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. BURKES MECHANICAL, INC., Respondent.	OSHRC Docket No. 04-475

APPEARANCES:

Stephen D. Turow, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Charles James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Howard M. Radzely, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Carla J. Gunnin, Esq.; Constangy, Brooks & Smith, LLC, Atlanta, GA
For the Respondent

DECISION

Before: THOMPSON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

Before the Commission is a decision by Administrative Law Judge Ken S. Welsch affirming citations issued to Burkes Mechanical, Inc. (BMI) under 29 C.F.R. § 1910.147, the general industry lockout/tagout (LOTO) standard, and 29 C.F.R. § 1910.261(b)(1), the lockout standard specific to pulp, paper, and paper board mills. At the time of these alleged violations, BMI was a contractor engaged primarily in machine repair for Gulf States Paper Company, Inc. (Gulf States), a paper mill located in Demopolis, Alabama. On September 24, 2003, a BMI employee at the Gulf States paper mill suffered fatal injuries resulting from an accident involving a fuel wood conveyor.

Following the accident, OSHA issued two citations to BMI. The first citation alleges a serious violation of 29 C.F.R. § 1910.147(c)(4)(i) for failure to utilize LOTO procedures when

employees were cleaning around and underneath a running conveyor, and a serious violation of 29 C.F.R. § 1910.147(c)(7)(i) for failure to train these employees on the purpose and function of BMI's LOTO program; and the second citation alleges a willful violation of § 1910.261(b)(1) for failure to lock out the conveyor before employees cleaned around and underneath it.[1]

At issue on review is whether the cited standards apply to the circumstances of this case, whether the violations of §§ 1910.147(c)(4)(i) and 1910.261(b)(1) are duplicative, and whether the violation of § 1910.261(b)(1) was properly characterized as willful. For the following reasons, we affirm the judge's decision that the standards apply and that the violations are not duplicative, but we characterize the violation of § 1910.261(b)(1) as serious and group the violations of §§ 1910.261(b)(1) and 1910.147(c)(4)(i) for purposes of assessing a penalty.

Background

Over the last fifteen to twenty years, BMI has repaired and upgraded machinery and equipment at the Gulf States paper mill. The fuel wood conveyor, the machine at issue in this case, is 108 feet long and 42 inches wide, and runs 250 feet per minute at a 15- to 18-degree upward angle. The conveyor starts below ground, travels through an enclosed area known as the "bark pit"—the area where the fatal accident occurred—and then feeds wood into a hogger for processing. The fuel wood conveyor has a start/stop button, as well as a safety pull cord that runs alongside the portion of the conveyor located inside the bark pit.

During normal production operations, the fuel wood conveyor produces some debris in the bark pit, consisting mostly of dust. Ordinarily, Gulf States employees would wash this debris to a sump pump by spraying the bark pit with a hose, but prior to the accident, BMI modified an in-feed chute, causing unusual amounts of debris to spill onto the bark pit floor. On September 23, 2003, Gulf States instructed BMI to clean up around the bark pit and conveyor. That day and the next, the BMI laborers worked inside the bark pit to remove the debris that had spilled onto the floor.

In order to enter the bark pit, the laborers had to climb down a staircase that runs parallel to the fuel wood conveyor. The bark pit contains four areas labeled A, B, C, and D. The BMI laborers

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[1] OSHA also cited BMI for a serious violation of 29 C.F.R. § 1910.261(a)(3)(v) because "[e]mployees working on or near a running conveyor were not instructed as to the location and operation of pertinent stopping devices." As to this citation item, BMI withdrew its notice of contest at the hearing. Accordingly, the judge affirmed the violation and assessed the $6,300 proposed penalty.

removed debris from underneath the conveyor in both Areas B and C. Area B starts at the tail pulley of the conveyor and ends at a 54-inch concrete ledge adjacent to the staircase. Near the tail pulley—the lowest point in Area B—the clearance between the belt and the floor is approximately 24 inches; at the end of the staircase railing, the clearance is 56 inches; and immediately before the concrete ledge—the highest point in Area B—the clearance is 82 inches. The concrete ledge marks the beginning of Area C. Part of the floor in this area slopes upwards at approximately the same angle as the conveyor, and the clearance between the floor and the belt is 28 to 34 inches. To access Area C, the laborers had to either crawl along the stairway side of the conveyor or climb onto the concrete ledge. In these areas, several idlers rotate at approximately 159 revolutions per minute when the conveyor belt is running.

Discussion

I. Applicability of the Cited Standards

A. Citation 2, Item 1—29 C.F.R. § 1910.261(b)(1)

Under this citation item, the Secretary alleges that BMI violated § 1910.261(b)(1) because "[e]mployees were cleaning around and under a conveyor belt and the belt had not been locked out." Section 1910.261(b)(1) requires as follows:

> Before any maintenance, inspection, cleaning, adjusting, or servicing of equipment (electrical, mechanical, or other) that requires entrance into or close contact with the machinery or equipment, the main power disconnect switch or valve, or both, controlling its source of power or flow of material, shall be locked out or blocked off with padlock, blank flange, or similar device.

BMI does not dispute that the belt was not locked out. It argues only that § 1910.261(b)(1) is inapplicable because its employees were not engaged in a covered activity. We disagree with BMI.

The record shows the BMI laborers cleaned debris from underneath the fuel wood conveyor because the debris affected, or had the potential to affect, the operation of the conveyor. BMI's activities clearly constituted "maintenance" and "cleaning . . . of the equipment." *See* 29 C.F.R § 1910.261(b)(1). Also, given the limited clearance between the bark pit floor and the conveyor belt, we find that employees cleaning underneath the conveyor in Areas B and C were in "close contact with the machinery." *See id.* Indeed, one laborer accidentally bumped his hardhat on the belt while he cleaned underneath the conveyor in Area B, and another laborer died after his arm and shovel became tangled between a rotating idler and the moving belt while he cleaned in Area C. We therefore conclude that § 1910.261(b)(1) applies to the cited conditions and affirm a violation of § 1910.261(b)(1).

B. Citation 1, Items 1 & 2—29 C.F.R. § 1910.147(c)(4)(i) and (c)(7)(i)

Under Item 1, the Secretary alleges that BMI violated § 1910.147(c)(4)(i)[2] because "lockout/tagout procedures were not utilized when employees were cleaning around and under a running conveyor belt." Under Item 2, she alleges that BMI violated § 1910.147(c)(7)(i)[3] because "employees in the cleaning crew were not trained on the purpose and function of the employer's lockout/tagout program."

To prove that the provisions of § 1910.147 apply, the Secretary generally must show the cited conditions involve 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." 29 C.F.R. § 1910.147(a)(1)(i) (emphasis in original). Here, however, the Secretary maintains such a showing is unnecessary because the cited work activity is covered by the scope requirements of § 1910.261(b)(1)—the industry-specific lockout standard, which does not include "unexpected energization" as a trigger for applicability. In support, the Secretary relies upon 29 C.F.R. § 1910.147(a)(3)(ii), which states "[w]hen other standards in this part require the use of lockout or tagout, they shall be used and supplemented by the procedural and training requirements of this section." Conversely, underlying BMI's approach to this issue is the assumption that in this case, coverage of the LOTO standard is defined solely by the scope and application provisions of § 1910.147. Under the circumstances present here, we need not decide which scope provision is controlling because under either scope provision, § 1910.261(b)(1) or § 1910.147, BMI was required to comply with the requirements of the cited LOTO provisions.

1. Coverage through 29 C.F.R. § 1910.261(b)(1)

As we found in the previous section, the BMI laborers' work activity—cleaning underneath the conveyor belt in Areas B and C—falls within the activities specified in § 1910.261(b)(1), which include "any maintenance, inspection, cleaning, adjusting, or servicing of equipment (electrical, mechanical, or other) that requires entrance into or close contact with the machinery or equipment."

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[2] Section 1910.147(c)(4)(i) requires that procedures "be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section."

[3] Section 1910.147(c)(7)(i) requires employers to "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."

Thus, if we were to accept the Secretary's contention that § 1910.147(a)(3)(ii) limits proof of coverage to the scope set forth in § 1910.261(b)(1), we would conclude that the lockout requirements of that specific provision, which clearly apply to BMI, are supplemented by § 1910.147(c)(4)(i) and (c)(7)(i).

2. Coverage through 29 C.F.R. § 1910.147

Likewise, if we were to accept that the applicability of the cited provisions is defined solely in this case by the relevant scope and application provisions of § 1910.147, we would also find that the BMI laborers' work activity is covered by the LOTO standard. Section 1910.147(a)(1)(i) specifies that the LOTO standard covers "the servicing and maintenance of machines and equipment."[4] "[S]ervicing and/or maintenance" is defined as "[w]orkplace activities such as

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[4] Section 1910.147(a)(1)(i) further limits the scope of the LOTO standard by specifying that its requirements apply only to "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." (Emphasis in original.) The term "*unexpected* energization" is not defined in § 1910.147. However, in *Reich v. General Motors Corp., Delco Chassis Division*, 89 F.3d 313 (6th Cir. 1996) ("*GM-Delco*"), the Sixth Circuit made the following observations about the term "unexpected":

> We conclude that the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate. In such a situation, "energization" of the machine cannot be said to be "unexpected" since the employee knows in advance that machine startup is imminent and can safely evacuate the area. The standard is meant to apply where a service employee is endangered by a machine that can start up without the employee's foreknowledge. In the context of the regulation, use of the word "unexpected" connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot start up without giving a servicing employee notice of what is about to happen.

Id. at 315.

GM-Delco is easily distinguished from the instant case. The deactivated machines in *GM-Delco* had specific precautions designed to ensure employees had adequate notice to get out of the way before start-up occurred. *Id.* Unlike those machines, the fuel wood conveyor here was neither deactivated nor "designed and constructed" to eliminate unexpected energization. Rather, without providing notice to nearby workers, the running conveyor could have been stopped and restarted by simply pressing a button, and the accumulation of debris could have caused material to get caught underneath the belt, resulting in a stoppage. Moreover, the BMI laborers cleaning in the bark pit were positioned in such a way that the conveyor could have unexpectedly caught hold of their tools, clothing, or body parts—all types of hazards § 1910.147 was intended to eliminate. *See* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,647. *See also* Memorandum from

constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipments[,]" including activities such as "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." 29 C.F.R. § 1910.147(b) (emphasis in original).

BMI argues the LOTO standard is inapplicable here because its employees were aware the conveyor was running while they cleaned underneath it. However, contrary to BMI's claim, "[s]ervicing and/or maintenance which takes place during normal production operations is covered" if, *inter alia*, "[a]n employee is required to remove or bypass a guard or other safety device . . . or where an associated danger zone exists during a machine operating cycle." 29 C.F.R. § 1910.147(a)(2)(ii). Moreover, as OSHA explains in the preamble, "operations such as cleaning and unjamming machines or equipment are covered by this standard when the employee is exposed to greater or different hazards than those encountered during normal production operations." *See* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,647. Rather than being able to stand away from the fuel wood conveyor and use a hose to clean the bark pit, the BMI laborers were forced to work around and underneath the conveyor because an abnormal amount of debris had accumulated on the bark pit floor such that further accumulation of the debris could have stopped the conveyor from running. In performing this task, one laborer was exposed to a moving belt and rotating idler as he worked clearing debris in Area C, and another laborer bumped his hardhat on the moving belt as he worked in Area B. Indeed, both the compliance officer and a Gulf States manager recognized that the conveyor posed a danger to those who cleaned up debris while located in either of these areas.

The preamble discusses hazards—quite similar to those presented in this case—that pertain to servicing or maintaining a machine during normal production operations:

> Performance of maintenance or servicing activities on a machine or equipment that is in operation has the potential of exposing employees not only to contact with moving machinery components at the point of operation, but also to contact with other moving components, such as power transmission apparatus, and also increases the risk of injury due to the position the employee must assume and the need to remove, bypass or disable guards and other safety devices. In many cases, these activities

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Richard E. Fairfax, Director, OSHA Directorate of Compliance Programs, to Michael Connors, OSHA Regional Administrator, dated October 5, 1999.

> expose the employee to the hazard of being pulled into the operating equipment when parts of the employee's body, clothing or the material or tools used for cleaning or servicing become entrapped or entangled in the machine or equipment mechanism. The use of extension tools or devices to permit the operator to stay outside these danger areas, while of some benefit in reducing direct employee exposure to the hazards of entanglement or entrapment, can, in itself, result in injuries to employees. This can occur, for example, when an employee is struck by the tools or devices that inadvertently come in contact with moving machine components, and are pulled from the employee's grasp.

See Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,647. Here, an increased risk of injury existed for those BMI laborers cleaning in Areas B and C who had to assume cramped, awkward positions while shoveling the debris in close contact with the operating equipment and were, thus, exposed to the hazard of being pulled into the operating equipment. For all of these reasons, if we were to accept that § 1910.147 rather than § 1910.261(b)(1) defines the scope of the LOTO standard, we would conclude that the BMI laborers engaged in a covered servicing or maintenance activity when they cleaned underneath the fuel wood conveyor in Areas B and C.[5]

We therefore conclude that regardless of which provision defines the scope of § 1910.147, BMI was required to utilize LOTO procedures and provide appropriate LOTO training to its employees. Because it is undisputed that BMI failed to comply with either of these requirements, we affirm violations of § 1910.147(c)(4)(i) and (c)(7)(i).[6]

II. Characterization of Citation 2, Item 1

A willful act is "one committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.'" *See Spirit Homes, Inc.*, 20 BNA OSHC 1629, 1630, 2002-04 CCH OSHD ¶ 32,714, p. 51,820 (No. 00-1807, 2004)

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[5] BMI argues that the Secretary failed to prove the company knew an employee would be exposed to a hazard. We find the record reflects, at the very least, that BMI could have known of the violative conditions with the exercise of reasonable diligence. BMI supervisors knew that employees were cleaning debris from the bark pit floor while the fuel wood conveyor was operating. Had the supervisors exercised reasonable diligence, one or both of them could have realized the extent and location of the debris underneath the conveyor belt, and that cleaning up the debris as instructed had placed the laborers in danger. *See Interstate Brands Corp.*, 20 BNA OSHC 1102, 1104 n.7, 2002-04 CCH OSHD ¶ 32,656, p. 51,319 n.7 (No. 00-1077, 2003) (to prove violation, Secretary must show, *inter alia*, that "employer either knew of the violative conditions or could have known with the exercise of reasonable diligence").

[6] Because BMI does not dispute the characterization of these violations, we affirm them as serious.

(consolidated cases) (quoting *Williams Enters., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). "'The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.'" *See id.* (quoting *Propellex Corp.*, 18 BNA OSHC 1677, 1684, 1999 CCH OSHD ¶ 31,792, p. 46,591 (No. 96-265, 1999)).

The judge characterized the violation of § 1910.261(b)(1) as willful because he found BMI to be plainly indifferent to employee safety. On review, BMI argues that the judge erred because neither Bill Paulk nor Dannie Lee Reese, BMI's superintendent and foreman, respectively, had the requisite state of mind for a finding of willfulness. For the following reasons, we reverse the judge and characterize this violation as serious.

Nothing in the record suggests BMI intentionally, knowingly, or voluntarily disregarded the requirements of § 1910.261(b)(1). Therefore, the only issue is whether BMI was plainly indifferent to employee safety. As to Paulk,[7] the record lacks evidence he either observed any employees underneath the fuel wood conveyor or knew debris was in Areas B or C. Rather, on the day before the accident, Paulk told Reese "to clean all the bark that had spilled from [Area] D all the way to [Area] A" and to shovel the debris onto the belt. That afternoon or the next morning, Paulk stepped in the door of the bark pit and saw Reese on the stairs and the laborers standing in Area A. Paulk thought Reese was only going to clean up around the stairs and in Area A because he "never looked at Area B." As to Reese,[8] the record reflects he was away from the bark pit when one of the laborers decided to crawl into Area C and shovel debris. Although Reese was aware employees were shoveling debris from underneath the conveyor belt in Area B, the record does not reflect whether

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[7] Because Paulk was the worksite superintendent, his state of mind could be imputed to BMI for purposes of finding that the violation was willful. *See Branham Sign Co.*, 18 BNA OSHC 2132, 2134, 2000 CCH OSHD ¶ 32,106, p. 48,263 (No. 98-752, 2000).

[8] BMI argues that Reese's state of mind cannot be imputed to BMI because he was a foreman, not a supervisor. The Commission, however, has held that "[t]he actual or constructive knowledge of the employer's foreman . . . can be imputed to the employer." *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1164, 1993-95 CCH OSHD ¶ 30,041, p. 41,216 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994) (unpublished table decision); *see also Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080, 2002-04 CCH OSHD ¶ 32,657, p. 51,326 (No. 99-0018, 2003) ("our precedents establish that job titles are not controlling and that the power to hire and fire is not the *sine qua non* of supervisory status, which can be established on the basis of other indicia of authority that the employer has empowered a foreman or other employee to exercise on its behalf").

his LOTO training would have made him aware that he was required to lockout the conveyor before employees could clean underneath it.[9]

Moreover, we disagree with the judge that BMI's failure to protect the laborers while they cleaned underneath the conveyor rises to the level of plain indifference. *See Branham Sign Co.*, 18 BNA OSHC 2132, 2134, 2000 CCH OSHD ¶ 32,106, p. 48,263 (No. 98-752, 2000) (Secretary can establish willfulness by showing that "employer had a state of mind such that, if informed of the duty to act, it would not have cared"). The record shows that Paulk never entered the bark pit to conduct a hazard assessment even though he knew the conveyor was running. While Paulk was aware of the danger associated with working underneath the conveyor and was familiar with the configuration of the bark pit, his awareness establishes only constructive knowledge, not plain indifference to employee safety. *See AJP Constr. Inc. v. Sec'y*, 357 F.3d 70, 75 (D.C. Cir. 2004) (constructive knowledge or mere negligence is adequate for non-willful violation, but willfulness requires conscious disregard of, or plain indifference to, OSH Act's requirements).

The judge considered BMI's contention that Reese "simply did not recognize any hazard," and never intended for anyone to enter Area C underneath the conveyor, to be evidence that BMI's LOTO training was deficient. We do not doubt that an adequately trained foreman would have known to lock out the conveyor before allowing employees to work underneath it. But BMI's failure to adequately train its employees does not on this record rise to the level of plain indifference in order to establish a willful violation of § 1910.261(b)(1). *Cf. Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1892-94, 1995-97 CCH OSHD ¶ 31,228, p. 43,788-91 (No. 92-3684, 1997) (plain indifference found based on failure to provide employees with means essential for compliance—including safety program, training, and protective equipment—combined with supervisory involvement in the violation and apparent failure to take remedial action after recent receipt of two other citations for violations of same standard at other sites).

Accordingly, we conclude that BMI did not willfully violate § 1910.261(b)(1). The accident that occurred as a result of BMI's failure to lockout the conveyor demonstrates the seriousness of

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[9] We also note that there was somewhat conflicting testimony with respect to Reese's awareness that an employee working in area B had complained about his hard hat hitting the conveyor. The employee testified that he had complained to Reese, Reese denied hearing this, and the employee was uncertain whether Reese actually heard him. Under these circumstances, we cannot find that Reese was aware of the complaint.

this violation. Therefore, we find that the record supports a serious characterization. *See* 29 U.S.C. § 666(k); *Stanley Roofing Co.*, 21 BNA OSHC 1462, 1466, 2005 CCH OSHD ¶ 32,792, p. 52,435 (No. 03-997, 2006) (violation found serious rather than willful where seriousness was evident from the record).

III. Duplicativeness

Violations are duplicative "where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement of the other item as well." *See Rawson Contractors, Inc.*, 20 BNA OSHC at 1082 n.5, 2002-04 CCH OSHD at p. 51,328 n.5. BMI argues that the violations alleged under §§ 1910.147(c)(4)(i) and 1910.261(b)(1)—Citation 1, Item 1, and Citation 2, Item 1—are duplicative because the use of its LOTO procedures in accordance with § 1910.147(c)(4)(i) would necessarily require its employees to lock out the fuel wood conveyor in accordance with § 1910.261(b)(1). The judge rejected this argument, finding that the standards are "directed at fundamentally different conduct." *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2207, 1991-93 CCH OSHD ¶ 29,964, p. 41,027 (No. 87-2059, 1993).

Section 1910.147(c)(4)(i) mandates the use of a comprehensive energy control program when employees are engaged in activities covered by the standard. This program must include "[s]pecific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy[,]" and "for the placement, removal and transfer of lockout devices and tagout devices and the responsibility for them[,]" and "[s]pecific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures." 29 C.F.R. § 1910.147(c)(4)(ii). In contrast, § 1910.261(b)(1) is narrower and merely requires the "main power disconnect switch or valve, or both" to be locked out or blocked off before employees engage in the covered activities. Whereas § 1910.147(c)(4)(i) primarily focuses on an employer's specific procedures for controlling hazardous energy, including verification, § 1910.261(b)(1) is solely concerned with the act of locking out the machinery and equipment. Based on this distinction, we conclude that § 1910.147(c)(4)(i) is broader and accordingly the two citation items are not necessarily duplicative. *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32,056 (No. 76-4765, 1981) (items not duplicative even though the abatement requirements of two applicable standards may be satisfied by compliance with more comprehensive standard).

However, under the circumstances of this case, it appears that had BMI complied with the lock-out procedures they had adopted pursuant to § 1910.147(c)(4)(i), they would have complied with § 1910.261(b)(1). Accordingly, we find it appropriate to group Citation 1, Item 1, and Citation 2, Item 1, which allege violations of §§ 1910.147(c)(4)(i) and 1910.261(b)(1), for penalty purposes. *See Pegasus Tower*, 21 BNA OSHC 1190, 1191, 2005 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-547, 2005) (appropriate to assess "one penalty" for "closely-related violations" (citing *L.E. Myers Co.*, 16 BNA OSHC 1037, 1048, 1993-95 CCH OSHD ¶ 30,016, pp. 41,134-35 (No. 90-945, 1993))).

IV. Penalty

In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). With regard to gravity, the record shows there was a prolonged, significant risk of serious injury or death while the BMI laborers worked underneath the conveyor, and BMI's supervisors did nothing to mitigate this risk. The fact that one laborer died because the conveyor was not locked out, and another hit his hardhat on the belt, illustrate the continuing danger to which the laborers were subjected. Under these circumstances, we find the gravity of these violations to be high. *See Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005) ("Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury."). With regard to good faith, we are disturbed by Paulk's failure to inspect the bark pit and Reese's lack of knowledge regarding LOTO procedures. While these facts alone do not support a finding of willfulness here, we find the conduct of these supervisors negates any good faith for the purposes of determining an appropriate penalty. Finally, the large size of BMI's business warrants no reduction in penalty,[10] but we do give credit for BMI's lack of prior history. Based on the foregoing, we find a single penalty of $6,300 to be appropriate for the two grouped citation items. We find no reason to depart from the judge's assessment of $4,000 for Citation 1, Item 2.

[10] At the time of the alleged violations, BMI employed more than 220 employees, although only approximately eight of them worked at Gulf States.

Order

We affirm Citation 1, Items 1 and 2, as serious. We also affirm Citation 2, Item 1, but reverse the judge and characterize the violation as serious. For penalty purposes, we group the violations alleged in Citation 1, Item 1, and Citation 2, Item 1, and assess a single penalty of $6,300. We assess a penalty of $4,000 for Citation 1, Item 2.

SO ORDERED.

/s/
Horace A. Thompson III
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: July 12, 2007

Secretary of Labor,

Complainant

v.

Burkes Mechanical, Inc.,

Respondent.

OSHRC Docket No. **04-0475**

Appearances:

Karen E. Mock, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Carla J. Gunnin, Esquire
Constangy, Brooks & Smith, LLC
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Burkes Mechanical, Inc. (BMI), a mechanical contractor, works on projects for Gulf States Paper Corporation in Demopolis, Alabama. On September 24, 2003, a BMI laborer, while attempting to clean the floor underneath a running conveyor in the bark pit, died when his arm was caught between the return idler and the conveyor belt. The Occupational Safety and Health Administration (OSHA) investigated the accident and issued BMI serious and willful citations on February 23, 2004. BMI timely contested the citations.

Citation No. 1 alleges serious violations of 29 C.F.R. § 1910.147(c)(4)(i) (item 1) for failing to utilize lockout/tagout (LOTO) procedures when its laborers were cleaning around and under an operating conveyor; 29 C.F.R. § 1910.147(c)(7)(i) (item 2) for failing to train its laborers on the purpose and function of LOTO; and 29 C.F.R. § 1910.261(a)(3)(v) (item 3) for failing to instruct its laborers working near and under an operating conveyor as to the location and operation of pertinent stopping devices. A penalty of $6,300 is proposed for each alleged serious violation.

Citation No. 2 alleges a willful violation of 29 C.F.R. § 1910.261(b)(1) for failing to lockout the conveyor belt when its laborers were cleaning around and under the conveyor in the bark pit. A

penalty of $63,000 is proposed for the alleged willful violation.

The hearing was heard on July 1 and 2, 2004, in Demopolis, Alabama. The parties stipulated jurisdiction and coverage (Tr. 4). After the Secretary amended Citation No. 1, item 3, to reference §10(j) of ANSI B20.1-1957 instead of §5.12(e), BMI withdrew its contest to item 3, as amended, and the proposed penalty of $6,300 (Tr. 10-11). At the request of the parties, this judge personally observed the conveyor and the bark pit on July 1, 2004 (Exh. ALJ-1; Tr. 231).

BMI denies the alleged remaining violations and asserts that the LOTO standards were not applicable to its labor crew's clean-up work around and under the conveyor. If found applicable, BMI argues that items 1 and 2 of Citation No. 1 are duplicative. BMI also denies that a violation of § 1910.261(b)(1) was willful.

For the reasons discussed, the citations are affirmed and a total penalty of $ 28,300 is assessed.

The Accident

BMI repairs and upgrades machinery and equipment for companies including Gulf States Paper Corporation in Demopolis, Alabama. BMI employs more than 220 employees. It has worked at the Gulf States' paper mill in Demopolis as a resident contractor for more than fifteen years. There are approximately eight BMI employees working at the mill. The paper mill manufactures paper products such as linear board for boxes (Tr. 27, 133, 245, 404).

On September 8, 2003, the Gulf States mill completed an outage for the purpose of modifying and upgrading machinery and equipment in its bark system. Among the modifications, BMI made changes to the infeed chute to the conveyor in the bark pit and the hogger platform. The bark system returned to operation on September 9, 2003 (Tr. 125, 127, 129-130).

During normal operations, the bark pit operates continuously from 12:00 a.m. Monday until 5:00 p.m. Saturday. There are no employees assigned to work in the bark pit. The bark pit is an enclosed underground area. Fuel wood used to power the paper mill is unloaded from trucks into a dumper which drops it below ground onto the B1 conveyor, which moves the fuel wood to a chute that feeds onto the B2 conveyor. The B2 conveyor moves the fuel wood on an incline from the bark pit below ground to the hogger, which is approximately 20 feet above the ground. The B2 conveyor is approximately 100 feet long (Exh. ALJ-1; Tr. 29, 73, 243).

To access the bark pit, there is a small door which opens onto thirteen cement steps. The steps are adjacent to the portion of the B2 conveyor inside the bark pit. The conveyor's tail pulley is approximately 2 feet above the floor of the bark pit. The floor surrounding the tail pulley and approximately the first 17 feet under the B2 conveyor are flat. The floor area under the B2 conveyor beside the stairway is sloped at approximately the same 18-degree angle as the conveyor. In this sloped floor area, the conveyor is 34 inches above the floor. Separating the bark pit floor from the sloped floor adjacent to the stairway is a wall measuring 54 inches high. There is an additional 28 inches of head space at the wall below the inclined conveyor. The conveyor belt is 42 inches wide and travels at approximately 250 feet per minute. The top side of the B2 conveyor belt is curved to hold the fuel wood. On its return side, the belt is flat and held against the conveyor by several rollers (or idlers) which are 42 inches long and 6 inches in diameter. The idlers rotate at approximately 159 revolutions per minute. There are two idlers inside the bark pit: one approximately 5 feet above the floor area which is flat, and the other one above the sloped floor adjacent to the stairway. The B2 conveyor has a start/stop button and an emergency stop cord which runs alongside the conveyor from the tail pulley to outside the bark pit (Exhs. C-1, C-2; Tr. 31-33, 56, 68, 94, 242-245, 260).

After the bark pit returned to operation, excessive amounts of bark and wood chips began spilling from the B2 conveyor onto the bark pit floor. To stop the spillage, BMI made additional modifications to the system over the next three weeks including Tuesday, September 23, 2003 (Tr. 105, 126-129, 137-138, 363). When making the modifications, the B2 conveyor was shut off, de-energized, and locked out (Tr. 275-276, 364-365). Otherwise, the conveyor remained in operation.

On September 23, 2003, Gulf States requested BMI superintendent Bill Paulk to have his labor crew remove the excessive bark debris from the bark pit floor. The labor crew consisted of foreman Dannie Reese and laborers Anthony Packer, Daniel Ruffin, and Terry Cheeseboro (Tr. 144, 147, 149, 154). The crew worked approximately four hours on September 23 cleaning the debris around the tail pulley area of the conveyor. While the crew worked, the B2 conveyor continued to run (Exh. R-1; Tr. 186). The crew, with the use of rakes, shovels and a wheelbarrow, cleaned the floor and placed the bark debris onto the conveyor (Tr. 154, 158, 187).

On September 24, 2003, the labor crew returned to the bark pit to complete the cleanup. The

B2 conveyor remained in operation (Tr. 261). The crew cleaned the stairway and the floor underneath the conveyor. To clean underneath the conveyor, the crew could only stand upright in a small area underneath the B2 conveyor at a cement wall below the sloped floor area (Exhs. C-5, C-6; Tr. 92-93, 236). Laborer Packer testified that his hardhat continued to be hit by the returning conveyor belt. He was told by foreman Reese to take a break (Tr. 188).

When foreman Reese left the bark pit to locate a skip pan, laborer Cheeseboro crawled underneath the B2 conveyor on the sloped floor adjacent to the stairway to clean out the bark debris (Tr. 160,168-169, 191, 193). The conveyor belt and idlers were less than 34 inches above the sloped floor. After handing out three shovelfuls of debris to laborer Packer, Cheeseboro's arm and the shovel became caught between the return idler and conveyor belt (Tr. 196, 198). The laborers tried to pull him out by his legs because they did not know how to stop the conveyor (Tr. 195-197). The conveyor was eventually stopped by foreman Reese (Tr. 160, 199-200).

As a result of the accident, OSHA compliance safety officer Dimitrios Critopoulos conducted an investigation (Tr. 215). As a result of his investigation, BMI was issued serious and willful citations for violations of the LOTO standards under §§ 1910.147 and 1910.261, which are applicable to paper mills.[1]

Discussion

BMI disputes the application of the LOTO standards at § 1910.147 or § 1910.261 regarding its cleanup activities around and under the B2 conveyor. BMI argues the employees were not performing service or maintenance work on the conveyor as required by LOTO.

Application of the
Lockout/Tagout Standards

BMI has written LOTO procedures which it utilized when modifying or repairing the bark pit equipment and machinery during the mill outage and when making additional modifications after the outage (Tr. 221, 252). On September 23 and 24, 2003, however, while the labor crew was

[1] Section 1910.261 standards are the specific standards applicable to pulp, paper, and paperboard mills. Because the accident occurred at a paper mill, generally the more specific standards apply. However, the general industry standards, including LOTO at § 1910.147, are incorporated by reference into § 1910.261 and are intended to supplement the more specific standards. *See* § 1910.261(a)(2).

cleaning up bark debris from the cement floor caused by BMI's modifications, BMI's LOTO procedures were not utilized and the B2 conveyor remained in operation (Tr. 261). There is no dispute the two rotating idlers below the conveyor belt created a potential "caught-in" hazard. One idler was less than 5 feet above the flat floor, and the other idler where Cheeseboro became caught was less than 34 inches above the sloped floor.

The LOTO standards are intended to address the "practices and procedures that are necessary to disable machinery or equipment and to prevent the release of potentially hazardous energy while maintenance and servicing activities are being performed." 54 FR 36,644 (September 1, 1989) (Exh. R-2). LOTO's scope provision states that "[t]his 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." 29 C.F.R §1910.147(a)(1)(i) (emphasis in original).

The application of the LOTO standards is described in § 1910.147(a)(2) which provides, in part:

> (i) This standard applies to the control of energy during servicing and/or maintenance of machines and equipment.
>
> (ii) Normal production operations are not covered by this standard (See subpart O of this part). Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if:
>
> (A) An employee is required to remove or bypass a guard or other safety device; or
>
> (B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle.
>
> *NOTE: Exception to paragraph (a)(2)(ii):*
>
> Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See subpart O of this part).

The Secretary defines "servicing and/or maintenance" in § 1910.147(b) as:

> 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.

BMI's argument that the LOTO requirements is limited only to service and maintenance activities performed on the machine or equipment is rejected. BMI's reading of the LOTO standards is too narrow under the facts in this case and contrary to the intent of LOTO. The Secretary does not use the word "on" which connotes "contact," but instead chooses to use the preposition "of" to describe the location of the service and maintenance. The Secretary's definition and her language throughout the LOTO standards make it clear that servicing and maintenance include workplace activities performed on or relative to the machines or equipment.[2] There must be some type of service or maintenance work activity which is occurring with the machines or equipment. The Secretary's intent is shown in the preamble to the LOTO standards where she identifies several accidents showing the typical hazards and demonstrating the applicability of pertinent LOTO provisions. One such accident appearing similar to this case involved an employee cleaning scrap from beneath a large shear when another employee hit the control button activating the blade. This in turn decapitated the employee cleaning up the scrap. 54 FR 36,644, September 1, 1989 . The Secretary considered this incident to violate LOTO § 1910.147(c)(2) (Exh. R-2, p. 7). It is noted that § 1910.261(b)(1) states, in part:

> Before any maintenance, inspection, cleaning, adjusting, or servicing of equipment that requires entrance into or close contact with the machinery or equipment...the equipment must be locked out.

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[2] In interpreting the language of the statute, its wording must be interpreted in a reasonable manner consistent with a common sense understanding. *Globe Industries*, 10 BNA OSHC 1596 (No. 77-4313, 1982). The words are to be viewed in context, not in isolation, and judged in light of its application to the facts of the case. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-531, 1991).

In this case, BMI's labor crew was cleaning up the excessive spillage of bark debris after BMI's service work on the infeed chute and head pulley to the B2 conveyor. The crew's cleanup work was related to and an adjunct to BMI's modifications to the bark pit equipment. The excessive spillage on the bark pit floor was caused by BMI's modifications to the equipment (Tr. 73, 105-106, 128). It is noted that BMI's interpretation as to the application of LOTO is contrary to its own practice. It appears that when BMI's crew was making modifications to the head pulley, the B2 conveyor was locked out (Tr. 275-276, 370-371).

Additionally, the bark debris was excessive and the accumulation could have interfered with the mechanical integrity of the conveyor (Tr. 285-286). BMI superintendent Paulk testified that he was concerned that the excessive accumulation of debris on the stairway, if it fell, could "get up under the bottom of the belt" (Tr. 406). He believed that the accumulation could have stopped the conveyor from running and, consequently, interfere with normal operations (Tr. 402). Paulk also testified in response to a question about how he knew there was bark spillage to clean up, that:

> "Because they called me over there and said they had a problem with the conveyor that had stopped up, and we had worked on it that day, repairing it, you know, getting it unstopped" (Tr. 364).

Gulf States told CO Critopoulos that the accumulations were interfering with the operation of the conveyor (Tr. 343). BMI's clean-up activity was an integral part of BMI's servicing and maintenance activities in keeping the bark pit in operation. BMI foreman Reese also believed the conveyor had "stopped up" because of the accumulation of debris (Tr. 168).

BMI argues that after the outage was completed, the B2 conveyor was in normal production operation.[3] According to Gulf States, the conveyor was back in a production mode on September 8, 2003 (Tr. 129). As stated by OSHA in the preamble:

> Whereas the definition of servicing or maintenance includes those activities which require an employee to remove or bypass guards or other safety devices or to otherwise expose himself/herself to hazardous machine elements, the standards for machine guarding offer protection when the machine is being used in the manner in which it was designed and intended to be used, that is when the machine or equipment

[3]"Normal production operations" is defined as "[T]he utilization of a machine or equipment to perform its intended production function." *See* § 1910.147(b).

> is used to perform its intended production function. 54 FR 36644 (September 1, 1989) (Exh. R-2, pg 56).

Although the conveyor was in operation after the outage, BMI, during the next three weeks, including September 23, 2003, performed additional service and maintenance work on the infeed chute and pulleys to prevent the excessive spillage of bark debris (Tr. 105-106). When making these modifications, the conveyor was locked out (Tr. 363). It is noted that even if the conveyor were in normal production, LOTO requires locking out if the service or maintenance requires the employee to remove or bypass a guard or other safety device, to place any part of his or her body into the point of operation, or where an associated danger zone exists during a machine operating cycle. 29 CFR § 1910.147(a)(2)(ii). In this case, to access underneath the conveyor, BMI's labor crew had to bypass the guardrail system along the stairway to the bark pit floor (Tr. 86).

BMI notes that in order to prove a violation of LOTO, the Secretary must establish that the hazard of unexpected energizing, start-up or release or stored energy could occur and cause injury. *General Motors Corp.*, 17 BNA OSHC 1217 (No. 91-2973, 91-3116, 91-3117, 1995). It is clear that LOTO applies to servicing or maintenance activities when there is a hazard of unexpected energization. As described in the preamble, OSHA states:

> [O]perations such as cleaning and unjamming machines or equipment are covered by this standard when the employee is exposed to greater or different hazards than those encountered during normal production operations; it should be emphasized that this rule applies to cleaning and unjamming when an unexpected activation or release of energy could occur. 54 FR 36644, September 1, 1989 (Exh. R-2, p. 8).

If the B2 conveyor were merely shut down, the record establishes the conveyor was subject to unexpected energization. The B2 conveyor has a start/stop button, but this does not completely prevent start-up of the conveyor. As Gulf States manager Lee testified, shutting down the B2 conveyor is different from locking it out (Tr. 111, 136). Nothing prevents an employee from activating the conveyor by pressing the start button if the B2 conveyor is shut down. The fact the conveyor was operating at the time of the accident does not prevent the application of LOTO. The Review Commission considers the hazard of "unexpected" to mean the lack of sufficient notice that energization could occur and cause injury. *General Motors Corp.*, 17 BNA OSHC at 1219-1220.

As evident by Cheeseboro's accident, the record establishes that a caught-in hazard was present when the labor crew cleaned underneath the conveyor. They were working within close proximity to the two rotating idlers. It is noted that Gulf States' regular clean-up of the bark pit by its employees was done with the use of a hose and water to remove small accumulations of dust from the floor. However, the conveyor was shut down and locked out whenever Gulf States employees had to work underneath the conveyor (Tr. 74, 108, 136).

BMI's argument that accepting the Secretary's position would require LOTO whenever an employee sweeps a workplace floor near machinery is rejected. The LOTO standards make it clear the work activities must be considered service or maintenance of the machine or equipment, and the employee would have to bypass guarding or other protection and, therefore, be exposed to an unexpected energization.

The LOTO standards cited are applicable to the facts of this case.

Alleged Violations

There is no significant factual dispute regarding the configuration of the bark pit and the facts surrounding the accident on September 24, 2003.[4]

BMI does not dispute the LOTO standards cited by OSHA were not complied with when its labor crew was cleaning the bark pit. The conveyor remained in operation. Moreover, BMI does not dispute the laborers, when cleaning under the conveyor, were exposed to a caught-in hazard created by the rotating idlers and conveyor belt, or that it knew its crew was working in the bark pit while the

[4]The Secretary has the burden of proving a violation.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.,* the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

conveyor was in operation (Exh. C-9).[5] BMI's superintendent and labor foreman knew the crew was cleaning the floor around the conveyor. BMI's foreman also worked underneath the B2 conveyor (Tr. 149).

With regard to specific violations alleged, the sole issues raised by BMI relate to (1) whether the violation of § 1910.261(b)(1) (Citation No. 2, item 1) is duplicative of § 1910.147(c)(4)(i) (Citation No. 1, item 1), and (2) whether the violation of § 1910.261(b)(1) (Citation No. 2, item 1) was properly classified as willful.

Citation No. 1, Item 1
Alleged Violation of § 1910.147(c)(4)(i)

The citation alleges that LOTO procedures were not utilized when employees were cleaning around and under an operating conveyor. Section 1910.147(c)(4)(i) provides:

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

There is no dispute that BMI has a LOTO program which it utilized when modifying or servicing the equipment in the bark pit. However, it is also clear that BMI's LOTO procedures did not extend to the labor crew's clean-up work on September 23 and 24, 2004.

A serious violation of § 1910.147(c)(4)(i) is established.[6] Superintended Paulk knew the labor crew was working in the bark pit removing the accumulation of bark debris from the floor while the B2 conveyor was operating. Labor foreman Reese, who also worked under the conveyor, knew his crew had to keep their heads ducked when working under the conveyor except in a small area by the cement wall (Tr. 149). Even by the wall, the employees were within an arms reach of both idlers (Exhs. C-4, C-7).

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[5] Issues not briefed are deemed abandoned. *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

[6] A violation is serious under § 17(k) of the Occupational Safety and Health Act (Act) (29 U.S.C. § 666(k)) if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. The issue is not whether an accident is likely to occur; it is rather whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

Citation No. 1, Item 2
Alleged Violation of § 1910.147(c)(7)(i)

The citation alleges that employees in the cleaning crew were not trained on the purpose and function of BMI's lockout/tagout program. Section 1910.147(c)(7)(i) provides, in part:

> 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.

LOTO training is required for authorized employees, affected employees, and all other employees "whose work operations are or may be in an area where energy control procedures may be utilized." *See* § 1910.147(c)(7). For each category of employees, the LOTO standards require certain topics for training.

Foreman Reese testified he had not been trained on LOTO procedures and is not responsible for deciding whether a machine needs to be locked out (Tr. 144, 146). He had watched a video at Gulf States which mentioned lockout procedures (Tr. 162-164). Despite Reese's testimony, CO Critopoulos testified that Reese had received LOTO training based on a review of BMI's records and interviews with BMI (Tr. 332). Laborer Packer, who has worked for BMI for approximately one year, has not received any training regarding LOTO procedures except through watching the video and discussions during safety meetings (Tr. 200-201). Superintendent Paulk stated BMI provides LOTO training to all foremen and mechanical employees, but not to the cleaning crew (Tr. 258).

The violation of § 1910.147(c)(7)(i) is established as serious. BMI knew the labor crew was not trained in LOTO procedures although they were exposed to a caught-in hazard between the rotating idlers and conveyor belt which could cause serious injury or possible death.

Citation No. 2, Item 1
Alleged Violation of § 1910.261(b)(1)

The citation alleges the conveyor belt was not locked out while employees were cleaning around and under the conveyor. Section 1910.261(b)(1) provides:

> Devices such as padlocks shall be provided for locking out the source of power at the main disconnect switch. Before any maintenance, inspection, cleaning, adjusting, or servicing of equipment (electrical, mechanical, or other) that requires entrance into or

> close contact with the machinery or equipment, the main power disconnect switch or valve, or both, controlling its source of power or flow of material, shall be locked out or blocked off with padlock, blank flange, or similar device.

There is no dispute the conveyor was not shut down and locked out while the labor crew worked underneath the conveyor, or that they were exposed to a caught-in hazard between the rotating idlers and belt. The conveyor belt was running at 250 feet per minute. Laborer Packer testified the running conveyor belt kept hitting the top of his hardhat and he was allowed to take a break (Tr. 188). A violation of § 1910.261(b)(1) is established.

BMI argues that compliance with § 1910.147(c)(4)(i) (Citation No. 1, item 1) also abates § 1910.261(b)(1). BMI asserts the alleged violation of § 1910.261(b)(1) should be vacated as duplicative.

BMI's argument is rejected. Section 1910.147(c)(4)(i) requires an employer to have LOTO procedures developed, documented and utilized. Section 1910.261(b)(1), in comparison, requires the main power disconnect switch or valve to be locked out before performing service or maintenance of equipment. Although the caught-in hazard created by failing to lock out the main power disconnect switch may have been abated if BMI had complied with § 1910.147(c)(4)(i), this does not mean the standards are duplicative. Citations are not duplicative where the standards are "directed at fundamentally different conduct." *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2207 (No. 87-2059, 1993). The standards cited in this case address different conduct, and abatement of one does not necessarily abate the other. In addition, BMI must comply with "all standards applicable to a hazardous condition even though the abatement requirements of two applicable standards *may* be satisfied by compliance with the more comprehensive standard." *H.H. Hall Construction, Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981) (emphasis in original); *Dec-Tem Corp.*, 15 BNA OSHC 2072, 2081 (No. 88-523, 1993).

Willful Classification

The Secretary has classified the violation of § 1910.261(b)(1) as willful. "It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). Whether a willful violation exists depends

upon the employer's state of mind with respect to the requirements imposed by a standard. It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation. "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

There is no dispute in this case that BMI knew the requirements of LOTO. BMI has a LOTO program which it utilized when performing its servicing and maintenance activities on the machines and equipment in the bark pit. BMI even utilized its LOTO program by locking out the B2 conveyor on the day prior to the accident when it made modifications to the head pulley (Tr. 275-276, 370-371).

BMI argues its interpretation that LOTO did not apply to its clean-up activities was reasonable and in good faith. Since the clean-up crew was not working on the conveyor, BMI did not believe it was necessary to lock it out (Tr. 407). BMI asserts that this good faith belief negates a showing of intentional, knowing or voluntary disregard of the requirements of the Act.

The Review Commission has generally accepted such a good faith defense if it met an objective test--whether the employer's belief concerning a factual matter, or concerning the interpretation of a rule, was reasonable under the circumstances." *General Motors Corp., Electro-Motive Division*, 14 BNA OSHC 2064, 2068 (No.82-630, et al., 1991) (a good faith belief about the interpretation of a standard can negate willfulness so long as the belief is reasonable).

However, the Eleventh Circuit, in which this case arises, holds that the intentional disregard or plain indifference test "makes irrelevant the employer's good faith disregard of the regulations, or the employer's belief that its alternative program meets the objectives of OSHA's regulations." *Reich v. Trinity Industries*, Inc. 16 F.3d 1149, 1153 (11th Cir. 1994).[7] "Allowing a willful violation

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[7] The Eleventh Circuit requires that for a willful violation, the proof must be either that (1) the employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard, or (2) that, if the employer did not know of the applicable standard or provision's requirements, it exhibited such reckless disregard for employee safety or the requirements of the law generally that one can infer the employer would not have cared that the conduct or conditions violated the standard. *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1355 (11th Cir. 2000).

to be imposed only in cases of bad faith would unduly restrict OSHA's authority to impose its most severe sanction" and thus "undermine the congressional purpose of creating a strong and effective federal job safety statute." *Id.* at 1154. *Also see Flour Daniel v. OSHRC,* 295 F.3d 1232 (11th Cir. 2002) (an employer's good faith disregard of the regulations is irrelevant under the intentional disregard or plain indifference test).

In this case, a willful classification based on plain indifference is supported by BMI's generalized instructions to its cleaning crew, BMI's pre-existing knowledge of the bark pit and the B2 conveyor, the labor crew foreman's knowledge that the employees were working underneath the moving conveyor belt, and BMI's failure, even if it believed LOTO was not applicable, to take any measures to protect its employees from the obvious caught-in hazard created by the rotating idlers and moving conveyor belt.

Although there is no evidence that BMI's superintendent knew the employees were working under the conveyor, he was aware of the configuration of the B2 conveyor in the bark pit, and the accumulation of bark debris (Tr. 374-375). He knew the conveyor remained in operation (Tr. 372). Superintendent Paulk also testified he was unaware of the accumulation of bark debris underneath the conveyor and only thought that the debris had spilled along the walkway (Tr. 368). However, his instructions to the cleaning crew was to clean the bark spillage from around the conveyor (Tr. 366).

BMI is a resident contractor at Gulf States. It previously had cleaned the bark pit (Tr. 334, 337). Superintendent Paulk has been a superintendent at the Gulf States mill for three years (Tr. 361). He acknowledges it is not safe to work next to or under a moving conveyor belt and idler because of the potential caught-in hazard (Tr. 382). However, BMI failed to perform a hazard assessment of the bark pit prior to the commencement of its clean-up activities (Tr. 405-406). *See Automatic Sprinkler Corp.,* 8 BNA OSHC 1384, 1387-88, (No, 76-5089, 1980) (an employer must make reasonable efforts to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work).

With regard to the crew foreman who was also underneath the conveyor by the cement wall, BMI acknowledges that he "simply did not recognize any hazard" and never intended for anyone to

go under the conveyor by the stairway where Cheeseboro was injured (BMI's Brief, p. 12). This failure by the foreman reveals a deficiency in BMI's LOTO training which the foreman supposedly received (Tr. 332). Although laborer Packer kept hitting his hardhat on the moving conveyor belt while cleaning under the B2 conveyor, foreman Reese merely told him to take a break (Tr. 266).[8]

According to Gulf States, there was no reason why the B2 conveyor could not have been shut down and locked out while the labor crew was cleaning the bark pit; but BMI never asked (Tr. 75). In addition, it is noted that Gulf States requires the conveyor to be shut down anytime its employees work underneath the conveyor because of the hazard involved(Tr. 74, 108).

Even if BMI did not think it was mandatory to lock out the conveyor, given the circumstances that several employees worked in close proximity to the belt and idler, BMI's actions rise to the level of plain indifference to the hazard presented and the safety of its employees. There is no showing that BMI explored other means to perform the work safely. There was no equivalent or additional safety protections provided the cleaning crew, including guarding the rotating idlers or even turning off the conveyor. The crew worked underneath the conveyor, and no safety precautions were taken to reduce or prevent exposure to the caught-in hazard between the rotating idlers and the conveyor belt running at 250 feet per minute. A willful violation of § 1910.261(b)(1) is established.

Penalty Consideration

BMI is a large employer with more than 220 employees (Tr. 228, 267). It is entitled to credit for history and good faith with regard to the non-willful citation. BMI has no history of safety violations within the preceding three years (Tr. 228). BMI has a lockout program and provided LOTO training to all foreman and mechanical employees (Tr. 258). It has weekly safety meetings where various topics are discussed such as fall protection and LOTO (Tr. 208).

A penalty of $2,000 for violation of § 1910.147(c)(4)(i)(Citation No. 1, item 1) is reasonable. BMI has a LOTO program. Its deficiency was that it did not include clean-up work, such as in this case, as service and maintenance activities, which were directly related to its work on the machines and equipment.

[8]Foreman Reese testified that if Packer did tell him, he did not hear him (Tr. 155).

A penalty of $4,000 for violation of § 1910.147(c)(7)(i)(Citation No. 1, item 2) is reasonable. Although the crew worked underneath a moving conveyor belt exposed to a caught-in hazard, the labor crew had received no training in lockout/tagout. Even crew foreman Reese who, according to BMI's records, had received LOTO training, failed to recognize any hazard and testified that he lacked LOTO training.

A penalty of $16,000 for violation of §1910.261(b)(1)(Citation No. 2, item 1) is reasonable. The conveyor was not locked out or even shut off while the crew worked hunched over underneath the conveyor. BMI failed to recognize the caught-in hazard created by the conveyor belt and two rotating idlers in the area to be cleaned. One employee died and another employee kept hitting his hardhat on the moving conveyor. The crew foreman even exposed himself to the hazard by being underneath the conveyor. BMI was aware of the configuration of the B2 conveyor, the amount of debris accumulation, and the fact that the conveyor continued in operation. Despite this awareness, no hazard assessment was made prior to performing the clean-up activities.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

Citation No. 1:

Item 1, alleged serious violation of § 1910.147(c)(4)(i), is affirmed and a penalty of $2,000 is assessed.

Item 2, alleged serious violation of § 1910.147(c)(7)(i), is affirmed and a penalty of $4,000 is assessed.

Item 3, alleged serious violation of §1910.261(a)(3)(v), as amended, is affirmed based on BMI's withdrawal of contest and a penalty of $6,300 is assessed.

Citation No. 2:

Item 1, alleged willful violation of §1910.261(b)(1), is affirmed and a penalty of $16,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: February 4, 2005