SECRETARY OF LABOR, **Complainant,** **v.** **CARGILL, INC.,** **Respondent,** **and** **INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UFCW, LOCAL 207C,** **Authorized Employee Representative.**	**OSHRC DOCKET NO. 02-1071**

APPEARANCES:

Mary Anne Garvey, Esquire U.S. Department of Labor Office of the Solicitor Cleveland, Ohio For the Complainant	Kim M. Hastings, Esquire Hahn Loeser Parks Cleveland, Ohio For the Respondent	Michael Sprinker Director, Health and Safety ICWUC/UFCW Akron, Ohio Authorized Employee Representative

Before: COVETTE ROONEY
Administrative Law Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). On May 16, 2002, Danelle Jindra, a compliance officer ("CO") with the

Occupational Safety and Health Administration ("OSHA") began an investigation into the events surrounding a fatal accident that had occurred that day at the workplace of Respondent, Cargill, Inc. ("Cargill") On June 4, 2002, OSHA issued to Cargill a serious citation alleging four violations and proposing a total penalty of $12,150.00. Cargill timely contested the citation, and on March 19, 2003, a hearing was held in Cleveland, Ohio in this matter.

At the commencement of the hearing, counsel for the Complainant on behalf of all parties informed the undersigned that a settlement had been reached regarding Serious Citation 1, Items 2, 3 and 4. Under the terms of the agreement, Item 2 was vacated, Item 3 was affirmed with a reduced penalty of $1,890.00, and Item 2 was reclassified as an other-than-serious violation with no penalty. (Tr. 6-7). The hearing addressed the remaining item, Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1910.147(d)(4)(i). At the hearing, counsel for the parties stated that there was no disagreement over the fact that the subject machine should have been locked out at the time of the accident and that the only issue before the undersigned was whether Cargill could establish the affirmative defense of unpreventable employee misconduct. (Tr. 9, 222-23). The parties have submitted briefs, and this matter is ready for disposition.

Stipulated Facts

On February 11, 2003, the parties submitted their joint pre-hearing statement, which contained the following stipulated facts:

1. Respondent, Cargill, Inc., has a place of business at 2065 Manchester Road, Akron, Ohio, where it is engaged in salt packaging.

2. The Respondent is, and was at the time of the inspection which gave rise to this proceeding, an employer engaged in interstate commerce.

3. On May 16, 2002, an accident occurred at the Respondent's facility which resulted in the death of employee Kenneth L. Moyer.

4. Mr. Moyer was one of eight employees working on the third shift at the time of his death.

5. Mr. Moyer had suffered a heart attack six months before the fatality and had been released to return to work approximately two months prior to the time of the accident.

6. Mr. Moyer was found deceased on top of a palletizer machine, laying on his back with his legs having been pushed towards his head by the pusher mechanism of the palletizer.

7. A palletizer is a machine which automatically loads bags of salt onto pallets.

8. The pusher area of the palletizer contains moving parts which may cause serious injury, including death, to employees if the palletizer is not shut down and its energy sources locked out prior to entry into the area.

9. On May 16, 2002, Mr. Moyer did not de-energize and lock out the palletizer before entering the pusher area.

10. It is the policy of Cargill that the palletizer be de-energized and locked out before an employee enters the pusher area of the palletizer.

11. Employees are trained periodically on Cargill's lockout/tag-out policies.

12. Employees are tested on Cargill's lockout/tag-out policies.

13. Kenneth Moyer was trained and tested on Cargill's lockout/tag-out policies in August, 2001.

14. Cargill, Inc. implemented a program known as behavior based safety at its Akron facility in late 1999.

15. Cargill's behavior based safety program includes, among other things, a peer safety observation program whereby peers observe each other performing tasks in an effort to promote best safety practices.

16. Although Cargill still uses some supervisor observation and discipline to enforce safety policies, the peer observation program is anonymous and does not result in the identification of or administration of discipline to offending employees.

17. At the time of Mr. Moyer's accident, no supervisors or members of management were assigned to work third shift.

18. Since the implementation of behavior based safety at the Akron facility in late 1999, there is no record of an employee on third shift having been disciplined for failing to comply with Respondent's lockout/tag-out procedures.

Serious Citation 1, Item 1

This item alleges a violation of 29 C.F.R. § 1910.147(d)(4)(i), as follows:

> Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.

On or before 5/16/02, lockout devices were not used for each energy device by an authorized employee prior to that employee entering the palletizer area.

Based upon the statements of counsel at the hearing, the foregoing stipulated facts and the briefs of the parties, there is no dispute that the cited standard applies, that the terms of the standard were violated, and that an employee was exposed to the hazardous condition. (Tr. 9, 222-24; C. Reply Brief, pp. 1-2, R. Brief, p. 1). Moreover, for the reasons set out below, I find that the Secretary has established the constructive knowledge element of her case.[1] Accordingly, the Secretary has met her burden of proof and has demonstrated a violation of 29 C.F.R. § 1910.147(d)(4)(i).[2]

It is Cargill's position that Item 1 should be vacated because it has demonstrated the affirmative defense of "employee misconduct." To prove the affirmative defense of unpreventable employee misconduct, an employer is required to show (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated the rules to its employees, (3) that it has taken steps to discover violations of the rules, and (4) that it has effectively enforced the rules when violations were discovered. *Precast Serv.*, 17 BNA OSHC at 1457, *Brock v. L.E. Myers Co.*,

---

[1]The Commission and the Sixth Circuit, to which this case can be appealed, have held that the Secretary makes out a prima facie case of knowledge by establishing that the employer either knew, or with the exercise of reasonable diligence could have known, of the presence of the hazardous condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). Other factors indicative of reasonable diligence include adequate supervision of employees and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. *Gary Concrete*, 15 BNA OSHC 1051, 1054-55 (No. 86-1087, 1991); *Towne Constr. Co.*, 12 BNA OSHC 2185, 2190- 91(No. 83-1262, 1986), *aff'd*, 847 F.2d 1187 (6th Cir. 1988). Commission precedent has held that where the evidence establishes the employer did not effectively enforce its work rule, this evidence also establishes the employer had constructive knowledge of the violation. *Precast Serv., Inc.*, 17 BNA OSHC 1454, 1457 (No. 93-2971, 1995), *aff'd. without published opinion*, 106 F.3d 401 (6th Cir. 1997) (the employer may introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees).

[2]To establish a violation pursuant to section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence. *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

818 F.2d 1270, 1276-77 (6th Cir. 1987). The Sixth Circuit has further held that, to prove its defense, the employer must show that due to the existence of a thorough and adequate safety program that is communicated and enforced as written, the conduct of its employee in violating that policy was idiosyncratic and unforeseeable. *CMC Elec., Inc. v. OSHA*, 221 F.3d 861, 866 (6th Cir. 2000); *Brock v. L.E. Myers Co.*, 818 F.2d at 1276-77. An employer who wishes to rely on the presence of an effective safety program to establish that it could not reasonably have foreseen the aberrant behavior of its employee must demonstrate that program's effectiveness in practice as well as in theory. *Id. See also Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805 (6th Cir. 2003).

Cargill contends it had established work rules that were directed to the violative conduct. The record shows that Cargill had a written corporate Lockout/Tagout Policy (Ex. R-C), a Lockout/Tagout Policy specific to the Akron Salt Plant (Ex. R-D), and a machine-specific Lockout/Tagout Reference applicable to both maintenance workers and machine operators (Ex. C-1). The specifics of the Lockout/Tagout policies were covered in yearly training (Ex. R-H) and in monthly safety meetings (R-G). The record also shows that Ex. R-C, the corporate policy, was the basis of what management used to train employees in lockout/tagout and that Ex. R-D, the plant-specific policy, was a document the corporate safety department developed as a guideline for the implementation of the program at the Akron Salt Plant. This document is available on Cargill's website. (Tr. 250-53). Additionally, the parties stipulated that Cargill had a policy that the palletizer be de-energized and locked out before an employee entered the pusher area of the palletizer. *See* Stipulations 10 and 11.

I find that Cargill's written lockout/tagout policies were insufficient and that they were also inadequately communicated. Despite the materials and training detailed above, testimony adduced at the hearing establishes that employees were not familiar with the aforementioned documents and that they did not recall having seen any written work rules on locking out the palletizer.[3] (Tr. 91, 267; Exs. C-1, C-2, R-C, R-D). The record shows that there were no written machine-specific lockout procedures and that employees were trained on the job by experienced hourly employees who

[3]The Commission has not required safety rules to be written as long as the rules are clearly and effectively communicated to employees. *See Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994). However, in support of my finding in this regard, the record in this case indicates that after the fatality, a written outline or checklist was implemented as to the palletizer. (Tr. 249).

provided training on what they had learned and what they believed to be sufficient information. This training was not formal or structured, there were no written training guidelines or checklists, and there were no written tests to assure adequate employee knowledge of a particular piece of equipment.[4] The record also reveals very little involvement by management with respect to machine-specific training, and employees informed management when they believed that they had been sufficiently trained. Further, there was no written documentation of the training employees received or written procedures for employees to follow while on the job, and there was no evidence about whether employees were trained to utilize the company website. (Tr. 79-80, 85-86, 91-92, 158-161, 180-81, 248-49).

In addition to the foregoing, management officials acknowledged that the annual lockout training the company offered was general and not machine specific. (Tr. 232-33, 236, 242, 248). A general lockout/tagout discussion was a topic presented along with a number of other topics during Interactive Day in 2001.[5] (Tr. 83-86, 268). General lockout/tagout was also a topic presented during employee orientation and on several dates during the 20 to 30 minute monthly safety meetings. (Tr. 243-45; Exs. R-G, R-H, and R-I). The record indicates that Mr. Moyer attended these training sessions, and yet it is clear that he did not follow the company's lockout policy on May 16, 2002. (Tr. 243, 259-61; Exs. R-I and R-H). The record further indicates that soon after his return to work, after six months of sick leave, Mr. Moyer told a fellow employee that he felt he needed more training. (Tr. 93). Based on the record, I conclude that Cargill's lockout/tagout policies were neither thorough enough nor adequately communicated so as to have prevented the subject violation.

Cargill also contends that it took adequate steps to discover violations of its lockout/tagout policies and that it enforced those policies. Cargill maintains that its safety program, which combined traditional supervision and discipline with a behavioral-based safety program, was effective despite the fact that supervisors were not present full time on the second and third shifts. *See* R. Brief, p. 12.

---

[4]Union President Gary Christoff testified that after a layoff and employees having to move to different jobs, the Union expressed concern to management about the lack of individuals available to do training and the fact that employees were feeling uncomfortable with the amount of training they had gotten in their new jobs. (Tr. 182-83).

[5]Mr. Christoff testified that the training on Interactive Day involved a mock setup of a fan and that that was the only piece of equipment discussed. (Tr. 268-69).

Cargill has identified several steps it took prior to May 16, 2002, to monitor employee compliance with its lockout/tagout policies:

1. Training on a regular basis with testing.

2. Lockout/tagout audits performed by supervisors on a random, periodic basis.

3. Use of the Behavioral Accident Prevention Process ("BAPP"), a process by which employees anonymously observe each other for acts set out on a short list of critical safety behaviors, including lockout/tagout compliance. Observations are used to compile statistics that are analyzed to develop and introduce corrective measures to remedy accident-causing behaviors and conditions.

4. Use of a traditional discipline process for observed on-the-job safety violations.[6]

Critical to the above is the BAPP, which Cargill implemented in 1999. Cargill presented the testimony of James Spigener, vice-president of performance improvement technology for Behavioral Science Technology, Inc. ("BST"), who stated that the program entails the training of employees to observe other employees. The observed employee who commits a safety infraction is informed of what he has done that is contrary to operational definitions and that may pose a safety risk. Mr. Spigener's analysis of the observations at Cargill up until May of 2002 showed the percentage of safe behavior had improved in lockout/tagout, and he concluded that employees were diligent in ensuring that lockout/tagout was done safely.[7] His review suggested that at no time did an employee indicate that he did not know that machinery was supposed to be locked out. (Tr. 11-14, 39-40; Ex. R-A).

Mr. Spigener further testified that the observation part of the BST program is voluntary, that is, an employee can choose not to be observed. He explained that mandatory observation actually undermines the process, although he acknowledged that the contact rate the BST strives for is for each employee to be observed at a minimum of once a month. He also explained that with anonymous observation the name of the observed employee is not recorded, which means that there are not going

---

[6] *See* Ex. C-7, Interrogatory 12.

[7] Mr. Spigener said that 2,000 observations were made, for a total of 28,000 behaviors. Of these, 344 were lockout/tagout observations. 326 were noted as 100 percent safe, and 18 were noted as having some risk. Of these 18, 13 were actually done safely but could have been improved to make it more likely the right behavior would occur. Only 5 involved employees who were not complying with the operational definition and who were putting themselves at risk. (Tr. 37-38).

to be any repercussions. Mr. Spigener noted that it is important to disassociate discipline from observation, and he agreed with the statement that having discipline associated with observation would "kill the process."[8] He further noted that the goal of the program is not to eliminate the need for supervision but rather to complement it. (Tr. 42-45, 48-49, 53-54).

Joe Payne, a 25-year veteran at the Akron facility and a member of the Union, serves in the role of the BST facilitator. He testified about how the program works, how supervisors and employees are trained, and how the observations are performed and how the recorded information is used. He confirmed the anonymity and voluntariness of the program and the fact that there is no disciplinary component attached to the observation. Mr. Payne said the observer must seek permission from the employee to observe him and that observers advise management of infractions but do not identify employees. He also said that on average almost all employees are observed monthly and that there is only one hourly employee who has never been observed since 1999. (Tr. 141-47, 152-53).

Mr. Payne further testified that the palletizer is used on all three shifts. He said that in the first half of 2002, there were no observers on the third shift; before then there had been, but they were all laid off in October of 2001. He discussed the situation with management because they were not getting any reports or actions on that shift, and, as a result, employees from other shifts would stay late or come in early to do observations. As laid-off observers were called back to work, the regular observations were resumed. Mr. Payne stated that, to his knowledge, no one had ever been disciplined for committing a safety infraction seen by an observer. (Tr. 148-50).

The record establishes that Cargill's safety program had two observational components. One was supervisors performing mandatory observations, and the other was trained employees performing voluntary, anonymous observations. The differences in the components were significant. Supervisors performed lockout/tagout observations at least once a month. These observations were done without employee permission, and observed violations of lockout/tagout policies were disciplined. However, because there were no supervisors on the second or third shifts, the record is devoid of any evidence of supervisory observations done on those two shifts. (Tr. 159, 163, 229-32; Ex. R-E and R-F). The evidence shows that the disciplinary records for the third shift concerned violations such as

[8]As he noted, one employee is not going to set a fellow worker up for discipline. (Tr. 53).

absenteeism, smoking, or an employee turning himself in. The CO testified that the reason she was given as to why other types of actions were not included was because there were no managers on the third shift. (Tr. 162-69, 202).[9] It is clear from the record that Mr. Moyer worked the third shift, which had no supervisory personnel assigned to it, and there is no evidence in regard to how many times, if any, Mr. Moyer was observed by management.

As explained above, the other observations were voluntary, in that the observers had to obtain employee permission, and no discipline resulted from these observations. Cargill acknowledges that the cornerstone of the program was not punishment or discipline, and the record demonstrates that no one was ever disciplined for committing a safety infraction viewed under the voluntary observation component. Moreover, during the first half of 2002, there were no observers on the third shift because they had all been laid off. (Tr. 42-44, 48, 51-54, 145-49, 153, 163, 202, 223-24).

The Act places final responsibility for compliance with its requirements on the employer. *Brown and Root, Inc*., 8 BNA OSHC 2140 (No. 76-1296). An employer who has failed to address a hazard by implementing and enforcing an effective work rule cannot shift to its employees the responsibility for assuring safe working procedures. *Stuttgart Machine Works, Inc*., 9 BNA OSHC 1366, 1369 (No. 77-3021, 1981). I find that Cargill failed to ensure adequate supervision of the employees who worked the second and third shifts, which had no supervisors assigned to them. It is clear that Cargill knew that issues arose and violations of its lockout/tagout policies occurred, and yet there were no regularly scheduled supervisors to oversee and enforce work rules on the second and third shifts. (Tr. 163, 231-32; Exs. R-E and R-F).[10] This fact negates a finding that the employer was making a diligent effort to discover and discourage violations. I further find that the voluntary observations, which lacked a disciplinary component, failed to meet the last element of Cargill's asserted defense, that is, the element requiring the employer to show that its work rules would be

---

[9]Such incidents were recorded by supervisors who had stayed over into the second shift for a couple of hours or by someone keeping time records.

[10]"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).

effectively enforced in the event violations were detected. For these reasons, Cargill has not met its burden of proof with respect to showing that, due to the existence of a thorough and adequate safety program which was communicated and enforced, the conduct of Mr. Moyer in violating Cargill's lockout/tagout policies was idiosyncratic and unforeseeable. Cargill's contention that the violation was caused by unpreventable employee misconduct is therefore rejected.

Classification and Penalty Assessment

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result" from the violation. In order to demonstrate that a violation was serious, the Secretary need not establish that an accident was likely to occur, but, rather, that an accident was possible and that it was probable that death or serious physical harm could have occurred. *Flintco, Inc.*, 16 BNA OSHA 1404, 1405 (No. 92-1396, 1993). The Secretary appropriately classified the violation in this case as serious because the violative condition resulted in injuries which proved fatal.

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. I consider the severity of the violation in this case to be high and the probability to be greater, particularly in view of the fact that the violation resulted in a fatality. I conclude that an adjustment for history is warranted; however, no credit for size or good faith is due in light of the high gravity of the violation. A penalty of $4,500.00 is assessed for the citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. *See* Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1910.147(d)(4)(i), is AFFIRMED as a serious violation, and a penalty of $4,500.00 is assessed.

2. Citation 1, Item 2, is VACATED.

3. Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1910.212(a)(2), is AFFIRMED as a serious violation, and a penalty of $1,890.00 is assessed.

4. Citation 1, Item 4, alleging a violation 29 C.F.R. § 1910.1200(h)(1), is AFFIRMED as an other-than-serious violation, and no penalty is assessed.

/s/
Covette Rooney
Judge, OSHRC

Dated: July 3, 2003
Washington., D.C.