UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 01-0712
J-LENCO, INC., Respondent.	:	

Appearances: Michelle M. DeBaltzo, Esq.
U.S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For the Complainant.

Douglas J. Suter, Esq.
Isaac, Brant, Ledman & Teetor
Columbus, Ohio
For the Respondent.

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). On February 8, 2001, an employee of J-Lenco, Inc., was injured at Respondent's facility in La Rue, Ohio. From February 27, 2001 to April 3, 2001, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's work site. As a result of the inspection, OSHA issued a six-item serious citation and a one-item other-than-serious citation to Respondent, alleging violations of safety standards appearing in Title 29 of the Code of Federal Regulations ("C.F.R."). Respondent timely contested the citations. Following the filing of a complaint and answer, and pursuant to a notice of hearing, the case came on to be heard in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs and reply briefs.

Jurisdiction

It is undisputed that at all relevant times Respondent has been an employer engaged in the production of sand-based molds called "cores." In addition, Respondent admits it handles goods or

materials which have moved in interstate commerce. I thus find Respondent was engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and the subject matter.

Factual Background

J-Lenco is a manufacturer of sand-based molds called "cores." Employees make the cores with different types of machines that utilize various energy sources, including electric, hydraulic and pneumatic, during their operating cycles. Generally, the machine cycle starts with a device called a "sand head" or a "blow head" swinging over the core box located at the front center of the core machine. The sand head then pours sand that has been mixed with chemicals into an opening on top of the core box, and, once the box is filled, the sand head swings back and a device called a "sweep or wipe" removes excess sand from the core box. At this point, a "gas head" swings over the core box and fills the box with a mixture of air and a catalyst called triethylamine which "cures" the sand to harden and form the core or mold. The gas head then swings back, at which time the employee removes the core from the core box and the operation cycle starts over again.[1] The employee who has been operating a particular core machine is responsible for cleaning it at the end of the shift. The cleaning of a core machine takes from 15 to 25 minutes.[2] (Tr. 237, 279-80, 310-13, 380-81.)

Operator William Franklin was using core machine #9 when the sand head began to drift during the cycle, which prevented the gas head from functioning. Mr. Franklin was attempting to manually push the sand head back when his arm became caught in the machine. Another operator, Bruce Armbruster, was able to free Mr. Franklin's arm from the machine, but not before Mr.

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[1]The facility has various types of core machines. While the machines may differ as to the specific steps employees must take to run them, for example, some are automatic and some are manual, the operating process for all the machines is similar. (Tr. 52-53, 343-44, 352-53.)

[2]As the plant manager explained it, cleaning core machine #9 involved closing the core box, bringing the blow head over, and setting it down. The operator would then

> [r]emove the bolts from the head, raise it up, swing the head back out of the way. There's switches here on this panel that you can swing the head in and out with and put it in the manual position. And then when they went in, they would hit the [emergency stop], remove their bolts, take the bolts out, raise their clamp back up, swing it back out of the way, go back in and take the blow head out. (Tr. 354.)

Franklin's arm had been crushed in the machine. (Tr. 155-57, 288-90.)

The Secretary's Burden of Proof

In general, to prove a violation of a specific standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) noncompliance with the terms of the standard, (3) employee exposure or access to the hazard created by the noncompliance, and (4) that the employer knew, or with the exercise of reasonable diligence could have known, of the condition.[3] *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Eng'd Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*, 13 BNA OSHC 2147 (1989).

Serious Citation 1, Item 1

This item alleges a serious violation of 29 C.F.R. § 1910.106(e)(2)(ii)(b)(2), which provides that "[t]he quantity of liquid that may be located outside of an inside storage room or storage cabinet in a building or in any one fire area of a building shall not exceed...120 gallons of Class IB, IC, II, or III liquids in containers." I find that the cited standard applies and that J-Lenco violated the terms of the standard. It is undisputed that three 107-gallon containers of triethylamine, a compressed gas in liquid form, and three 55-gallon containers of liquid "zip-slip 78" were located outside the storage room at the facility. (Tr. 21-22, 27-28, 31-32, 329-30, 356-57; C-4, C-6.) It is further undisputed that these materials are Class IB liquids. (Tr. 23-25, 29; C-3, C-5.) As to the triethylamine, J-Lenco appears to argue that because the containers were arguably portable tanks, the standard is "unenforceably vague." ®. Brief pp. 2-3.) Respondent presented no evidence to show that the triethylamine was contained in portable tanks. In fact, the term "portable tank" was never even

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[3]Respondent's brief asserts that in *Carlisle Equip. Co.*, 24 F.3d 790 (6th Cir. 1994), "[t]he Sixth Circuit...has expressly ruled that to prove a violation against an employer under 5(a)(2), which **IS** a violation of a specific OSHA regulation, the Secretary must actually prove employee exposure to a hazard." (R. Brief p.1.) Not only does Respondent's counsel misspell the case name and give the wrong citation, but counsel's assertion that the Sixth Circuit in *Carlisle* required actual employee exposure to prove a violation is completely unfounded. Not only was employee exposure not an issue in *Carlisle*, but the court stated that the Secretary must show that "employees had *access* to the hazardous condition." *Carlisle*, 24 F.3d at 792 (emphasis added). That counsel would cite to *Carlisle* as standing for the proposition that the Secretary must show actual employee exposure is most likely not a product of elucubration but rather a result either of counsel's failure to read the case or counsel's careless use of language in his brief.

mentioned at the hearing, and was first mentioned in this case in Respondent's post hearing brief.[4] That Respondent would now argue that it was in compliance with the Act because the triethylamine containers were portable tanks is unpersuasive, and accordingly rejected. As to the zip-slip 78, J-Lenco asserts these containers were mistakenly shipped to its facility and were ready to be shipped back.[5] ®. Brief pp. 2-3.) Even if this were the case, however, it would not excuse the violation, because the standard clearly prohibited the *location* of the containers outside of the storage room. Accordingly, these containers were "located" for purposes of the standard when they were outside the storage room and not actively in transit. I find, therefore, that Respondent violated the terms of the cited standard by placing more than 120 gallons of Class IB liquids outside of the inside storage room or storage cabinet.

The Secretary has also demonstrated employee exposure to and employer knowledge of the condition. The record shows that employees had to retrieve buckets of the cited liquids to operate the core machines. (Tr. 25-26, 30.) The record also shows that J-Lenco had actual knowledge of the condition, based on its admission that it knew the containers were located outside the storage room. (Tr. 32, 329-30.) The serious classification of the violation is appropriate, considering the potential injuries that could result from an accident. (Tr. 25, 30.) The proposed penalty of $1,250.00 is also appropriate, after giving due consideration to the size of the employer's business, the gravity of the violation, and the employer's good faith and prior history of OSHA violations. (Tr. 34-35.) This item is affirmed as a serious violation and a penalty of $1,2500.00 is assessed.

Serious Citation 1, Item 2

This item alleges a serious violation of 29 C.F.R. § 1910.136(a), which requires the employer to "ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole, and where such employee's feet are exposed to electrical hazards." It is undisputed that core machine operators wore regular street shoes while performing their job duties, that the sand cores they handled weighed

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[4]Respondent also failed to assert or argue that it believed the standard to be unenforceably vague in its notice of contest or its answer. Again, Respondent did not make this claim at the hearing or at any time prior to its post hearing brief.

[5]The record is unclear as to whether all three drums or only one drum of zip-slip 78 went to the facility by mistake. (Tr. 118, 329-30, 356-57.) In either case, I would find that Respondent violated the terms of the standard. *See* discussion, *infra*.

from under a pound up to 50 pounds, and that the operators occasionally dropped the cores while handling them.[6] (Tr. 231, 272-73, 347-48.) I find, therefore, that the cited standard applies, that J-Lenco violated the terms of the standard, and that core machine operators were exposed to the hazard of falling objects on a daily basis. Although Respondent in essence argues that because J-Lenco had no history of foot injuries caused by falling cores, its employees were not exposed to a hazard, Commission precedent is well settled that lack of injury does not prove lack of hazard or disprove the alleged violation. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517 (No. 90-2866, 1993); *Simplex Time Recorder Co.*, 766 F.2d 575 (D.C. Cir. 1985). I also find that Respondent had actual knowledge of the violation, based on the testimony of Don Kennedy, the plant manager. (Tr. 347.) Even if Respondent did not have actual knowledge, it could have discovered the violation with the exercise of reasonable diligence because the condition was in plain sight of shift supervisors and other management officials. The Secretary, however, has failed to establish that the alleged violation was serious. The CO testified that the violation was classified as serious because a broken foot and a sprained foot were possible injuries. (Tr. 41.) In light of the testimony of two operators who stated that when the cores fell to the ground, they broke apart, I conclude that the Secretary has failed to demonstrate that there was a substantial probability that the cited condition could have resulted in serious physical harm, and that the violation is properly classified as "other." (Tr. 231-32, 272-73.) This citation item is accordingly affirmed as an other-than-serious violation, and no penalty is assessed.

Serious Citation 1, Item 3

Item 3 alleges a serious violation of 29 C.F.R. § 1910.147(c)(4)(ii)(B), a provision of the lockout/tagout ("LOTO") standard. Specifically, the citation alleges that

> The machine specific lockout procedures for the core machines were inadequate in that they did not include:
> (1) Specific information on the number and location of hydraulic valves and controls which must be locked out, bled off, or activated to release accumulated hydraulic energy[;]
> (2) Information on the number and location of capacitators which may need to be discharged[;]
> (3) Specific information on the number and location of pneumatic valves which must

[6]The plant manager testified that the cores weighed an average of 5-10 pounds. (Tr. 348.)

be locked out, bled off or activated to release stored pneumatic energy.[7]

Respondent argues that it did not violate the standard because the cited condition fell within the exception to the LOTO standard set out in 29 C.F.R. § 1910.147(a)(2)(ii). This exception provides that:

> 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).

Under Commission precedent, the party claiming the benefit of an exception has the burden of proving that its claim comes within that exception. *See StanBest, Inc.*, 11 BNA OSHC 1222, 1225-26 (No. 76-4355). I conclude that Respondent has failed to establish that the exception applies to the cited conduct. The duties of the core machine operators, as described by the witnesses, include both setting up and cleaning the machines. (Tr. 237-49, 259-60, 279-82.) These activities are clearly within the standard's definition of servicing and maintenance and are not "minor adjustments," as J-Lenco claims. *See* 29 C.F. R. § 1910.147(b). I find, therefore, that the cited standard applies to the cited conduct.

I further find that Respondent did not comply with the terms of the standard. J-Lenco's LOTO program does not specifically outline the steps for shutting down, isolating, blocking and securing the different types of core machines to control hazardous energy. In particular, the program does not include the number and location of the various energy sources on the different machines. *See* C-13-15; R-4. Instead, the program appears to be a generic program that is not explicit as to the different types of core machines that employees operate.[8] *Id.* In addition, the procedural steps taken

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[7]The standard provides:

> 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.

[8]Most of J-Lenco's LOTO program is a general program that could be used by any industry. In fact, there is only one page in the program that explicitly mentions a core machine, and even that page is not specific to any particular core machine. *See* C-13.

by the core machine operators, as described by the plant manager, were inadequate to comply with the standard. (Tr. 323-26, 349-82.) Even assuming *arguendo* that they were, two core machine operators testified they had not seen C-13, entitled "Core Machine Lockout/Tagout Procedures," and that they did not regularly follow those procedures when they operated the machines. (Tr. 245, 290.)

Finally, I find that employees were exposed to the cited condition and that Respondent had knowledge of the violation. J-Lenco asserts that when all required steps were taken, that is, pulling out the power plug, hitting the emergency stop, activating the limit switch, and putting the machine in manual mode, there was no hazard of unexpected energization or activation.[9] (Tr. 324-26.) While these steps may have deactivated the electrical power, they did not address other kinds of energy, such as hydraulic energy, that could have unexpectedly energized at least some of the moving parts of the machine, and the plant manager himself conceded as much. (Tr. 262-64, 325-26, 355-56, 381-82.) Therefore, when employees cleaned the core machines and changed the core boxes, they were exposed to the hazard sought to be eliminated by the standard. Respondent had knowledge of the violation because it was done with the concurrence of and in plain view of shift supervisors. Even if the company did not have actual knowledge it could have discovered the violation with the exercise of reasonable diligence. The Secretary has established the alleged violation.[10]

The Secretary has properly classified this item as a serious violation. It is clear that there was a substantial probability that the failure to have specific procedural LOTO steps could have resulted in serious physical harm, such as broken bones or crushing injuries. (Tr. 57-59, 218-19.) In addition, the Secretary's proposed penalty of $1,250.00 for this item is appropriate in light of the gravity of the violation and the employer's size, history and good faith. (Tr. 58-59, 66, 73-74.) Item 3 is affirmed as a serious violation, and the proposed penalty is assessed.[11]

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[9]According to one core machine operator, J-Lenco did not even enforce these required steps. He testified that both he and his supervisor cleaned a core machine without pushing the emergency stop button the week before the accident. (Tr. 281-82.)

[10]Respondent requests approval of its proposed abatement measures for the violation of the cited standard. (R. Brief pp.14-15.) I decline to rule on this proposal.

[11]In assessing this penalty, I have considered Respondent's argument that Items 3 through 5 should be grouped because "they are so closely related so as to constitute a single hazardous condition."(R. Brief pp. 15-16.) I reject this argument because, while Items 3 through 5 all allege violations of the LOTO standard, each requires a separate abatement. *See Weststar Mechanical, Inc.*,

Serious Citation 1, Item 4

The Secretary alleges in Item 4 a violation of 29 C.F.R. § 1910.147(c)(7)(i) for J-Lenco's failure to provide "adequate training to ensure that employees acquired the knowledge and skills required for the safe application, usage and removal of energy control devices."[12] Specifically, the Secretary alleges that J-Lenco did not train core machine operators as authorized employees exposing them to unexpected startup of the core machines during cleaning operations and insertion and removal of core boxes. J-Lenco asserts that core machine operators were "affected employees" and did not require training as "authorized employees." I find, however, that the core machine operators were authorized employees. The standard defines an authorized employee as "[a] person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section." 29 C.F.R. § 1910.147(b). The standard further defines servicing and maintenance as including "setting up, adjusting ...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." It is clear from the testimony of several core machine operators that their duties included cleaning, adjusting and unjamming the core machines. (Tr. 23-49, 158-64, 239-60, 279-82.) On the day of the accident, Mr. Franklin was in essence unjamming the core machine because the blow head was drifting back preventing the core box from opening. (Tr.

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19 BNA OSHC 1568 (Nos. 97-0226 & 97-0227, 2001).

[12]The standard provides:

> 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 be instructed in the purpose and use of the energy control procedure.
> (C) All other employees whose work operations are or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out.

158-64.) Respondent was thus required to train the operators as authorized employees.[13]

The evidence shows that while maintenance personnel may have been trained in LOTO procedures, core machine operators were not trained as required by the standard. (Tr. 321-23, 339.) The plant manager and core machine operators described operator training as on-the-job training, i.e., placing a new employee with an experienced operator who went down a list and explained the release agents and how to use them. (Tr. 288, 316-17.) I find that this training was inadequate. I further find that the "Operator Review Sheet" and the updated training the plant manager referred to were inadequate, the former because it did not sufficiently describe the energy control program for each core machine and the latter because it did not include updated training on LOTO. (Tr. 318; R-1-2.) It would appear that the extent of training for core machine operators was that they were instructed to push the emergency stop button when they went "into a machine." (Tr. 237-38, 280-82, 317, 323-24.) This conclusion is supported by the testimony of the core machine operators, who also testified that they had not been trained in LOTO before the accident.[14] (Tr. 241, 282-84, 328-39.)

The record further demonstrates that core machine operators were exposed to the hazardous condition and that Respondent had actual knowledge of the violation. In light of the duties of the core machine operators, they were required to use LOTO procedures daily. That they were not properly trained to do so exposed them to hazardous conditions, as exemplified by the accident.[15] J-Lenco acknowledges that it was aware that core machine operators were not trained as authorized employees, and it is clear that, with the exercise of reasonable diligence, the company could have discovered the violative condition. Item 4 is accordingly affirmed as a serious violation. For the reasons set out above, the proposed penalty of $1,125.00 is appropriate and is therefore assessed.

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[13]While I find that core machine operators were authorized employees for purposes of this alleged violation, I would still find a violation of the standard even if core machine operators were considered affected employees based on the description of the LOTO training provided to core machine operators. *See* discussion, *infra*.

[14]Core machine operator Kathy Houseworth, for example, testified that before the accident, her only LOTO training was a "movie" addressing LOTO generally. (Tr. 239-41.)

[15]While the accident may have occurred while Mr. Franklin was servicing the core machine, it is clear from the testimony of some witnesses that core machine operators were exposed to the hazardous condition during production when they had to wipe sand off the core box and when they had to remove the cores at the end of the cycle. (Tr. 164, 287.)

Serious Citation 1, Item 5

This item alleges that lockout or tagout devices were not "affixed to each energy isolating device by authorized employees," in violation of 29 C.F.R. § 1910.147(d)(4)(i). I find that the cited standard applies and that Respondent did not comply with its terms. J-Lenco asserts in essence that core machine operators were not required to use LOTO devices because they were not authorized employees. As discussed *supra*, however, core machine operators were authorized employees. Further, it is undisputed that these employees did not use lockout or tagout devices when performing their assigned duties. Core machine operators were exposed to the cited condition when they cleaned the core machines and helped change core boxes, and J-Lenco had actual knowledge of the condition. Item 5 is affirmed as a serious violation, and, for the reasons given *supra*, the Secretary's proposed penalty of $1,125.00 is appropriate and is accordingly assessed.

Serious Citation 1, Item 6

Item 6 alleges a violation of 29 C.F.R. § 1910.212(a)(3)(ii) for failing to guard the point of operation on core machinery and exposing employees to injury. I find that the cited standard applies and that Respondent violated the terms of the standard. It is undisputed that the plexiglass doors were missing from core machine #9 at the time of the accident. (Tr. 75, 166-68, 196-97, 234, 275-76, 332-35.) Moreover, it is clear that the missing plexiglass doors exposed Mr. Franklin to the point of operation on core machine #9. The accident plainly demonstrates that the terms of the standard were violated and that an employee was exposed to the cited hazard.

Respondent appears to deny it had knowledge of the violation. In essence, J-Lenco asserts that Mr. Franklin removed the plexiglass doors on the day of the accident and that it therefore could not have known of the violation. ®. Brief pp. 10-13.) A review of the record, however, shows that Mr. Franklin did not remove the plexiglass doors.[16] Operators Kathy Houseworth and Bruce Armbruster, who worked the same shift as Mr. Franklin, both testified that when the shift started at

[16]Respondent refers to affidavits signed by other employees stating that at the end of the previous shift, the plexiglass doors were in place. (R. Brief p. 12.) These employees did not testify at the hearing, and the affidavits were not admitted into evidence. Therefore, they are not included in the record and have not been considered. Instead, I rely on the credible testimony of Mr. Franklin, Ms. Houseworth and Mr. Armbruster. All three employees had intimate knowledge of the conditions leading to the accident, and gave honest, detailed testimony consistent with one another. Moreover, Respondent has failed to provide any reason why these witnesses should not be found credible and reliable.

7:00 a.m., they saw Mr. Franklin operate core machine #9 without the plexiglass doors. (Tr. 233-34, 275; *see also,* Tr. 88, 166-68, 196-97.) Ms. Houseworth further testified that the plexiglass doors often had not been in place on core machine #9. (Tr. 234.) In addition, Mr. Armbruster stated that if Mr. Franklin had removed the doors during the shift he would have seen him and that this did not occur. (Tr. 275-76.) According to the undisputed testimony of several witnesses, the plexiglass doors consisted of two plastic pieces held in place by a total of four bolts. (Tr. 275-76, 295, 299-300, 303-04, 335-36, 358-60, 364-68.) In order to remove the doors, employees would have to reach up to the top of the doors which was approximately six feet high and remove the bolts using at least one wrench.[17] *Id.* Based this description of the plexiglass doors, I find Mr. Armbruster's statement that he would have seen Mr. Franklin remove the plexiglass doors, but did not see him do so, to be credible and reliable. I find, therefore, that the plexiglass doors on core machine #9 were off on the day of the accident and in fact had been off of the machine for some time before the accident. This finding is further supported by Mr. Franklin, who testified that he spoke with two different shift supervisors about the missing doors and that they could not explain why they had been removed.[18] (Tr. 196-97.) Based on the record, the Secretary has shown all of the elements of her prima facie case.

Respondent asserts that the violation was a result of unpreventable employee misconduct. To establish this affirmative defense, the employer must show it had an adequate safety program that was communicated and enforced as written and that the employee's violating that policy was idiosyncratic and unforeseeable. *CMC Elec., Inc.*, 19 BNA OSHC 1001, 1003 (6th Cir. 2000), *citing L.E. Myers Co.*, 818 F.2d 1270, 1276-77 (6th Cir. 1987); *see also, Towne Constr. Co.*, 13 BNA OSHC 1656, 1659 (6th Cir. 1988). Specifically, J-Lenco asserts that the violation was unpreventable because it had an adequate safety program that was effectively communicated and enforced. ®. Brief pp. 10-14.) Although Respondent had a safety rule that required all guards to be in place before and during machine operation, the company has not demonstrated that it effectively enforced the rule.

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[17]Although Respondent implies that the doors could have been removed in 3 to 5 minutes, I find Mr. Armbruster's estimate of 10 to 20 minutes more accurate, especially considering the size and construction of the doors. (Tr. 275, 295, 366-67.)

[18]Even if Mr. Franklin had not testified in this regard, I would find that J-Lenco should have discovered the violation. The plexiglass doors were large and the fact that they were not in place on the machine would have been apparent to a reasonably attentive supervisor. (Tr. 459-60.)

(Tr. 203-06, 317; R-1.) The record shows that when Mr. Franklin violated this rule on two prior occasions, he was simply told not to run the machine without guards.[19] (Tr. 180-81, 317-18, 335, 362-64.) No disciplinary action, however, was taken against Mr. Franklin for repeatedly violating the safety rule. In addition, the testimony of the plant manager confirms that safety rules in general were not effectively enforced through any progressive disciplinary system.[20] While he testified to the effect that violation of a safety rule would result in the employee being "written up," verbally reprimanded or suspended without pay, he was not able to answer the Secretary's question as to what the actual policy was regarding discipline. (Tr. 345-47.) Respondent has not demonstrated by a preponderance of evidence that the violation was caused by unpreventable employee misconduct. Its affirmative defense is accordingly rejected.

The Secretary has properly classified this violation as serious. There was a substantial probability that the failure to guard the core machine could have resulted in serious physical harm, such as broken bones or crushing injuries. (Tr. 89-90, 218-19.) Further, the Secretary's proposed penalty of $1,250.00 is appropriate, for the above-stated reasons. This item is affirmed as a serious violation, and the proposed penalty of $1,250.00 is assessed.

"Other" Citation 2, Item 1

This item alleges an other-than-serious violation of 29 C.F.R. § 1910.147(c)(6)(ii), which requires the employer to certify that periodic inspections of its energy control (LOTO) procedure have been performed to ensure that the procedure is being followed. I find that the cited standard applies and that Respondent did not meet the terms of the standard. While J-Lenco officials told the OSHA compliance officer who conducted the inspection that they annually audited their LOTO procedures, the company failed to document these audits. (Tr. 92-94.) I further find that the Secretary has met her burden of establishing employee exposure and employer knowledge. As to knowledge, even if J-Lenco did not have actual knowledge of the condition, it could have discovered the

[19]The record also shows that on another occasion, Mr. Franklin told Dale Murphy, his immediate supervisor, that he could not operate the core machine with both guards in place, after which Mr. Murphy told him to run it "any way you can." (Tr. 180-81.)

[20]Other evidence further confirms that safety rules were not enforced as required. Ms. Houseworth and Mr. Armbruster, for example, testified that they had operated core machines with the safety buttons taped down in the presence of their supervisors and that they had not been disciplined for doing so. (Tr. 241-43, 284-86.)

violation with the exercise of reasonable diligence. This item is affirmed as an other-than-serious violation. No penalty was proposed, and none is assessed.

Findings of Fact

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

Conclusions of Law

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Act.

2. The Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in serious violation of 29 C.F.R. § 1910.106(e)(2)(ii)(b)(2), as alleged in Citation 1, Item 1, and a civil penalty of $1,250.00 is appropriate for this violation.

4. Respondent was in violation of 29 C.F.R. § 1910.136(a), as alleged in Citation 1, Item 2; however, the violation was other-than-serious, and no civil penalty is appropriate for this violation.

5. Respondent was in serious violation of 29 C.F.R. § 1910.147(c)(4)(ii)(B), as alleged in Citation 1, Item 3, and a civil penalty of $1,250.00 is appropriate for this violation.

6. Respondent was in serious violation of 29 C.F.R. § 1910.147(c)(7)(i), as alleged in Citation 1, Item 4, and a civil penalty of $1,250.00 is appropriate for this violation.

7. Respondent was in serious violation of 29 C.F.R. § 1910.147(d)(4)(i), as alleged in Citation 1, Item 5, and a civil penalty of $1,250.00 is appropriate for this violation.

8. Respondent was in serious violation of 29 C.F.R. § 1910.212(a)(3)(ii), as alleged in Citation 1, Item 6, and a civil penalty of $1,250.00 is appropriate for this violation.

9. Respondent was in other-than-serious violation of 29 C.F.R. § 1910.147(c)(6)(ii), as alleged in Citation 2, Item 1, and no civil penalty is appropriate for this violation.

ORDER

1. Citation 1, Item 1 is AFFIRMED as a serious violation.

2. Citation 1, Item 2 is AFFIRMED as an other-than-serious violation.

3. Citation 1, Item 3 is AFFIRMED as a serious violation.

4. Citation 1, Item 4 is AFFIRMED as a serious violation.

5. Citation 1, Item 5 is AFFIRMED as a serious violation.

6. Citation 1, Item 6 is AFFIRMED as a serious violation.

7. Citation 2, Item 1 is AFFIRMED as an other-than-serious violation.

8. A total civil penalty of $6,250.00 is assessed.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated:
Washington, D.C.