Secretary of Labor, Complainant, v. Whirlpool Corporation, Oxford Division, Respondent.	OSHRC Docket No. 02-0696

Appearances:

Leslie John Rodriguez, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Steven R. McCown, Esquire
Littler Mendelson
Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Whirlpool Corporation (Whirlpool), Oxford Division, located in Oxford, Mississippi, is engaged in manufacturing stove tops and built-in ovens. On February 6, 2002, a press operator was seriously injured when her head was crushed in a mechanical power press. Based on this accident, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Denise Thomas conducted an inspection on February 8, 2002. As a result of this inspection, Whirlpool was issued a three-item serious citation and a one-item "other than serious" citation on April 16, 2002. Whirlpool timely filed a notice of contest.

Citation No. 1, Item 1, alleges a serious violation of 29 C. F. R. § 1910.147(c)(4)(ii)(B) for failing to develop and implement specific procedures for shutting down, isolating, blocking and securing equipment to control hazardous energy; Citation No. 1, Item 2, alleges a serious violation of 29 C. F. R. § 1910.217(b)(7)(vii) for failing to control the operation of mechanical power presses by supervised means; Citation No. 1, Item 3, alleges a serious violation of 29 C. F. R. § 1910.217(f)(2) for failing to train and instruct operators in the safe method of work before starting work on mechanical power presses.

Citation No. 2, Item 1, alleges an "other than serious" violation of 29 C. F. R. §

1910.147(c)(7)(i) for failing to provide training to ensure that the purpose and function of the energy control program was understood by employees. The total proposed penalty for both citations is $8,250.00.

The hearing was held on August 20, 2002, in Oxford, Mississippi. Jurisdiction and coverage are stipulated. Both parties filed posthearing briefs.

Whirlpool denies the violations and asserts the unpreventable employee misconduct defense.

For the following reasons, the violations are affirmed and a total penalty of $8,250.00 is assessed.

Background

Whirlpool's division in Oxford, Mississippi, manufactures stove tops and built-in ovens. The company uses different types of mechanical power presses to make the parts for these products. Several of the presses are two-operator, part revolution clutch presses (Tr. 141). According to employee testimony, the process for operating these presses involves the following: first, one employee turns the keys on; then both employees stand in front of their palm buttons, holding their arms up above their heads in order to push a set of palm buttons which causes the press to come down on the metal in the die and lift back up; next, one employee walks into the press to remove the part from the die and insert a new piece of metal; and, if necessary, remove any metal scraps from the die; then the process begins again (Tr. 14, 24-25, 77).

The two operators must press their palm buttons simultaneously for the press to operate (Tr. 24). Before and at the time of the accident, the keys that activate the two sets of palm buttons were always on the control panels of the press (Tr. 31, 85). Turning off the key to one set of palm buttons could deactivate that set, allowing the other set of palm buttons to operate the press (Tr. 45). This permits one operator to operate the press alone if the other employee takes a break or goes to the restroom (Tr. 30, 45).

When an employee is in the press removing parts or metal scraps, laser light curtains are triggered, and laser light indicators turn red, which signify the press will not operate (Tr. 19). Jacalyn Sills, a press operator for Whirlpool, testified that in order to remove the parts, an operator bends into the press, placing her arms and half her body into the press (Tr. 34). The operator uses a scraper tool to remove the metal scraps from under the die, but uses her hands to remove scraps

from the die itself (Tr. 32, 34). The metal scraps must be removed, or they will damage the new parts and the die (Tr. 32).

The night shift at the Whirlpool plant is 5:00 p. m. to 3:30 a. m., Monday through Thursday. At the time of the accident, the supervisor on the night shift was Mike McCord and the "set-up man" or die setter was Paul Walker (Tr. 39, 84, 89). The die setter for the shift would insert and remove the die for each press in accordance with what part was being made (Tr. 22).

Employees Jacalyn Sills and Timothy Surrette were press operators on the night shift and had been working together on press #2501 for approximately seven to eight months (Tr. 20, 75). Both of these employees began work at Whirlpool as employees of Ablest Temporary Employment (Ablest); and, after several months on the job, Whirlpool hired them as permanent employees (Tr. 9, 47-48, 66, 68). Both Sills and Surrette had worked at Whirlpool for approximately two years (Tr. 6, 66-67). In addition to being a press operator, Surrette also worked with Kenny Hughes, the maintenance man on the second shift (Tr. 68).

On the night of the accident, February 6, 2002, Sills and Surrette were working together on press #2501 and the lasers stopped working (Tr. 18). Supervisor McCord moved them to press #3001 (Tr. 19). Press #3001 was rarely used on the night shift (Tr. 22). Sills stated that she had only worked on the #3001 about six to eight times in two years (Tr. 23). Surrette said he had worked on the #3001 only three times before the accident (Tr. 81).

Although both the #2501 and #3001 were presses, there were differences. Press #250l, a 250-ton press, is smaller than the #3001, a 300-ton press (Tr. 31, 69). The laser light on #2501 is close to the die, but is more than 15 inches away from the die on the #3001 (Tr. 28, 78). On the #250l, the keyholes were between each set of palm buttons; Surrette and Sills each had a keyhole (Tr. 29). On the #3001, the keyholes were about three feet away and to the right of the palm buttons and it was not obvious which keyhole operated which set of palm buttons (Tr. 29).

Around 2:00 a. m., Sills went into the press to clean out the metal scrap (Exh. C-7; Tr. 40, 43). As she came back around, out of the press, she told Surrette that she was going to the restroom (Tr. 40). She walked to the control panel and shut off her key which deactivated her set of palm buttons (Tr. 42, 43). As she walked by Surrette, she noticed that her parts had not been removed from the press by Surrette and she hollered at Surrette to hold up so she could move her

parts (Tr. 40, 41, 43, 56). He backed off, and she walked into the press through the lasers and noticed that the laser light indicator was red (Tr. 41, 58). As she moved her parts, she saw Surrette with his hands up in the air (Tr. 44). She then heard a noise and was pulled into the press (Tr. 41). As her head was crushed, her left leg went up and apparently caught the laser and shut off the press (Tr. 45). Supervisor McCord and die setter Walker freed Sills from the press (Tr. 88). The press crushed 80 percent of Sills' skull causing loss of sight in her right eye, loss of hearing in her right ear, and some memory loss (Tr. 11, 44, 60). She underwent surgery and will continue having reconstructive surgery for the next five years (Tr. 44).

On February 6, 2002, Everett Scott, senior engineer at Whirlpool, telephoned the Jackson, Mississippi, OSHA office to report the accident. On the morning of February 8, 2002, CO Thomas inspected the Whirlpool plant with Scott and interviewed him, Surrette, and McCord.

DISCUSSION

Alleged Violations

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard. 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).

The Part 1910 general industry standards apply to Whirlpool's manufacturing business. Whirlpool does not dispute the applicability of these standards.

Whirlpool's knowledge of the violative conditions is imputed to it through its supervisor, Mike McCord. He was the supervisor on the night shift and directed the work activities of employees Sills and Surrette (Tr. 19, 46, 73, 84). On the night of the accident when press #2501 was not operating correctly, McCord moved Sills and Surrette from press #2501 to press #3001. "Because corporate employers can only obtain knowledge through their agents, the actions and

knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). "[W]hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). In the instant case, the work being performed was done in plain view of supervisor McCord. He testified that he walked around the plant checking on the employees and machines (Tr. 84-85).

Alleged Serious Violation of 29 C. F. R. § 1910.147(c)(4)(ii)(B)

Citation No. 1, Item l, alleges that:

> Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy, had not been developed:
> (a) Throughout plant - Specific procedures had not been developed and implemented for mechanical power presses and other equipment.

Section 1910.147(c)(4)(ii)(B) provides:

> (4) *Energy control procedure.* (ii) The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the following: (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy.

The lockout/tagout (LOTO) requirements clearly apply to the conditions at respondent's facility. There is no dispute that Whirlpool's written LOTO procedures were not machine specific (Exh. R-8).

Whirlpool contends that it complied with the standard because it had machine-specific LOTO procedures on a diagram on each machine that indicated where that machine's energy source was located (Exhs. C-5, R-8).

Whirlpool's reliance on the diagram as its LOTO procedures is misplaced. The diagram on press #3001 shows the "main electric power cut-off" and "air cut-off" for the machine; however, it does not show all of the various energy sources on the machine, such as the keys, nor does it provide any specific procedures or steps for the employees to follow in order to deenergize the press (Exh. R-8).

In addition, Whirlpool's written procedures are very generalized and lack specific information on Whirlpool's machines (Exh. R-8). The written program does not indicate the names of the affected employees, the types and magnitudes of energy, the hazards, the methods to control the energy, the types and location of the machines and energy isolating devices, the types of stored energy and methods to dissipate or restrain energy, and the method of verifying the isolation of the equipment. *See Drexel Chemical Co.*, 17 BNA OSHC 1908, (No. 94-1460, 1997) (Because the purpose of the lockout procedure is to guide an employee through the lockout process, general procedures are not acceptable).

Whirlpool did not comply with the terms of the standard which requires specific steps for shutting down, isolating, blocking and securing machines. Accordingly, the violation of 29 C. F. R. § 1910.147(c)(4)(ii)(B) is affirmed.

Serious Classification

Under § 17(k) of the Occupational Safety and Health Act, a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative conditions. 29 U. S. C. § 666(k). "The Commission has held that, in determining whether a violation is serious, 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). This violation is serious because failure to have specific LOTO procedures for each machine could result in an employee having access to a machine that is not safely locked out. The likely consequence of this is death or serious injury, such as fractures, amputation, or crushing, which occurred in this case.

Therefore, the violation of 29 C. F. R. § 1910.147(c)(4)(ii)(B) is affirmed as serious.

Alleged Serious Violation of 29 C. F. R. § 1910.217(b)(7)(vii)

Citation No. 1, Item 2, alleges that:

> Controls for more than one operating station on mechanical power press(es) using part revolution clutches were not designed to be activated and deactivated in complete sets of two operator's hand controls per operating station by means capable of being supervised:
>
> (a) Press Department, Power Press 3001 - The key for controlling the press was left in the machine and was not maintained in the possession of the supervisor.

Section 1910.217(b)(7)(vii) provides:

> (7) *Machines using part revolution clutches*. (vii) Controls for more than one operating station shall be designed to be activated and deactivated in complete sets of two operator's hand controls per operating station by means capable of being supervised by the employer. The clutch/brake control system shall be designed and constructed to prevent actuation of the clutch if all operating stations are bypassed.

It is undisputed that keys were left in the control panel of the presses. Supervisor McCord admits that keys were left in the presses at the time of the accident (Tr. 85).

Whirlpool contends that it complied with the standard because the standard does not require the key to be in control of the supervisor, but that the key is capable of being supervised. Whirlpool argues that it did this by selecting the more experienced of the two press operators to be in charge of the keys. Sills, as the more experienced operator, was in charge of the keys on the #2501 and the #3001.

Contrary to Whirlpool's claim, McCord testified that at the time of the accident, the press operators were not supposed to deactivate and activate the keys; only the set-up/die setter was to operate the keys (Tr. 86). Nevertheless, the keys were left in the control panel and not removed from the press. Sills stated that no one was designated as the key operator and that whoever needed to go the restroom would shut off his or her side of the press, and the other operator would continue working the press (Tr. 30). Sills testified that employees are not allowed to stand around so if one goes to the restroom, the other has to operate the press (Tr. 45).

Whirlpool's method did not meet the standards requirement of "means capable of being supervised by the employer." The employees were operating the keys as they determined without supervision by the employer.[1]

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[1] Since the accident, Whirlpool has instituted a new procedure of pulling the keys out of the press once it is started and putting the keys into lockboxes (Tr. 85).

Failure to supervise LOTO could result in death or serious injury. Thus, the violation of 29 C. F. R. § 1910.217(b)(7)(vii) is affirmed as serious.

Alleged Serious Violation of 29 C. F. R. § 1910.217(f)(2)

Citation No. 1, Item 3, alleges that:

> Operator(s) were not trained and instructed in the safe method of work before starting work on mechanical power press(es):
>
> (a) Press Department, Power Press 3001 - Operators were not adequately trained on the safe operation of the press.

Section 1910.217(f)(2) provides:

> (f) *Operation of power presses.* (2) *Instruction to operators.* The employer shall train and instruct the operator in the safe method of work before starting work on any operation covered by this section. The employer shall insure by adequate supervision that correct operating procedures are being followed.

Whirlpool contends that the standard does not require formalized training; and that nonetheless, Whirlpool did provide training and Sills and Surrette got on-the-job training (Exhs. R-2 through R-7; Tr. 53, 71-72, 76-78). In addition to training, there is a warning sign on the press (Exh. R-1; Tr. 62).

Sills testified that she did not receive any training from Whirlpool on the presses, on the differences between #2501 and #3001, on scrap removal, on part removal, or on the lasers (Tr. 9, 28, 33, 35). Sills said she did not receive any training from supervisor Steve Moore, who was the supervisor when she started working for Whirlpool (Tr. 52).

Surrette testified that he received no training from Whirlpool on the presses and was a "rank stranger" to the 300l (Tr. 71, 81). Also, he stated that he did not have any training in LOTO from maintenance man Hughes (Tr. 70). Surrette said he did have forklift training from Whirlpool (Exh. R-2).

Employees were not adequately trained and instructed in safe methods of work. Whirlpool's on-the-job training method of pairing a new press operator with an experienced press operator was inadequate because the training came from a co-worker who received her training from another co-worker and not from the employer. The on-the-job training focused on how to operate the press

and not on safe methods of work. Additionally, the standard requires an operator to be trained "before starting work," not during work. According to Sills, "you learned as you went" (Tr. 14).

Supervisor McCord said he went over the safety program with new employees, but Sills and Surrette never had the course. There was no evidence that employees received a copy of Whirlpool's written safety program. Furthermore, a warning sign on the press is not training.

A lack of adequate safety training and instruction on presses can lead to serious injury or death. Thus, the violation of 29 C. F. R. § 1910.217(f)(2) is affirmed as serious.

Alleged "Other Than Serious" Violation of 29 C. F. R. § 1910.147(c)(7)(i)

Citation No. 2, Item 1, alleges that:

> The employer did not provide adequate training to ensure that the purpose and function of the energy control program was understood by employees:
>
> (a) Press Department, Press 3001 - Training for affected employees who did not perform maintenance on equipment and would not need to lock out equipment was not adequate."

Section 1910.147(c)(7)(i) provides in pertinent part:

> (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.

Whirlpool contends that it trained its employees as evidenced by Sills and Surrette's testimony that they knew not to touch or use a machine that was locked out (Tr. 48, 71). Also, supervisor McCord stated that he did train new employees on LOTO (Tr. 93).

Neither Sills nor Surrette was trained by McCord or by anyone at Whirlpool on LOTO (as noted *supra*). Although Sills stated she saw the Ablest video on LOTO (which was approximately seven to ten minutes long), McCord did not even know what was on this video and was unaware if it was adequate training (Exh. C-1; Tr. 10, 93, 94, 105). Moreover, safety training must be done by the employer Whirlpool, not Ablest. Surrette stated that maintenance person Hughes never trained him in LOTO even though he worked with Hughes (Tr. 70). While employees may have known not to touch a locked-out machine, they did not have the knowledge and skills required for safe application, usage and removal of energy as required by the standard.

Sills stated that employees did not lock out their press when removing parts, cleaning out metal scraps, and going on break (Tr. 32, 36). She testified that Whirlpool requires "at any cost that you make 2000 parts per night." (Tr. 46). She stated that supervisor McCord "stresses that you work, work, work very fast" and make sure "that production is being made at whatever cost." (Tr. 46). It would seem that Whirlpool promoted a work environment that stressed production over any safety training. *See DCS Sanitation Management, Inc. v OSHRC,* 82 F.3d 812 (8th Cir. 1996) (If supervisors encouraged employees to disregard safety procedures to increase efficiency, safety instruction would be meaningless).

Accordingly, a violation of 29 C. F. R. § 1910.147(c)(7)(i) is affirmed.

Unpreventable Employee Misconduct Defense

Whirlpool asserts the affirmative defense of unpreventable employee misconduct based on Sills' deactivating her key and not deactivating Surrette's key, which made him capable of working the press by himself; Sills getting inside the press to retrieve parts or metal scraps; and Surrette's violating the safety procedures.[2]

In order to establish the affirmative defense of employee misconduct, an employer must show:

> (1) that it has established work rules designed to prevent the violation; (2) that is has adequately communicated the rules to its employees; (3) that it has taken steps to discovery violations; and (4) that it has effectively enforced the rules when violations have been discovered.

Nooter Construction Co., 16 BNA OSHC 1572, 1578 (No. 91, 0237, 1994).

The employer must first show that it has established work rules designed to implement the requirements of the standard. *See Wheeling-Pittsburgh Steel Corp.,* 16 BNA OSHC 1780, 1784 (No. 91-2524, 1994). "In order to be considered effective, an employer's work rule must be clear enough to eliminate employee exposure to the hazard covered by the standard…." *Beta Construction Co.,* 16 BNA OSHC 1435, 1444 (No. 91-102, 1993). Whirlpool had a rule not to touch or operate a machine that was locked out or tagged out (Exh. R-6; Tr. 93). Supervisor McCord claims that there was a rule that operators were not to deactivate and activate the keys to their palm buttons on their

[2] Surrette was terminated for violating (unspecified) safety procedures during the accident (Tr. 118-119).

presses. However, employees routinely did deactivate and activate their keys in order to go on break or to the restroom. There is no evidence that Whirlpool had a rule not to place body parts in the press. Even though there was a warning label on the press about putting body parts into the press, Sills testified that there was no way to retrieve parts and metal scraps without putting her body in the press (Tr. 35). There is no evidence that Whirlpool had a rule that employees must only use scraper tools to remove metal scraps from the press. Although Whirlpool had a rule to clean the press bed, it did not specify how to clean it (Exh. R-3).

The second requirement to prove the affirmative defense is that an employer must show that it has adequately communicated the safety rules to its employees. Whirlpool did not adequately communicate its rules to its employees. There is no proof that Sills and Surrette attended any safety meetings, no proof that employees were provided a copy of the safety program, and no proof that they were required to read the safety program. *See Nooter* at 1577 (work rule not communicated where safety handbook not generally given to employees). In this case, what was communicated to employees was the rule to meet the production quota which appeared to supersede any safety rules.

Third, an employer must show that has taken steps to discover violations. "Establishing adequate procedures for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards." *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). "Effective 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). In this case Whirlpool did not show that it made any diligent efforts to discover violations of these rules. Although McCord said his duties included walking around the plant, he said he never saw any employees deactivating or activating their keys (Tr. 87). Yet, employees were working in plain view and keys were kept in the control panels of the presses. Also in plain view were employees reaching into the dies to retrieve scraps and remove parts. Whirlpool failed to make a diligent effort to discover violations.

Finally, the employer must effectively enforce the rules when violations have been discovered. "To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rules violations occurred." *GEM Industrial, Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996). "Evidence of

verbal reprimands alone suggests an ineffective disciplinary system." *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). In this case, employees were not disciplined for turning off their keys to their palm buttons in order to go on break or to the restroom. Employees were not disciplined for going inside the press to retrieve parts or metal scraps. "Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *GEM* at 1865.

Whirlpool did not present any evidence of a formal discipline program consisting of increasingly harsher discipline measures such as verbal warnings, written warnings, work suspension, and termination. Whirlpool has not demonstrated that there was effective enforcement of safety rules even though it did terminate Surrette.

Whirlpool has failed to establish each of the four elements of the unpreventable employee misconduct defense. For that reason, Whirlpool's employee misconduct defense is rejected.

Penalty Assessment

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U. S. C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.*, 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

Whirlpool does not dispute the calculation of the penalties or the penalties (Tr. 159).

I find that the penalty, as proposed by the Secretary, of $1,875.00 is appropriate for Citation No. 1, Item 1; $4,500.00 is appropriate for Citation No. 1, Item 2; and $1,875.00 is appropriate for Citation No. 1, Item 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The preceding 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 on the preceding decision, it is ORDERED:

(1) Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.147(c)(4)(ii)(B), is affirmed and a penalty of $1,875.00 is assessed.

(2) Citation No. 1, Item 2, alleging a serious violation of 29 C. F. R. § 1910.217(b)(7)(vii), is affirmed and a penalty of $4,500.00 is assessed.

(3) Citation No. 1, Item 3, alleging a serious violation of 29 C. F. R. § 1910217(f)(2), is affirmed and a penalty of $1,875.00 is assessed.

(4) Citation No. 2, Item 1, alleging an other than serious violation of 29 C. F. R. § 1910.147(c)(7)(i), is affirmed and no penalty is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: December 23, 2002