BEFORE THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT - RESPONDENT,

v.

BERRY GLOBAL, INC.
and its successors

RESPONDENT - PETIONER.

DOCKET NO. OSHANC 2020-6283
OSHA INSPECTION NO. 318190550

ORDER OF THE COMMISSIONERS

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 28th day of April 2023, in the OAK Courtoom, Lee House, by Paul E. Smith, Chairman, William Rowe, and Terrence Dewberry, members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant:	Stacey A. Phipps, Special Deputy Attorney General; North Carolina Department of Justice, Raleigh, North Carolina
Respondent:	Travis W. Vance, Fisher and Phillips, Charlotte, North Carolina

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission AFFIRMS the Order of Hearing Examiner Mary-Ann Leon.

ISSSUES PRESENTED

WHETHER THE HEARING EXAMINER CORRECTLY AFFIRMED THE VIOLATION OF 29 CFR 1910.147(c)(4)(i)?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1910.147(c)(4)(i)

Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in the activities covered by this section.

FINDINGS OF FACT

1. Complainant is charged with enforcement of the provisions of the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.

2. Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(10) and is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).

3. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.

4. On April 19 and 20, 2022, a remote hearing was held before the Honorable Mary-Ann Leon

5. On July 22, 2022, Hearing Examiner Mary-Ann Leon filed an Order finding that the provisions of 29 CFR 1910.147(c)(4)(i) had been violated and affirming the penalty of $5,000.00.

6. On August 17, 2022, Respondent timely petitioned the Review Board for a review of the decision of the Hearing Examiner.

7. An Order granting review was filed on August 23, 2022.

8. The oral arguments were heard by the full Commission on April 28, 2023.

9. The Review Commission adopts the Hearing Examiner's findings of facts.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.

2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.

3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.

4. The Complainant met its burden of proving by substantial evidence that the Respondent committed a serious violation of 29 CFR 1910.147(c)(4)(i).

5. The Commission AFFIRMS the Order of Hearing Examiner Mary-Ann Leon.

DISCUSSION

Respondent argues that the cited standard, 29 C.F.R. § 1910.147(c)(4)(i), does not apply to the die sets because they are "tools" rather than "equipment." Respondent further posits that "[u]nder the Hearing Examiner's interpretation, every tool in an employer's workshop would have to be locked out." But Respondent's interpretation of the standard is too narrow, and Respondent's slippery slope argument is unmerited. As described in OSHA's 2008 Compliance Directive (CPL) 02-00-147, the Lockout/Tagout ("LOTO") standard generally "addresses practices and procedures that are necessary to disable machinery or equipment and to control potentially hazardous energy while servicing and/or maintenance activities are being performed." Here, the die set is used to create plastic containers and weighs several thousand pounds. It is plainly a piece of equipment. *See EQUIPMENT*, Black's Law Dictionary (11th ed. 2019) ("The

articles or implements used for a specific purpose or activity (esp. a business operation)"). Many pieces of equipment could also be described as "tools." The mere fact that a piece of equipment could also be described as a tool does not place it beyond the scope of the LOTO standard.

The LOTO standard applied when the die sets were separated for servicing. That standard guards against the potential release of gravitational energy. As Hearing Examiner Leon noted, CPL 02-00-147 defines "hazardous energy" as "any energy, including mechanical (e.g., power transmission apparatus, counterbalances, springs, pressure, gravity), pneumatic, hydraulic, electrical, chemical, nuclear, and thermal (e.g., high or low temperature) energies, that could cause injury to employees." LOTO has also been held to apply to the release of kinetic or gravitational energy in administrative and court opinions. Hearing Examiner Leon cited *Otis Elevator Co. v. Secretary of Labor*, 762 F.3d 116 (D.C. Cir. 2014), a LOTO case involving an elevator chain that moved unexpectedly, due to gravity, when an employee unjammed the chain. Other jurisdictions have recognized that the LOTO standard can also apply to require the physical restraint of otherwise static components during servicing. For example, the LOTO standard applied in *AJM Packaging Corp.*, No. 16-1865, 2022 WL 1102423 (OSHRC Apr. 1, 2022), where an employee was injured when a scrap chute fell after he manually lifted the scrap chute to clear a paper jam. Similarly, in *Department of Labor & Industries of the State of Washington v. Kaiser Aluminum & Chemical Corp.*, 111 Wash. App. 771, 779, 48 P.3d 324, 329 (2002), the LOTO standard applied to the bucket of a front-end loader when placed in an elevated position for maintenance.

Moreover, in addition to the reasoning stated in the Hearing Examiner's decision, we note that the preamble to the final LOTO rule, Control of Hazardous Energy Sources

(Lockout/Tagout), 54 Fed. Reg. 36,644 at 36,647 (Sept. 1, 1989), expressly contemplates the rule's applicability to separated dies that are elevated in a machine and therefore are subject to fall if not restrained properly, potentially resulting in injury to a "part of the body which occupies the space between the dies." That is exactly what occurred here. As explicitly contemplated by the preamble, the LOTO standard applied when the die sets were separated for servicing in this case.

Respondent also argues that even if the cited standard does apply to the die sets, there was no violation because Respondent provided instructions and training to employees regarding the operation of the Die-Sep, and because Respondent did not have knowledge of a hazard. However, there is substantial evidence that Respondent's instructions and training were inadequate. While the instructions for operating the Die-Sep machine included the attachment of chains, no specific instructions were included for how to attach the chains as required to adequately restrain the die sets. The Hearing Examiner considered Respondent's testimony about unwritten training on the Die-Sep, but reasonably concluded that this "self-serving testimony" was "outweighed by the employer's own written instructions."

Further, Respondent misapprehends the hazard of which it must have known. Respondent claims that it had no prior knowledge of any time that the V-block and chains had ever failed nor of any damage to the V-block and chains. Regardless of whether that is true, Respondent does not dispute that it knew generally of the hazard present when employees were cleaning the die sets. The Hearing Examiner appropriately stated, "The employer's recognition of the hazard is described in its own instructions to employees regarding the safe operation of the Die-Sep." Further, the electro-magnets had failed previously, reinforcing Respondent's knowledge of the need for the V-block and chains to restrain, or lock out, the die sets during

cleaning. Therefore, Respondent had knowledge that a hazard existed to which the cited standard, 29 C.F.R. § 1910.147(c)(4)(i), applies.

Additionally, there is substantial evidence that Respondent knew of preexisting damage to the V-block, as indicated by multiple employees' reports, but failed to address it. Any doubt as to this point is laid to rest by the Employer's spoliation of evidence. "[W]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case." *Arndt v. First Union Nat. Bank*, 170 N.C. App. 518, 527, 613 S.E.2d 274, 281 (2005) (quoting *McLain v. Taco Bell Corp.*, 137 N.C.App. 179, 187-88, 527 S.E.2d 712, 718 (2000)). Here, at the hearing, the Respondent conceded that it anticipated litigation immediately after the accident occurred. Nevertheless, after the accident, it destroyed the failed V-block despite its obvious relevance to any such litigation. The CSHO and the Hearing Examiner were therefore prevented from being able to evaluate the extent of any preexisting damage or degradation to the V-block, and whether that damage created a risk of failure that was so obvious as to put the Employer on notice of the hazard. On this record, it is appropriate to draw an adverse factual inference on both points.

Finally, Respondent asserts the affirmative defense that the incident giving rise to this citation was caused by employee misconduct. But there is substantial evidence that Respondent failed to maintain adequate lockout instructions, as discussed above, negating this defense. Moreover, deficiencies related to the degradation of the failed V-block were plainly not caused by any employee misconduct.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's July 22, 2022, Order in this case be, and hereby is, **AFFIRMED** to the extent that is it not inconsistent with this opinion. Respondent is further **ORDERED** to abate the violations and to pay the accessed penalty of $5,000.00 within 30 days of the filing date of this Order.

This Dec 27, 2023.

Paul E. Smith
Paul E. Smith (Dec 27, 2023 11:44 EST)

PAUL E. SMITH, CHAIRMAN

Terrence Dewberry
Terrence Dewberry (Dec 27, 2023 01:14 EST)

TERRENCE DEWBERRY, MEMBER

William D Rowe
William D. Rowe (Dec 27, 2023 11:41 EST)

WILLIAM D. ROWE, MEMBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER OF THE COMMISSIONERS upon:

TRAVIS W. VANCE
FISHER & PHILLIPS
227 WEST TRADE ST.
SUITE 2020
CHARLOTTE, NC 28202

By depositing same in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid at Raleigh, North Carolina, and upon:

STACEY A. PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By email to carla.rose@labor.nc.gov

THIS THE 29 DAY OF December 2023.

KB Sluss

Karissa B. Sluss
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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