SECRETARY OF LABOR, Complainant, v. VANDERVOORT'S DAIRY FOODS COMPANY, and its successors, Respondent.	OSHRC DOCKET NO. 02-2175

APPEARANCES:

For the Complainant:
C. Elizabeth Fahy, Esq., Madeleine Le, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:
Ellen L. Perlioni, Esq., Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas

Before: Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Vandervoort's Dairy Foods Company, and its successors, (Vandervoort's), at all times relevant to this action maintained a place of business at 900 S. Main St., Fort Worth, Texas, where it was engaged in the distribution of dairy products and fruit drinks . Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On July 22, 2002, a Vandervoort's employee, Julio Albarran, was crushed in a "depalletizer" machine at Vandervoort's Fort Worth plant. Following the fatal accident, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the work site. As a result of that inspection, Vandervoort's was issued a citation alleging violation of the standard at 29 C.F.R. §1910.147(c)(7)(i), together with proposed penalties. By filing a timely notice of contest Vandervoort's brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On July 16, 2003 a hearing was held in Dallas, Texas. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Serious citation 1, item 1 alleges:

29 CFR 1910.147(c)(7)(i):

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

> Location: Vandervoort's Dairy/Milk Vault # 2, Product Receiving Dock
> On or about July 22, 2002 an employee was fatally injured when he was caught in the depalletizing equipment he was operating. It was determined through observation and employee interview that a pallet got jammed and the employee attempted to unjam the pallet. Though the LO/TO procedures for the depalletizer was posted it did not address the issue of the pallets getting stuck. The employee was not adequately trained in the purpose and use of the company's energy control procedure.

Vandervoort's maintains that the adjustment of product to unjam the machine is not an operation covered by the standard. In the alternative, Vandervoort's argues that it provided the required level of LO/TO training.

Facts

The deceased, Julio Albarran, was an order picker at Vandervoort's (Tr. 27). On July 22, 2002, Albarran was stocking half gallons using the depalletizer (Tr. 28). On that date another Vandervoort's employee, Gustavo Gonzales, found Albarran pinned between the cases and a backstop located on the far side of the conveyor belt (Tr. 30; Exh. C-1). The depalletizer was on and in automatic mode (Tr. 30-31).

Gustavo Gonzalez testified that he had worked as an order picker at Vandervoort's for approximately two years (Tr. 15). During that time, he operated the depalletizer, a machine used to offload cartons of product from pallets (Tr. 16, 59; Exh. C-1). During offloading, a pallet loaded with stacks of cartons is placed on the depalletizer's sliding platform. The platform then retracts, bringing the pallet in front of the depalletizer's pusher arm. The arm pushes the product forward onto a conveyor belt, which carries the product, by stacks, into Vandervoort's vault (Tr. 60, 80; Exh. C-1). Gonzalez testified that he was trained to run the depalletizer by another employee, Hilario Reyes (Tr. 18). According to Gonzalez, Reyes told him which buttons to push to run the machine (Tr. 18-20). Reyes never specifically taught him about problems he might have with the depalletizer (Tr. 18-19). However, he stated, during the course of his training product would catch on the edge of a pallet and become jammed. While the machine was still running in automatic mode, Reyes would stand on a platform on the side of the machine and give the pallet a shake to free the product (Tr. 21-24, 55). Once freed, the product would move onto the conveyor chain (Tr. 25-26). Gonzalez testified that he learned how to unjam the product by watching Reyes (Tr. 21, 25). Gonzales was never told to turn off the machine before shaking the product loose from the pallet (Tr. 26-27).

During his initial orientation, Gonzalez was instructed in the general provisions of Vandervoort's lockout/tagout procedures (Tr. 32-34, 40-45; Exh. D-54, D-55, D-56, D-59). As part of the orientation, Gonzalez completed a quiz in which he acknowledged that he was never to place any part of his body into a moving piece of machinery (Tr. 35-37; Exh. D-57). Gonzales was specifically instructed to "turn the pushers off before trying to unjam them" and to "[n]ever put any part of your body into the pusher while it is on." (Tr. 46; Exh. D-56, ¶8).

Mark Hall, a stocker and receiving clerk with Vandervoort's, also operates the depalletizer (Tr. 58-59). Hall testified that product jams between the pusher and the lip of a pallet a dozen or more times a day (Tr. 76-77). As a new employee, another stocker trained him to turn off the depalletizer before removing jammed product (Tr. 62-63). According to Hall, after turning the machine to "manual", he removes the pusher arm from the product, and deenergizes the depalletizer by turning off all the power sources (Tr. 77, 87). Specifically, Hall turns off an off/on switch on the front of the panel and presses a button on the back of the panel that cuts off power to the controls (Tr. 90). Hall testified that he then uses a hook to maneuver the stacks of product onto the conveyor (Tr. 63, 77-78, 87). Respondent's Exhibit D-65 shows Hall inserting his hands and arms into the stacks of product to maneuver the stacks with the hook (Exh. D-65). Hall testified that he can see the depalletizer's control panel from the platform where he stands while manually adjusting stacks of product (Tr. 85-86). He stated that anyone walking up to the controls would be able to see him (Tr. 86). The hook is only used when unjamming product from plastic pallets, however (Tr. 64). When product is stuck on a wooden pallet, Hall uses the same method as Gonzales to free the product. Hall climbs up onto the platform and gives the product a shove with his hands to free it from the pallet's wooden slats (Tr. 64, 93, 95). The arm can then push the product onto the conveyor (Tr. 64, 93). When unjamming product from a wooden pallet, Hall leaves the machine in the automatic mode (Tr. 93).

Hall received training in general lockout/tagout procedures during his initial orientation (Tr. 72-75; Exh. D-43, D-44, D-45). He was never trained as an "authorized" employee.

Gary Wyler, Vandervoort's regulatory compliance manager (Tr. 143), and Louis Herrera, Vandervoort's human resource manager (Tr. 99), testified that Albarran received lockout/tagout training during his new employee orientation (Tr. 109, 147-53; Exh. D-6, D-7, D-8, D-9). Herrera testified that he and Albarran discussed Vandervoort's employee handbook, including the rule prohibiting employees from placing any part of their bodies into a moving piece of machinery (Tr. 112, 119, D-13, D-14). Herrera showed Albarran a safety video dealing, in part, with lockout/tagout issues (Tr. 115-16; Exh. D-66). Wyler testified that he conducted Albarran's orientation training, and discussed with him the purpose and use of Vandervoort's lockout/tagout procedures (Tr. 154, 164). Albarran's training file includes, *inter alia,* a

signed document in which Albarran indicated that he recognized Vandervoort's rule requiring him to turn the pusher off before trying to unjam it, and to never put any part of his body into the pusher while it is on. (Tr. 149; Exh. D-5). Albarran was out due to a non work-related injury during Vandervoort's annual training for "affected" employees, and so did not receive refresher training in 2001 (Tr. 162-66; Exh. C-21). Wyler admitted that Albarran was not trained as an "authorized" employee (Tr. 167). Wyler also stated that he did not personally show Albarran how to run the depalletizer, and did not know if Albarran was ever trained in the proper method of unjamming product from the machine (Tr. 166-67).

James Randy Scaggs, the production supervisor at Vandervoort's, testified that employees get up on the depalletizer to rock the cases to get them unhung "the way they were shown to do it." (Tr. 174). According to Scaggs, adjusting product stuck on a pallet was a routine procedure (Tr. 177). However, Scaggs testified, there was no reason for an employee to place his body in front of the pusher while adjusting product. Doing so would have been a violation of Vandervoort's safety rules (Tr. 171, 177, 180).

Vandervoort's has lockout/tagout procedures for the depalletizer (Exh. D-11). The procedures recognize that reenergizing the depalletizer creates pinch points which may endanger employees servicing the equipment, and sets out procedures for locking out the equipment. The procedures require that affected employees be notified, the depalletizer shut down, and the equipment isolated from its energy source. The procedures require that all compressed air and hydraulic pressure be bled down, and the absence of pressure verified. Maintenance personnel are then to lockout and/or tagout the equipment using the locks and tags assigned to them, and verify that the equipment has been disconnected by pressing the start button (Exh. D-11).

Discussion

The cited standard provides:

> (7) *Training and communication.* (i) The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage and removal of the energy controls are acquired by employees. The training shall include the following:
>
> (A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.
>
> (B) Each affected employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

In order 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 standard applies to the conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2170, 2171, 2000 CCH OSHD ¶32,137, p. 48,443 (No. 99-257, 2000).

Applicability. 29 C.F.R. §1910.147 **The control of hazardous energy (lockout/tagout)** covers the servicing and maintenance of machines and equipment, including lubrication, cleaning, unjamming[1] and/or making adjustments or tool changes where employees may be exposed to the unexpected energization or startup of the equipment or to the release of hazardous stored energy. *See*, 29 C.F.R. §1910.147(a), (b). The lockout/tagout standard requires employers to "establish a program and utilize procedures for affixing appropriate lockout devices or tagout devices to energy isolating devices and to otherwise disable machines or equipment to prevent unexpected energization, startup or release of stored energy. . ." 29 C.F.R. §1910.147(c). The standard covers servicing and/or maintenance which takes place during normal production operations 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. . .(point of operation) or where an associated danger zone exists during a machine operating cycle.

As noted above, Vandervoort's argues that the adjustment of product to unjam the depalletizer is not an operation covered by the standard, as it neither requires the removal of a guard, nor requires employees to place any part of their bodies into a danger zone created by the machine's operating cycle. In addition, Vandervoort's argues, the standard is inapplicable because operators unjamming the depalletizer have a clear view of the depalletizer's control panel, precluding any unexpected activation.

Employee exposure to the point of operation. The record establishes that Vandervoort's employees use two different methods to unjam the depalletizer. It is not the practice of the depalletizer operators to deenergize the equipment before attempting to shake product loose from the slats of a wooden pallet, as that adjustment does not require them to put any part of their bodies in an area where they might be caught by the machine. When plastic pallets are jammed, however, the evidence establishes that Vandervoort's stocking clerks deenergize the depalletizer and eliminate any residual energy by retracting

[1] Vandervoort's attempt to distinguish unjamming machinery from unjamming product stuck in the machinery is unconvincing.

the pusher arm before manually unloading product jammed against the lip of the pallet. It is clear from Vandervoort's demonstration video that when unloading manually with a hook, employees place their hands and arms in the zone of danger created by the machine's operating cycle. According to employee Hall, jams occur perhaps a dozen times a day, requiring the equipment's operators to routinely deenergize the machine prior to unloading product manually.

Unexpected activation. Vandervoort's maintains that operators unjamming the depalletizer are in no danger from the unexpected activation of the equipment, citing *General Motors Corp., Delco Chassis Division*, 17 BNA OSHC 1217, 1995 CCH OSHD ¶30,793 (Nos. 91-2973, 91-3116 & 91-3117, 1995) [multi-step procedure involving lights and alarms prevented the *unexpected* reactivation of the cited equipment]. As noted by Respondent, once the depalletizer is turned off for servicing, it cannot be reactivated unless another employee deliberately turns on the power to the control panel, sets the machine to automatic mode, and activates the pusher arm. An employee energizing the control panel could not fail to see the operator unloading product manually from the depalletizer. The safeguards required by the cited standard are intended to protect employees *only* from the unexpected reactivation of equipment attributable to inadvertence. No lockout/tagout procedures can protect employees from the deliberate and malicious actions of another. The Secretary has not shown, by a preponderance of the evidence, that Vandervoort's depalletizer operators are exposed to the danger of the depalletizer unexpectedly starting up while manually unloading the depalletizer in the manner described in this record. This record does not support the Secretary's contention that lockout/tagout procedures should have been employed by employees unjamming the depalletizer in said manner. Because the evidence does not establish that the cited standard was applicable to the described operation, the alleged violation must be vacated.

This judge recognizes that the decedent does not appear to have been following the described procedures when he was caught in the depalletizer. The depalletizer was not deenergized, and there is no evidence that Mr. Albarran was using the hook. There is also evidence that depalletizer operators may have received contradictory instructions in the proper means of performing their jobs. While told in orientation to turn off the depalletizer when unjamming the machine, it appears to have been common practice to leave the machine in automatic while shaking wooden pallets to unjam them. Such contradictory instructions may confuse employees as to the proper means of avoiding hazards present in their work. However, they do not constitute a violation of the lockout/tagout standards where, as here, the evidence fails to establish that employees performing the cited operations were exposed to the hazard of unexpected reenergization.

ORDER

1. Citation 1, item 1, alleging violation of 29 C.F.R. §1910.147(c)(7)(i) is VACATED.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: November 19, 2003