on the forklift.[3] According to Mr. Kunka, such an assignment was extremely common for Equipment Depot, as most customers would not authorize a repair without knowing how much it would cost. (Tr. 144, 167-68, 175-76, Exhs. C-1, R-15).

[3]When Mr. Kunka looked in the back of Mr. Overby's truck, there were no replacement tilt cylinders or parts to fix the tilt cylinder. (Tr. 240). In addition, the record shows that no tools were seen laying on the ground near the forklift after the accident. (Tr. 44).

Testimony of Michael Coe

Michael Coe, AGE's general manager, testified that Equipment Depot had dispatched Mr. Overby to the AGE site on April 17, 2000, to make some repairs that Mr. Blankenship had solicited on April 14, 2000. Mr. Blankenship had visited Mr. Coe that day and given him some work orders that Mr. Clark had generated on his April 4, 2000 visit. Mr. Blankenship pointed out some items that were serious and needed to be fixed. Mr. Coe told Mr. Blankenship to have those items fixed and to give him some prices on the other matters. Mr. Coe stated that Mr. Overby was at AGE on April 17, 2000, to fix the items he had discussed with Mr. Blankenship. (Tr. 13-17, Ex. C-1).

Later in his testimony, Mr. Coe agreed that Mr. Clark had done a planned maintenance inspection of the subject forklift on April 4, 2000. Mr. Coe recalled signing a document that day but could not recall if he discussed the items on it with Mr. Clark, although he did read the comments written on the planned maintenance checklist. Mr. Coe also recalled talking to Mr. Blankenship on April 14, 2000, about the condition of the tilt cylinder on the forklift, because it had been broken for a while. Other than that particular detail, Mr. Coe did not remember the specifics of their conversation. (Tr. 24-28, Exh. C-1).

Testimony of Brad Blankenship

Brad Blankenship is in charge of Respondent's customer sales and service for Waco and seven other Texas cities. He testified that on April 14, 2000, he met with Mr. Coe and discussed with him the preventive maintenance form that Mr. Clark had completed. He also testified there was one item not on the form that Mr. Coe wanted checked out, that is, the tires on the subject forklift. Mr. Blankenship took three preventive maintenance checklists to the meeting, and he and Mr. Coe discussed a Toyota forklift and two Hyster forklifts, one of which was the subject forklift. Mr. Blankenship said he met with Mr. Coe to present the preventive maintenance forms to Mr. Coe and to ask him about certain problems noted with respect to the forklifts. He also said that the problems Mr. Clark had found raised some flags that could possibly get an employee hurt, specifically, a floor shifter that did not return to the neutral position, a leaking hose on the bottom of a transmission, and a broken tilt cylinder on the right side of the subject forklift. Mr. Blankenship told Mr. Coe these were things that seriously needed to be repaired, and Mr. Coe said: "Let's get it done, let's do it." Mr. Blankenship then called his service manager, Mike Bailey, and, after a brief discussion about what was on the preventative maintenance checklists, arrangements were made for a field technician to visit AGE on April 17, 2000. (Tr. 247, 254-57).

According to Mr. Blankenship, the field technician was to confirm what was on the preventive maintenance follow-up sheets and to get information so that a quote of what it would cost to repair the forklifts could be prepared. Mr. Blankenship recalled that Mr. Coe wanted quotes on the tires and the

broken tilt cylinder on the subject forklift. He also recalled that Mr. Coe was present when he called Mr. Bailey on AGE's speaker phone. Mr. Overby was not to make any repairs until he was given approval, and, to Mr. Blankenship's knowledge, Mr. Coe had not given Mr. Overby approval to repair anything. Mr. Blankenship agreed, however, that Mr. Coe requested that a technician be sent to AGE to do some repairs. He also agreed that Mr. Overby was at the AGE facility on April 17, 2000, to fix things that Mr. Coe gave him permission to fix. More specifically, Mr. Blankenship said that Mr. Coe gave him permission to send a field technician to "fix the problems." Later, Mr. Blankenship qualified his statement by indicating that the only purpose for Mr. Overby's visit with respect to the subject forklift was to assess it and to provide a quote; he was not there to do any work on that forklift. (Tr. 256-59, 280-82).

Testimony of Mike Bailey

Mike Bailey, the service manager for Respondent's Waco branch, testified that he prepared the service call sheet for AGE's April 17, 2000 service call. There were three forklifts listed on the service call sheet, the third one listed was the subject forklift, and the note that Mr. Bailey wrote on the sheet in that regard read: "Hyster, tires, tilt cylinder problem." Mr. Bailey said the tire size had worn off the tires on the subject forklift and that Mr. Overby was to physically measure the tires to determine the size needed for the forklift. He also said that Mr. Overby was to look into the tilt cylinder so that Mr. Bailey would know what specific part was broken in order to provide a price quote for AGE. In addition, Mr. Bailey needed the forklift's model and serial number as well as the mast number because tilt cylinders vary depending on the height of the mast.[4] According to Mr. Bailey, it was not necessary for the forklift to be running to find out what part of the tilt cylinder was broken, because, once the mast was tilted forward and the forks dropped to the ground, the tilt cylinder would be in plain view. (Tr. 284, 343-45, Exh. R-16).

Analysis

To prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew, or could have known with the exercise of reasonable diligence, of the violative condition. *See, e.g., Walker Towing*

[4] Mr. Bailey testified that there were no parts in Mr. Overby's truck to repair the tilt cylinder when the truck was inventoried upon its return to the shop. (Tr. 395).

Corp., 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991). In regard to whether the LOTO standard applied to the activities of Mr. Overby on the day of the accident, section 1910.147(a)(1)(i) provides as follows:

> This standard covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. This standard establishes minimum performance requirements for the control of such hazardous energy.
>
> In addition, section 1910.147(b) defines "servicing and/or maintenance" as follows:
>
> Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

Respondent contends that if employees are not engaged in servicing and maintenance, then the cited standard does not apply. Respondent further contends that is precisely the case here, positing that Mr. Overby was not engaged in servicing or maintenance of the forklift and that there could be no unexpected energization. In support of its position, Equipment Depot relies on the following facts:

> 1. Mr. Blankenship testified that AGE wanted a quote before authorizing the repair.
>
> 2. Mr. Bailey confirmed that it was normal for AGE to request a quote before authorizing any repairs and that he dispatched Mr. Overby to AGE to measure the tires and to get the information necessary to prepare a quote to replace the tires and repair the tilt cylinder.
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> 3. Mr. Bailey and Mr. Kunka both testified that the only information needed on the tilt cylinder was the serial number of the forklift and the type of mast, *i.e.*, how many sections or extensions the mast had.
>
> 4. There were no tools laying around Mr. Overby's work area as would be expected if he had been repairing the tilt cylinder; rather, they were all in his tool box in the service truck.
>
> 5. Mr. Overby did not have a replacement tilt cylinder with him on his truck and could not have repaired the tilt cylinder in any event.

Whether the LOTO standard applies to a specific work activity has purposely been left flexible by the drafters so that the trier of fact can conduct a case-by-case analysis of the varied factual situations that may present themselves. However, one factor remains constant, and that is the remedial nature of the Act. When examining workplace activities to determine whether they encompass service or maintenance activities, as opposed to inspection, the cited definition is intended to be broadly construed. On the other hand, the fact that the scope of the standard is to be broadly construed does not excuse the Secretary from presenting sufficient evidence to meet her burden of proof.

If the evidence relied upon by Equipment Depot, as set out above, stood alone, then the Secretary would have failed to establish that Mr. Overby was engaged in servicing or maintenance of the forklifts

at AGE. In that case, the activities of Mr. Overby would have indeed encompassed inspection of the forklifts and the standard would not apply. However, such is not the case, as the record also indicates that:

> 1. AGE's General Manager, Mr. Coe, testified that Respondent dispatched Mr. Overby to AGE on April 17, 2000, to make some repairs that were solicited by Mr. Blankenship.
>
> 2. Mr. Blankenship went to AGE on April 14, 2002, and took with him three work orders that Mr. Clark generated on April 4, 2000.
>
> 3. Mr. Blankenship pointed out some items that seriously needed to be fixed, and Mr. Coe told him: "Let's get it done, let's do it." Mr. Coe said that Mr. Overby was at AGE to fix the items he had discussed with Mr. Blankenship. Mr. Coe told Mr. Blankenship to get the serious items fixed and to provide him with some price quotes on other items.
>
> 4. Mr. Coe indicated that Mr. Overby was at AGE to repair another Hyster forklift that had an oil leak and a broken cable and that he was also there to work on the subject forklift.
>
> 5. Mr. Blankenship agreed that Mr. Coe requested that a technician be sent to AGE to do some repairs. He also agreed Mr. Overby was at AGE to fix things that Mr. Coe gave him permission to fix. Mr. Blankenship said Mr. Coe gave him permission to send a technician to fix the problems, but he also said the subject forklift was not included in this category.

Based upon the foregoing, I find that Mr. Overby was at AGE to repair serious problems that had been noted on three forklifts. However, whether Mr. Overby was there to repair the subject forklift specifically is difficult to discern from the record. Mr. Overby had no parts to fix the broken tilt cylinder with him, and there were no tools found on the ground near the subject forklift after the accident. On the other hand, Mr. Blankenship conceded that Mr. Coe had requested a technician to do some repairs and that Mr. Overby was at AGE to fix things that Mr. Coe gave him permission to fix. Mr. Coe, as noted above, testified that Mr. Overby was at the facility to work on the subject forklift.

There are clearly some inconsistencies in the witnesses' recollections of the events of April 14, 2000, especially upon considering the absence of a replacement cylinder in Mr. Overby's truck and the lack of any parts for the cylinder. Regardless, on the basis of the record, I find that the purpose of Mr. Overby's visit was twofold. One was apparently to gather information in order to provide some price quotes to Mr. Coe. The second was apparently for Mr. Overby to repair the forklifts after he received authorization from Mr. Coe. There is no question that the repair of forklifts falls within the scope of the LOTO standard. Absent a finding that Mr. Overby's sole purpose in going to the AGE facility was to inspect the three forklifts, which I decline to make, Respondent's contention that the standard does not apply is not persuasive. I conclude that the LOTO standard applies to the circumstances of this case, and, accordingly Respondent's contention is rejected.

Serious Citation 1, Item 1a

Item 1a of Citation 1 alleges a violation of 29 CFR 1910.147(c)(4)(i), as follows:

> Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:
>
> a) In that the employer failed to implement specific procedures for isolating energy sources for Hyster Model S50E industrial trucks, exposing employees to the hazards of energized equipment.
>
> b) In that the employer failed to ensure that employees utilized tags and or locking devices while servicing industrial equipment, exposing employees to the hazards of energized equipment.

The Secretary contends that Equipment Depot did not comply with the requirements of 29 CFR 1910.147(c)(4)(i) when it failed to develop, document and utilize the required specific procedures for the Hyster S50E forklift that was involved in Mr. Overby's fatal accident. Her position is that because Respondent's field mechanics perform maintenance on powered industrial trucks on a daily basis without specific written procedures, these employees are exposed to the hazards of unexpected energization.

Testimony of CO Ketcham

CO Ketcham testified that Equipment Depot could comply with 1910.147(C)(4)(i) by developing and implementing specific procedures for the subject forklift and ensuring employees used the procedures. He said the employer was in a position to develop such procedures, that periodic checks would determine if the procedures were being used, and that it would be up to the company to decide when and where to make the periodic checks. CO Ketcham also testified that he had no information of any other instances in which Mr. Overby or other Equipment Depot field service technicians had worked on a forklift and failed to set the brake. (Tr. 70-71, 120-21).

The CO reviewed the company's LOTO program, and, in his opinion, it was very generic and did not cover the different types of equipment on which employees would be required to work. He agreed that company personnel told him that their field technicians go through comprehensive on-the-job training as part of an apprenticeship program. The CO indicated, however, that he was not aware of what was covered in the training, although he said that if the program was not written the employer could assure it was used by periodically inspecting its field sites and watching its employees operate powered industrial trucks. The CO also indicated that he was not aware of what training Mr. Overby had in forklift operation, but he received work reports from the company that showed that Mr. Overby had worked on the subject forklift before. CO Ketcham concluded from his investigation that Mr. Overby, for some reason, started the forklift from the side without the parking brake being applied, resulting in the forklift engaging and Mr.

Overby being pinned between the forklift and his service truck. He said that the failure to tag out in this case most likely had nothing to do with the cause of the accident. (Tr. 75, 103-05, 111-13, 129, 133).

Testimony of Mike Bailey

Mr. Bailey has worked for Equipment Depot since 1980 and has direct supervision over all of the company's service technicians; he is also responsible for hiring and firing technicians. He testified he hired only workers with extensive mechanical backgrounds and that new hires were placed with experienced specialists in particular mechanical areas. The specialists emphasized safety, and each new hire went through extensive on-the-job training regardless of past experience. The new hire began in the rental department, working with experienced employees on as many as five to seven forklifts a day. The new hires learned the operational functions of all the forklifts that were at the Waco shop for maintenance, which included setting and releasing the parking break, checking the brakes, and checking the transmission in forward and reverse; they also operated the forklifts to full fork height and performed side-shifts. Mr. Bailey said that while controls on forklifts are similar, there are differences with different models. He also said that new hires were shown the differences on the various models and that operator handbooks and service manuals were utilized. He noted that new hires were usually in the rental area about a month and that he kept up with their progress by watching and talking to them during their training and by talking to the specialists who were training them.[5] (Tr. 284-92, 297-99, 303-04, 312, Exh. R-22).

Mr. Bailey further testified that new hires were then trained by experienced mechanics in the heavy repair shop where more extensive work was done, such as brake jobs, engine and transmission overhauls, and hydraulic repairs. This training stressed safety and proper procedures before starting repair work, such as parking the forklift, lowering the forks all the way to the ground for stability, and turning off the engine and setting the parking brake; it also included procedures such as chocking the equipment. After a new hire completed his training, Mr. Bailey decided if he was qualified to be a field technician. If so, training continued by sending the employee with an experienced technician into the field, where the safety training the new hire had received in the shop was reinforced; however, no heavy maintenance work was done in the field, as all such work was done in the company's heavy repair shop.[6] After the experienced field

[5]Mr. Bailey also kept track of work that new hires performed and training they received by reviewing their time cards; virtually everything employees did was documented through the company's billing procedures and reflected on employee time cards, and, in some months, the company had documented several thousand dollars solely for training. (Tr. 307-10).

[6]Mr. Bailey said the company had 22 field technicians who covered 54 counties in Texas and that a field technician might work on three to seven jobs a day.

technician presented his evaluation of the new hire's work in the field, Mr. Bailey determined whether that employee should be given a service truck and designated a field technician. (Tr. 301-07, 310-312, 348).

Mr. Bailey hired Mr. Overby, who went through the training as set out above. Mr. Overby then worked in the field under the supervision of experienced field technicians, including his brother-in-law. During the time Mr. Overby worked with his brother-in-law in the field, they serviced a client with over 40 forklifts, and it was after that time that Mr. Bailey issued Mr. Overby his own truck. Based on his personal observations of Mr. Overby in the rental and heavy repair shops as well as the opinions of the experienced employees who had been assigned to train him, Mr. Bailey thought that Mr. Overby was an excellent employee; he was meticulous and dependable and followed all the company rules, and Mr. Bailey had no reason to believe that Mr. Overby would not do an excellent job in the field in terms of both safety and accuracy. Mr. Bailey stated that Mr. Overby had worked on equipment like the subject forklift, that is, a Hyster S50E forklift with a "monotrol" system, many times in the past. (Tr. 334-42, 347).

Mr. Bailey testified that he had never received any complaints about Mr. Overby's work in the field and that Mr. Overby had never had any accidents or close calls. He said the field technicians moved constantly from one customer to another and that he conducted spot checks of the technicians when he visited customer locations. He also said that two customer service representatives, one a former field technician and the other a former mechanic, visited customers frequently and observed the field technicians during their visits. Mr. Bailey had never had any problems with his service technicians not following safety procedures in the field, although he had verbally reprimanded some technicians for infractions such as not wearing a seat belt. He had also issued verbal reprimands to shop employees for matters such as not setting a parking brake, but, on balance, he had found his employees to be very safety conscious. (347-52).

Mr. Bailey was in charge of all formal safety training at Equipment Depot. He held a monthly safety meeting for all employees, and notice of the meetings, which were mandatory, was given a week in advance so that field technicians would not schedule work away from the shop for that time. A different topic was discussed at each monthly meeting, and each topic had a handout sheet that was provided to all attendees; it was also common to refer to repair manuals for a particular forklift at meetings, and the repair manuals were kept in the library.[7] Mr. Bailey used Chapter 13 of the company's training manual for his

[7]Mr. Bailey read the handouts verbatim to the employees at the meetings, and the employees took the handouts with them to use as a reference. Mr. Bailey kept a log of who attended each meeting, and all employees were required to sign the log after the meeting to

(continued...)

LOTO training, which was usually held in June.[8] He went over the need to chock wheels and set the parking brake as well as "stored energy" and how that affected the jobs of his employees. He also went over the company's tagout procedure, including when to tag out equipment, and he addressed LOTO procedures with respect to specific forklifts. Mr. Bailey trained his employees to use tags but indicated there were situations in which they would not need to use them, for example, when an employee was checking a machine or sitting in a machine like an operator. In these scenarios, the employee would have no need to tag out the machine to prevent unexpected startup. (Tr. 312-16, 373, 376, Exh. R-1).

Testimony of Kelly Kunka

Kelly Kunka oversees Respondent's corporate safety program. He testified that Mr. Overby had worked on Hyster forklifts numerous times before the accident. In particular, he noted that Exhibit R-18, a report he himself prepared, showed that Mr. Overby, reflected as employee number 9, had worked on Hyster forklifts on a number of occasions.[9] He also noted that many Hyster forklifts, including the subject forklift, have monotrol systems in which the transmission does not have a forward, neutral and reverse gear lever like other forklifts. Instead, the operator pushes one side of the accelerator pedal to drive forward and the other side of the same pedal to drive in reverse, and the only way to put the forklift in neutral is to engage the parking brake; otherwise, the forklift is always in gear and will roll at a significant speed in the direction last driven. In addition to Exhibit R-18, Mr. Kunka testified about Exhibit R-20, a document showing that Mr. Overby had actually worked on the subject forklift several times prior to the accident. It was the opinion of Mr. Kunka that, based on the number of times Mr. Overby had worked on the subject forklift and other Hyster forklifts with monotrol transmission systems, he would have known that the forklift would roll if the parking brake was not set. (Tr. 22-23, 87-88, 174-184, 345-46, Exh. C-7).

Discussion

[7](...continued)
acknowledge they had attended and had understood the course material. (Tr. 317).

[8]Mr. Bailey testified that he gave the training shown on a sign-in sheet dated June 15, 2000; the record also shows he gave formal LOTO training to Mr. Clark and to Sidney Capps, another employee, in June of 2000. (Tr. 359-62, Exhs. R-23, R-24). Mr. Overby received his formal LOTO training in June of 1999. (Tr. 319, Exhs. R-3, R-4).

[9]In preparing Exhibit R-18, Mr. Kunka observed that one customer, Central Texas Corrugated, had only Hyster forklifts with monotrol transmissions; he therefore would have expected that Mr. Overby worked on a Hyster forklift with a monotrol system when at Central Texas Corrugated on June 30, 1999. (Tr. 215-18).

The Secretary's primary contention is that the LOTO procedures found in Chapter 13 of Equipment Depot's training manual outlines only in a general way how employees are to lock out and tag out all equipment having energy sources. The Secretary thus argues that the program failed to comply with the LOTO standard because there were no specific procedures as to the equipment that Respondent's employees encountered, including the Hyster S50E forklift that was involved in the accident.

Respondent's written program states that it "establishes the minimum requirements for the lockout of energy isolating whenever maintenance or service is done on machines or equipment." The program authorizes each mechanic "to lockout and tagout the piece of construction equipment, on highway vehicle, off highway vehicle, commercial engine, farm equipment and/or industrial powered truck he/she has been assigned to perform service or maintenance...." Specifically, the program requires:

> The authorized employee shall identify the type and magnitude of the energy that the machine or equipment utilizes, shall understand the hazards of the energy, and shall know the methods to control the energy. If the authorized employee has questions or concerns, he/she shall consult the applicable Service Manual for complete operational instructions before proceeding.
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> ***
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> If the machine or equipment is operating, shut it down by normal stopping procedure (depress stop button, open switch, close valve, etc.).
>
> ***
>
> Stored or residual energy (such as that in...elevated machine members,...hydraulic systems...etc.) must be dissipated or restrained by methods such as grounding, repositioning, blocking, chaining, bleeding down, etc.
>
> ***
>
> Lockout the energy isolating device(s)....In most cases there is no device to isolate the switch so disconnecting the batteries (is) the only acceptable [method] of locking out the piece of equipment.
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> ***
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> Tags shall be applied on all equipment (preferably on steering wheel or at operational controls) prior to beginning any repairs.
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> ***

The thrust of the Secretary's complaint in Citation 1, Item 1a, is that Equipment Depot's LOTO procedures were not "forklift specific." The CO recommended this item because no specific procedures for locking out the Hyster S50E existed. The record shows that Respondent sells, services and rents industrial forklifts and other industrial equipment. It dispatches field technicians to its customers' places of business on a regular basis to service a variety of different types of equipment. The company has 3,000

to 4,000 customers and about 6,000 pieces of equipment that it services in its planned maintenance program, and it has 22 field service technicians operating out of its Waco headquarters that work at three to seven customer locations a day. Some of the forklifts the company services have monotrol transmissions, while others have the more common forward, neutral and reverse gear levers.

Under the above circumstances, as CO Ketcham testified, the LOTO program contained in the company's training manual would be too general for such an operation, and the yearly formal training in LOTO procedures would be insufficient. However, as noted above, there is much more to Respondent's LOTO program, and I find that the company did in fact provide training that specifically addressed forklifts and their various idiosyncracies. The formal yearly training was intense and comprehensive, and it was documented by training outlines, employee handouts and sign-in sheets. Mr. Bailey provided a detailed presentation to his employees about what they would encounter in their jobs and how the LOTO procedures affected their safety on the job. Equipment Depot also developed an on-the-job training program and apprenticeship program to go hand-in-hand with its formal LOTO training. Everything contained in the formal program and more was addressed in the apprenticeship program that commenced for new hires on the day they reported to work. As Mr. Kunka indicated, the company could talk about chaining up a mast all day in a classroom setting, but learning in the shop areas was much more effective training. I find, based on the above, that the company's formal LOTO training in conjunction with its intensive apprenticeship and on-the-job training met the standard's requirements to develop specific procedures for the control of potentially hazardous energy. I further find that the program focused on all types of powered industrial trucks that an employee would encounter in the shop and in the field.

The next question to resolve is whether Equipment Depot failed to document its LOTO procedures. I note that documentation can take many forms and that Respondent's formal training was documented in the more conventional way. At its monthly safety meetings, the company had a sign-in sheet, which, after the training session was over, the employees signed to acknowledged they attended the training and understood what was taught. The monthly safety meetings were mandatory, and sufficient notice of the topic and time of training was posted so that the field technicians would not have a service call conflict. In my view, these procedures satisfied the company's obligation to document its formal training sessions.

The on-the-job training and apprenticeship training was documented another way. Because of the constant movement of the field technicians between customer locations, Mr. Bailey used time cards and the monthly labor recap report to evaluate what type of training each new hire received while working in the shop areas and at numerous customer locations under the direct supervision of an experienced field technician. Until Mr. Overby's accident, Mr. Bailey had no reason to believe there was any problem with

his method of keeping track of employee training. Based on the testimony of Mr. Bailey and Mr. Kunka, I find that Equipment Depot had a reasonable system in place to document its informal apprenticeship training as well as its on-the-job training. In addition, I accept Mr. Bailey's testimony that he did indeed utilize this system to document and follow the company's informal training process with respect to new hires, both in the shop areas and at customer locations.

CO Ketcham testified that Equipment Depot was not obligated to send a supervisor to check on its field technicians every time a service call was made and that the frequency of checks, and how and when to make them, was up to the employer. (Tr. 119-120). Mr. Bailey testified that he personally conducted spot checks of his technicians when at customer locations and that his visits to customer sites varied from twice a week to three to four times a week.[10] (Tr. 348, 387-90). Further, the record shows that Equipment Depot's customer service representatives were in the field almost daily and that they also monitored the service technicians. The record also shows that, since 1999, all forklift personnel were required to have OSHA safety certification. One customer service representative, Brad Blankenship, conducted the OSHA certification training for Equipment Depot's employees as well as those of some of Equipment Depot's customers. Both of Equipment Depot's customer service representatives had extensive mechanical knowledge, and Mr. Blankenship was a field service representative before his present position. (Tr. 247-49, 265-66, 348-49). Finally, the record shows that Equipment Depot had had no problems with safety violations by its field technicians in the past and that field technicians were chosen for that work on the basis of their being the company's most dependable employees.

Based on the foregoing, I find that Equipment Depot's policy and procedures providing for the periodic checking and monitoring of its employees fully complied with the requirements of the LOTO standard. As all three requirements of 29 CFR 1910.147(c)(4)(i) have been met, that is, the development, documentation and utilization of LOTO procedures, Item 1a of Citation 1 is vacated.

Serious Citation 1, Item 1b

Item 1b of Citation 1 alleges a violation of 29 CFR 1910.147(c)(7)(i), as follows:

> The training program of the employer did not include all the training elements listed under Items A-C of this section:

[10]Mr. Bailey indicated that before going to a customer site, he would check the routing board to determine where his field technicians were scheduled to be that day; if he learned a technician was at a customer site, he would conduct a spot check. (Tr. 348, 387-90).

a) Employees were not trained on specific procedures for Hyster model S50E industrial trucks; exposing employees to the hazards of being struck by and caught between equipment.

The cited standard requires employers to train employees on the purpose and function of the energy control, or LOTO, program. The Secretary relies on two factors to meet her burden of proving a violation of the cited standard. One was CO Ketcham's testimony that two employees he interviewed, Sidney Capps and Terry Clark, told him they had not received LOTO training and had not seen any procedures involving LOTO. The CO indicated the two employees told him they were unaware of any LOTO procedures for any type of powered industrial equipment. The second factor the Secretary relies on is that since such training was only provided once a year, Equipment Depot regularly sent its employees out in the field to perform maintenance and/or service on powered industrial trucks without the benefit of training.

The record clearly shows that Respondent provided extensive training to all new hires from the day an employee joined the company. The formal training in LOTO was offered annually, usually in June, as part of a year-round schedule of safety topics. If the June safety meeting covering LOTO was the only training employees received, then the Secretary would have met her burden of proof with respect to both Items 1a and 1b. However, as found above, such is not the case. The Secretary's more viable argument concerns the statements to the CO by Sidney Capps and Terry Clark. Such statements by employees have routinely been ruled admissible by the Commission, and the Secretary has established a prima facie case based on CO Ketcham's testimony. Thus, the burden shifts to Respondent to rebut the CO's testimony, and I find that Equipment Depot has carried its burden in that regard.

CO Ketcham testified that he spoke with Mr. Clark and Mr. Capps on August 4, 2000. However, Respondent established through testimony and documentary evidence that Mr. Capps and Mr. Clark both went through formal safety training in regard to Equipment Depot's LOTO procedures. This training took place during the June 2000 safety meeting that was dedicated to LOTO procedures. Mr. Overby had gone through the same formal training in June of 1999. (Tr. 361, Exhs. R-3-4 (Overby), Exhs. R-23-24 (Clark), Exhs. R-3, R-24 (Capps)). In view of this evidence, I conclude that there must have been a failure of communication between CO Ketcham and the two employees when he spoke to them about their training. Mr. Capps and Mr. Clark had actually attended formal LOTO training just prior to their interview by the CO. As happens in many situations, communication and memory can unintentionally falter, and such appears to be the case here. In addition, as noted above, I have fully credited the testimony of both Mr. Kunka and Mr. Bailey that all new hires went through an intensive apprenticeship from the day they reported for work and that this training included the operation of forklifts and LOTO procedures.

For the foregoing reasons, I find that the Secretary has failed to carry her burden of proof with respect to Item 1b. Item 1b of Citation 1 is therefore vacated.

Serious Citation 1, Item 2

Item 2 of Citation 1 alleges a violation of 29 CFR 1910.147(f)(2)(i), as follows:

> When outside servicing personnel were engaged in activities in a facility, the onsite employer and the outside employer did not inform each other of their respective lockout or tagout procedures:
>
> a) The employer failed to notify AGE Industries of the lockout or tagout procedures utilized by Equipment Depot on their site; exposing employees to the hazards of energized equipment.

Respondent contends it trained its field service technicians to always remove powered industrial equipment to a remote location where it was under their complete control so that no one would try to start the machine without their knowledge. In this case, Mr. Overby removed the forklift to a location away from the AGE facility, that is, AGE's employee parking lot. (Tr. 136). Respondent's position that it did not violate the standard is premised on the argument that, since the forklift was in a relatively remote and secure area, there could be no unexpected energization by a customer's employee.

Assuming *arguendo* that the forklift had been removed to a relatively remote area, Equipment Depot's argument still fails. The parties agree that the purpose of exchanging LOTO programs is to ensure that the customer will not attempt to activate a machine while the outside party is working on it. Here, it was very important for Equipment Depot to notify AGE of its LOTO procedures. Such notification would have allowed AGE to train its employees that, when they saw an Equipment Depot field technician at the site, the employees were to stay away from the equipment being repaired. Stated another way, the customer could alert its employees that the equipment was off by itself for a reason, that is, that the employees would not go up to the equipment and start it while it was being serviced. In this case, a copy of Respondent's LOTO procedures, especially those dealing with removal of equipment to a remote location, was not provided to AGE. The Secretary has thus established a violation of the cited standard.

Respondent also contends that it is infeasible to provide copies of its LOTO procedures to every customer. I find that a copy of the procedures in a condensed version emphasizing the above areas could be easily developed. In addition, both the company and OSHA have safety professionals that could agree on what is necessary to be in the document for distribution to Respondent's 3,000 to 4,000 customers. In other words, there is a middle ground for Equipment Depot to come into compliance with the standard.

Regardless, I conclude that Respondent has failed to establish its infeasibility defense, and Item 2 of Citation 1 is affirmed as a serious violation.

The Secretary proposed a penalty of $1,625.00 for this item. The CO testified that he considered the violation to be of high severity due to the serious injuries that could occur, which included being crushed, pinned or run over by a powered industrial truck. The gravity-based penalty for this item was $2500.00, to which the CO applied reductions of 20 and 15 percent, respectively, for size and good faith. (Tr. 80-82). I find the proposed penalty appropriate. A penalty of $1,625.00 is therefore assessed.

Serious Citation 1, Item 3a

Item 3a of Citation 1 alleges a violation of 29 CFR 1910.178(l)(3)(i)(C), as follows:

> Powered industrial truck operators did not receive initial training in truck controls and instrumentation: Where they are located, what they do, and how they work.
>
> a) For the Hyster Model S50E industrial truck operated by the deceased employee, the employer failed to train the employee on the functions of the park brake and its relationship to the transmission and starter solenoid; exposing employees to the hazard of being struck by or caught between industrial trucks.

During his inspection, CO Ketcham requested copies of Respondent's training records or other documentation that would show that Mr. Overby had been trained on the subject forklift. He received no proof of certification or other documentation to indicate such training, and, consequently, he recommended the issuance of this item. (83-84). The CO testified that company representatives told him that their service technicians went through comprehensive on-the-job-training through an apprenticeship program; however, he did not know what, if any, training Mr. Overby had received in the operation of forklifts. (Tr. 103-05).

Respondent contends that the CO's testimony fails to prove that the requisite training was not given and that this item should be dismissed for that reason alone. I disagree. The CO asked the right questions, and no specific information was provided. The CO acted properly in recommending this item, and, based on his testimony, the Secretary has established her prima facie case. The burden thus shifts to Respondent to show that its service technicians, especially Mr. Overby, were adequately trained in forklift operation.

I conclude that Respondent has met its burden. As noted above, all service technicians went through comprehensive on-the-job training in all aspects of forklift operation, and they were trained on all types of equipment. I fully credit the testimony of Mr. Bailey and Mr. Kunka about the apprenticeship program. On the basis of their testimony, I find that the program was effective, that it was well planned to address all aspects of powered industrial truck operations that employees would encounter on the job, and that there was no question that the second thing a technician learned, after turning the ignition key, was

how to set the brake.[11] In addition, the record shows that after Mr. Bailey hired him, Mr. Overby went through the above training; he started in the rental shop, then went on to the heavy repair shop, and finally was trained in the field by an experienced field service technician. It was not until Mr. Overby completed this intensive training that he was allowed to represent the company as a field service technician.

I am very cognizant of the fact that this inspection was triggered because a valued Equipment Depot employee, Mr. Willie Overby, lost his life when he was pinned between the Hyster S50E forklift that he was working on and his service truck. It appears that Mr. Overby may have started the forklift from the ground without the parking brake being engaged and that the forklift then rolled forward, fatally injuring him. The subject forklift was not one of the more common forklifts that have a forward, neutral and reverse gear lever. Rather, it had a monotrol system, described earlier, which meant that it was always in gear and would roll at a significant speed in the direction last driven unless it was put in neutral, which could only be done by engaging the parking brake. It is clear from the record in this case, however, that the parking brake on the Hyster S50E was not set when the accident occurred.

In view of this fact, I have given even further consideration to the question of whether Mr. Overby had been adequately trained in the operation of Hyster forklifts with monotrol transmission systems. My review of the testimony and documentary evidence submitted by Respondent has convinced me that Mr. Overby was indeed familiar with the monotrol transmission that was part of the subject forklift's operating system. Mr. Bailey testified that Mr. Overby had worked on Hyster forklifts with monotrol systems many times. (Tr. 347). Mr. Kunka testified that Mr. Overby had worked on Hyster forklifts numerous times and that many Hyster forklifts have monotrol transmission systems. (Tr. 176-77, Exh. R-18). Mr. Kunka also testified Mr. Overby had worked on the subject Hyster forklift a number of times before the accident. (Tr. 179, 182-84, Exh. R-20). Finally, Mr. Kunka testified that on June 30, 1999, Mr. Overby had been at Central Texas Corrugated and had worked on a Hyster forklift with a monotrol transmission system.[12] (Tr. 215-18, Exh. R-18). I find fully credible the testimony of both Mr. Bailey and Mr. Kunka about Mr. Overby's experience in working on equipment like the forklift involved in the accident.

Based upon the foregoing, I conclude that Mr. Overby did know the location and operation of the controls on the subject forklift. In addition, due to his previous experience with Hyster forklifts with

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[11]Chapter 9 of the company's training manual specifically addresses these issues.

[12]Mr. Kunka's testimony in this regard was based on information he had obtained from other experienced service technicians who had been to Central Texas Corrugated before the time of the accident; in view of that information, he was able to represent that that company used only Hyster forklifts with monotrol transmission systems. (Tr. 215-18).

monotrol transmission systems, he knew that the foot brake had to be engaged to put the equipment in the neutral position. Therefore, I find that the Secretary failed to carry her burden of proof with respect to this citation item. Item 3a of Citation 1 is consequently vacated.

Serious Citation 1, Item 3b

Item 3b of Citation 1 alleges a violation of 29 CFR 1910.178(1)(6), as follows:

> The Employer failed to certify that each operator has been trained and evaluated as required by paragraph (1). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation:
>
> a) The employer failed to certify that employees operating powered industrial trucks were trained in accordance with the standard.

The standard requires the employer to certify that forklift operators have been trained on the various aspects of forklift operation listed in 29 CFR 1910.178(1). In this case, the employees were trained. The remaining question is whether Respondent's method of documenting such training can be considered equivalent to the standard's requirement that a formal certification be issued indicating the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation. I agree with Respondent that such documentation was indeed performed, even to the extent of notations in its labor recap report. Specifically, Exhibit R-18 reflects that the employees performed "make ready" work, where no customer was billed; it also reflects "internal sales policy adj" entries showing on-the-job training. Equipment Depot contends that while the form of its documentation may not have been what OSHA liked to see, the purpose of the standard was met.

Alternatively, Respondent argues that if a violation is deemed to exist at all, it is purely a technical "paperwork" violation. Respondent suggests that, in these circumstances, the citation item should be dismissed under OSHA's own policy guidelines. The guideline relied upon is OSHA Instruction CPL 2.11, entitled "Citation Policy for Paperwork and Written Program Requirement Violations," which provides:

> When the employer has complied fully with a requirement in a standard (*e.g.* for taking particular protective measures, for an evaluation, or for training), except that the employer has failed to make a required written certification that the action was taken, no citation shall be issued. CPL 2.111 G.3.d.

Equipment Depot states there is no reason why this policy should not apply here. I disagree. It is true that Respondent's documentation procedures are functionally equivalent to formal certification. Most importantly, the training was done and documents, albeit in various forms, were precisely kept. In addition, Mr. Bailey used the information on a consistent basis to monitor the training of his technicians

with respect to truck controls and instrumentation. Regardless, the company chose its system, and when CO Ketcham requested written certification he received none. With respect to the company's system, I find that formal certification in writing should have been readily available for the CO as well as Respondent's management and employees. The standard's requirements are straightforward and clear, and written certification serves a purpose separate and distinct from the actual requirement to document training. Thus, I find that the instructions set forth at CPL 2.111 do not apply to this particular situation.

As noted above, Equipment Depot also contends that if a violation exists, it is purely a technical paperwork violation. Under Respondent's interpretation of the facts, a *de minimis* violation may be found. However, a *de minimis* determination would require no abatement and would do little to ensure compliance with the standard. Stated another way, the worthwhile goal of having the certification readily available for OSHA as well as Equipment Depot's employees and management would not be accomplished. Since the nature of the violation does not lend itself to a serious classification, I find an other-than-serious violation to be appropriate. Item 3b of Citation 1 is therefore affirmed as an "other" violation.

The Secretary proposed a total penalty of $4,000.00 for Items 3a and 3b. The CO testified that he placed the probability of an injury occurring as high and that the severity of such an injury was also high due to the serious injuries that occurred in this case. (Tr. 91). However, the proposed penalty was premised on a belief that Equipment Depot had not trained its employees on truck controls and instrumentation, and I have concluded that Respondent did provide such training. Considering factors relevant solely to the lack of the certification requirement, the gravity of Item 3b is low. Further, the CO did allow a 20 percent reduction for size. On balance, and since the proposed penalty was based primarily on Item 3a, I find a penalty of $350.00 to be appropriate for Item 3b. A penalty of $350.00 is therefore assessed for Item 3b.

Serious Citation 1, Item 4

Item 4 of Citation 1 alleges a violation of 29 CFR 1910.178(m)(5)(iii), as follows:

> When an industrial truck operator was dismounted and within 25 feet of the truck still in his view, the load engine means were not fully lowered, controls were not neutralized, or the brakes were not set to prevent movement:
>
> On or about 4/17/00, in the parking lot of AGE Industries in Belton Texas, an Equipment Depot employee failed to set the parking brake on a Hyster Model S50E industrial truck, exposing the employee to the hazard of being struck by and caught between equipment which resulted in the employees death.

The record demonstrates that the monotrol transmission on the S50E Hyster forklift did not have a neutral gear and that when Mr. Overby was discovered pinned between the forklift and his service truck,

the parking brake was not set. (Tr. 87, 92). Thus, the violation occurred when Mr. Overby failed to set the parking brake on the forklift. Equipment Depot's defense of this item is that the violation was due to employee misconduct. The Commission determined early in its existence that an employer is not the absolute insurer of employee safety, and it developed the affirmative defense of unpreventable employee misconduct. The purpose of this defense, despite its title, is not to place blame on employees. Rather, the defense recognizes that there are situations in which an employer did all that could be expected to prevent a violation. To prove this defense, an employer must show (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated the rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered. *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

With respect to the first requirement, Equipment Depot had, as discussed above, a clear rule that the parking brake must always be set. In fact, this was the first thing a new hire was taught, other than turning the ignition key. Respondent also taught employees the difference between the traditional forward, reverse and neutral on more conventual forklifts and the monotrol system on some of the Hyster forklifts. The rule was specifically addressed in the formal safety training that used both safety manuals and handouts on the subject. Mr. Bailey read the handouts verbatim at the training and employees also received copies of the handouts for future reference. On the day of the accident, Mr. Overby followed the company procedures of driving the forklift away from the customer's work area and tilting the mast and lowering the forks. I find that Respondent has satisfied the first element of its burden of proof.

In regard to the second requirement, the work rule to set the parking brake was ingrained in all employees, including Mr. Overby, from the first day a new hire reported to work. Equipment Depot did not assume a new hire had received such training from a previous employer, even though it hired only experienced workers. Before the accident, Mr. Overby had always followed his training and worked safely. He knew that before starting or dismounting the Hyster S50E, the parking brake had to be engaged. He also knew, from his prior work on the subject forklift, that it would roll if the parking brake was not set. The record shows that Mr. Overby had turned the forklift off before he measured the tires on the day of the accident. The record further shows that Respondent's employees were constantly reminded of this rule. I find that Equipment Depot has met the second element of its defense.

As to the third requirement, "[e]ffective implementation of a safety program requires 'a diligent effort to discover and discourage violations of safety rules by employees.'" *Propellex Corp.*, 18 BNA OSHC 1677, 1682 (No. 96-0265, 1999). Respondent has shown that it made a diligent effort to discover violations of its safety rules. First, as noted above, all supervisors and hourly employees knew the rules.

Second, Mr. Bailey followed through with spot checks of his field service technicians on his frequent visits to customer sites, and he coordinated his visits by consulting the routing board outside his office that showed where each technician was on any given day. Significantly, until Mr. Overby's accident, there had never been a problem with field service technicians not following safety procedures.

Finally, in regard to the fourth requirement, "[t]o prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred." *Gem Indus., Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996). Mr. Bailey testified that he had reprimanded employees for minor safety violations, such as not wearing a safety belt. He also testified that, on balance, his employees were very safety conscious and that his periodic spot checks in the field had detected no major violations of its safety rules. I find that Respondent has met the fourth element of its defense.

Based upon the foregoing, I conclude Respondent could not have anticipated or foreseen that Mr. Overby would restart the subject forklift without first setting the parking brake. Doing so was directly contrary to his training, and Mr. Overby was aware from past experience with that very forklift that it would roll under those circumstances. For these reasons, Item 4 of Citation 1 is vacated.

Repeat Citation 2, Item 1

Item 1 of Citation 2 alleges a violation of 29 CFR 1910.147(c)(5)(i), as follows:

> Locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware were not provided by the employer for isolating, securing, or blocking of machines or equipment from energy sources:
>
> The employer, Equipment Depot LTD., was previously cited for a violation of this Occupational Safety and Health Standard or its equivalent standard 29 CFR 1910.147(c)(5)(i) which was contained in OSHA Inspection Number, Citation Number 1, Item Number 2, issued on 8/7/98, and became a Final Order on 6/199.
>
> a) Tags on the control mechanisms and blocks isolating energy sources on the Hyster Model S50E industrial truck being serviced on the AGE Industries facility parking lot were not provided, exposing employees to the hazards of being struck by or caught between the industrial truck and other objects.

When CO Ketcham arrived at the AGE facility, the Hyster S50E was not tagged or blocked, and he did not see any tags or blocks in the area; further, Mr. Overby's truck was locked and the keys were unavailable, and the CO was thus unable to determine if Mr. Overby had locks or tags with him on April

17, 2000.[13] (Tr. 96, 118, 140). However, CO Ketcham testified that the same two Equipment Depot employees who told him that they had had no safety training, Mr. Capps and Mr. Clark, also told him that there had been times in the six months preceding their interview with the CO when they did not have locks, tags or blocks in their service vehicles. (Tr. 99-101).

It would appear from the foregoing that this citation item was based largely on the statements Mr. Capps and Mr. Clark made to the CO. However, these statements provide an insufficient basis for a finding that, prior to April 17, 2000, Equipment Depot failed to provide tags or blocks. The statements were made out of court, and they are also extremely general and prone to several interpretations. Further, the CO evidently did not obtain written and signed statements from the employees to bolster his testimony at the hearing, and the Secretary did not call either employee as a witnesses. Finally, as found above, the statements of the employees about not having had LOTO training were not supported by the evidence of record. In view of these factors, the statements, although admissible, are accorded no probative value.

The remaining issue is whether Respondent failed to provide "Tags on the control mechanisms and blocks isolating energy sources on the Hyster Model S50E Industrial truck being serviced on the AGE Industries facility parking lot." The record establishes that Equipment Depot purchased tags and blocks and that these items were distributed to the field service technicians and kept in all the service trucks. (Tr. 189, Exh. R-21). Mr. Bailey testified that the company kept a ready supply of blocks in the shop areas and in all the service vehicles and that when he inventoried Mr. Overby's truck after the accident there were blocks in the truck. Mr. Bailey also testified that the parts department distributed tags to the field technicians in bundles and that at every safety meeting he made sure the technicians had plenty of tags. (Tr. 316, 327-28). Mr. Blankenship, the first company employee to arrive at the accident scene, testified that he looked in the back of the truck and saw the usual supply of tags and blocks. (Tr. 262). As noted, the truck was later locked to prevent theft of the tools and equipment in the truck.

[13]The truck had been locked to protect against theft of the tools and equipment in it, and the keys were in Mr Overby's clothes at the hospital. (Tr. 118, 140, 192-93).

Based on the foregoing, Respondent has shown that it provided tags and blocks to its field service technicians. Respondent has also shown that, on the day of the accident, there were tags and blocks in Mr. Overby's truck. In view of the record, Item 1 of Citation 2 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Item 1a, alleging a serious violation of 29 CFR 1910.147(c)(4)(i), is VACATED.

2. Citation 1, Item 1b, alleging a serious violation of 29 CFR 1910.147(c)(7)(i), is VACATED.

3. Citation 1, Item 2, alleging a serious violation of 29 CFR 1910.147(f)(2)(i), is AFFIRMED, and a penalty of $1,625.00 is assessed.

4. Citation 1, Item 3a, alleging a serious violation of 29 CFR 1910.178(l)(3)(i)(c), is VACATED.

5. Citation 1, Item 3b, alleging a serious violation of 29 CFR 1910.178(l)(6), is AFFIRMED as an other-than-serious violation, and a penalty of $350.00 is assessed.

6. Citation 1, Item 4, alleging a serious violation of 29 CFR 1910.178(m)(5)(iii), is VACATED.

7. Repeat Citation 2, Item 1, alleging a violation of 29 CFR 1910.147(c)(5)(i) is VACATED.

/s/
Stanley M. Schwartz
Judge, OSHRC

Dated: February 6, 2003