OAH 5-1901-37292
MN OSH Docket No. 13968

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Roslyn Robertson, Commissioner, Minnesota Department of Labor and Industry, Complainant, vs. Peerless Chain Company, Respondent.	**ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Jim Mortenson on the Respondent's Motion for Summary Disposition, filed March 21, 2022. Kevin Jonassen, Assistant Attorney General, represents Complainant. Raphael B. Coburn and Jeffrey S. Beck, Faegre Drinker Biddle & Reath, LLP, represent Respondent. Complainant filed a Response to the Motion on April 11, 2022. Respondent filed a Reply Memorandum on April 18, 2022.

Based upon the arguments, record, and proceedings herein, and for the reasons set forth in the accompanying memorandum,

IT IS HEREBY ORDERED:

1. Respondent's Motion is **DENIED**.

2. Summary disposition is **GRANTED** sua sponte to Complainant as to Citation Item 1, because Respondent's lockout tagout policy was not adequately developed as a matter of law.

3. The remaining items of Citation 1 will proceed to hearing on June 24, 27 and 28, 2022, as scheduled.

Dated: June 22, 2022

JIM MORTENSON

Administrative Law Judge

MEMORANDUM

I. Introduction

This matter involves a single citation with four items, each of which Respondent contests. Respondent requests summary disposition on all four items, arguing there is no genuine dispute of material facts and it is entitled to judgment as a matter of law on all four items. Complainant argues that there are material facts in dispute, and so this matter must proceed to hearing.

II. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.[1] A motion for summary disposition may be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[2] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.[3]

The function of an administrative law judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[4] The judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[5]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[6] A fact is material if its resolution will affect the outcome of the case.[7] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[8] A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.[9] Instead,

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[1] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2021).
[2] *See Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[3] Minn. R. 1400.6600 (2021).
[4] *See e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[5] *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[6] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[7] *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (citing *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976)).
[8] *Thiele,* 425 N.W.2d at 583.
[9] *Highland Chateau, Inc. v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) (citing *A & J Builders, Inc. v. Harms*, 179 N.W.2d 98, 103 (Minn. 1970)).

a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[10]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[11] Thus, summary disposition is only proper when no fact issues need to be resolved.[12]

III. Analysis

A. Undisputed Facts

Based on a review of the submissions from both parties, the following facts are not in dispute. As explained below, many of these facts are material to the outcome for any of the four contested items.

Respondent is a company that manufactures chain. It is located in Winona, Minnesota, where its factory employs approximately 140 people.[13]

On January 27, 2020, Thor Vang, an affected employee, was operating the 221 end welder to assemble chain.[14] This machine welds chain links, one link at a time, and then cuts away excess welded material on the completed chain link. To operate the machine, an operator holds the links on either side of the open link to be welded and pulls it towards him or herself. Then, the operator activates a foot switch which causes the machine to run through its cycle of pressing the link together, welding it, and cutting away excess weld material.[15]

The foot switch on the 221 end welder has a guard over and on the sides of the pedal.[16] The guard does not prevent an accidental activation of the machine.[17] The machine is open, without a device to prevent a person putting their hand in the point of operation.[18] When operating the machine, however, the operator must use both hands to pull away from the point of operation (negative pressure), preventing accidental injury.[19]

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[10] Minn. R. Civ. P. 56.05.
[11] *Sauter*, 70 N.W.2d at 353.
[12] *Id*.
[13] Ryan Kowalski Declaration (Decl.) at ¶¶ 3-5 (Mar. 21, 2022).
[14] R. Kowalski Decl. at ¶¶14, 15, Exhibit (Ex.) 7; Brenda Nickels Decl. ¶¶ 3, 4, Ex. 1 (Apr. 8, 2022). The 221 end welder is also known as "Chain Welder #221." *See* R. Kowalski Decl. Ex. 8; B. Nickels Decl. Ex. 5.
[15] Jeremy Frazier Decl. ¶¶ 6, 7 (Mar. 21, 2022); B. Nickels Decl. ¶ 3, Ex. 1.
[16] J. Frazier Decl. ¶ 4.
[17] B. Nickels Decl. ¶ 15, Ex. 1.
[18] *Id.* at ¶ 12, Ex. 1.
[19] J. Frazier Decl. ¶ 5.

Occasionally, the trimmer on the machine requires adjusting.[20] Company policy requires a trained and authorized employee – known as a "lead" – to make such adjustments.[21]

Vang determined to adjust a trimmer on the machine himself, in violation of company policy because he was not trained and authorized to do so.[22] Vang failed to follow the machine's logout tagout (LOTO) procedure.[23] While making the adjustment, Vang activated the machine and severely injured his hands, which were located in the point of operation.[24]

Respondent has a general LOTO policy and procedure.[25] The policy describes in detail the training for various employees on LOTO procedures.[26] The purpose of the policy is plainly stated as are the compliance expectations and procedures.[27] The scope, application, and authorization of who is to implement the procedures is also stated.[28] Respondent's specific LOTO policy for the 221 end welder states:

> **Caution**: Servicing & maintenance is not permitted unless this equipment is isolated from **all energy sources**. This is the exclusive responsibility of designated trained "Authorized Employees" defined as Maintenance Utility, Electricians, Tool & Dye, and Dept. 635 who must follow the complete "LOCKOUT TAGOUT PROCEDURE". This sheet is limited to LOTO procedures for this equipment ONLY.[29]

The policy continues with five specific steps for the procedure, providing instruction on the equipment for the particular lockout, the energy source (electrical or water), the location of the energy isolating devices, and control devices.[30] Neither the specific nor general LOTO policy includes specific requirements for testing the machine to determine and verify the effectiveness of the energy control measures. They only include general statements that testing to verify de-energization must be done.[31]

Vang's injury resulted in Complainant's investigation, the citation, and the four items thereunder.

B. Legal Requirements for Challenges to OSHA Violations

[20] The parties dispute how often this adjustment must occur.
[21] B. Nickels Decl. ¶ 4, Ex. 1; R. Kowalski Decl. ¶ ¶ 19, Ex. 9, 20.
[22] B. Nickels Decl. ¶¶ 4, 11, Ex. 1; R. Kowalski Decl. ¶ ¶ 19, Ex. 9, 20.
[23] B. Nickels Decl. ¶ 9; Kowalski Decl. ¶ 12.
[24] B. Nickels Decl. ¶ 4, Ex. 1; Kowalski Decl. ¶ 19, Ex. 9.
[25] Kowalski Decl. ¶ 12, Ex. 6.
[26] *Id.* at ¶¶ 1-2.
[27] *Id.* at ¶¶ 2-3.
[28] *Id.*
[29] Kowalski Decl. Ex. 8; B. Nickels Decl. Ex. 5 (emphasis in original).
[30] Kowalski Decl. Ex. 8; B. Nickels Decl. ¶ 10, Ex. 5.
[31] Kowalski Decl. Ex. 6, Ex. 8.

When an OSHA violation is challenged, the Department bears the burden of proving:

1. The cited standard applies;
2. The requirements of the standard were not met;
3. Employees were exposed to, or had access to, the violative condition; and,
4. The employer knows or, through the exercise of reasonable diligence, could have known of the condition.[32]

The Respondent may raise a defense of unforeseeable employee misconduct.[33] To successfully demonstrate this defense, the Respondent "must prove that it had a work rule in place which implemented the standard, and that it communicated and enforced the rule."[34] The "focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program…"[35] Further, when an employer's defense of unforeseeable employee misconduct involves a supervisory employee, the "employer is excused from responsibility for acts of its supervisory employees only if it shows that the acts were contrary to a consistently enforced company policy, that the supervisors were adequately trained in safety matters, and that reasonable steps were taken to discover safety violations committed by its supervisors."[36]

C. The Four Items

1. Alleged violation of 29 C.F.R. § 1910.147(c)(4)(i).

The first item under Complainant's citation of Respondent is an alleged violation of 29 C.F.R. § 1910.147(c)(4)(i). The scope of the standard at 29 C.F.R. § 1910.147, which includes:

> [. . .] the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. This standard establishes minimum performance requirements for the control of such hazardous energy.[37]

This is referred to as the lockout tagout standard.[38]

Complainant alleges Respondent violated 29 C.F.R. § 1910.147(c)(4)(i), which requires employers to have a policy on lockout tagout standards. The rule provides that "[p]rocedures shall be developed, documented and utilized for the control of potentially

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[32] Minn. R. 1400.7300, subp. 5; *Omaha Paper Stock Co. v. Sec. of Labor*, 304 F.3d 779, 784 (8th Cir. 2002).
[33] *Valdak Corp. v Occupational Safety and Health Review Comm'n*, 73 F.3d 1466, 1469 (8th Cir. 1996).
[34] *Id.;* Minn. R. 1400.7300, subp. 5.
[35] *Valdak* 73 F.3d at 1469*, citing Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir. 198X), *cert. denied,* 484 U.S. 989, 108 S.Ct. 479 (1987); and *Danco Constr. Co. v. Occupational Safety and Health Comm'n*, 586 F.2d 1243, 1246-47 (8th Cir. 1978).
[36] *Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d 139, 144 (8th Cir. 1978), *internal cites omitted.*
[37] 29 C.F.R. § 1910.147(a)(1)(i).
[38] *See* 29 C.F.R. § 1910.147.

hazardous energy when employees are engaged in the activities covered by this section." According to Complainant, Respondent failed to utilize a lockout tagout procedure for the 221 end welder. Both parties agree that Vang did not follow the procedure. This is a material fact that is not in dispute.

Respondent argues that the lockout tagout standard does not apply. Thus, as a matter of law, argues Respondent, it is entitled to summary disposition. Respondent also argues that even if the standard applies, its policies meet the standard.

Complainant argues that there is a dispute of material fact concerning how often the 221 end welder's trimmer required adjustment. This is in response to Respondent's argument that because the trimmer is routinely and repetitively adjusted, the adjustment of the trimmer meets the exception to the lockout tagout standard at 29 C.F.R. § 1910.147(a)(2)(ii).[39] The facts considered in light most favorable to the Complaint (nonmovant) demonstrate that the trimmer adjustment takes place during normal production operations and requires an employee to place his or her hand into the point of operation to perform the adjustment. The trimmer adjustment, thus, is covered by the standard.

The exception to this requirement is not applicable on its face because the facts demonstrate trimmer adjustments are not "performed using alternative measures which provide effective protection." The undisputed facts show that trimmer adjustments are normally performed using Respondent's lockout procedure, not an alternative. As a matter of law, the cited standard applies.

Next, the issue is whether Respondent's lockout procedure meets the cited standard, where, as here, there is no dispute of fact that the procedure does not expressly address the 221 end welder. Respondent argues that its policy is sufficient and it is entitled to judgment as a matter of law. Complainant argues that Respondent's procedure does not "clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy."[40]

The fact that Respondent has a LOTO policy, and what it says, is not in dispute. The dispute is whether, as a matter of law, the policy meets the requirements of 29 C.F.R. § 1910.147(c)(4). The record is clear that the LOTO policy – looking at both the general and machine specific policies – lacks specific requirements for testing the 221 end welder to ensure lockout is effective and it is fully de-energized. The record is sufficiently developed, and the answer is binary: either the policy is adequate and the decision is in favor of Respondent, or the policy is not adequate, in which case the decision is in favor of Complainant.

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[39] The note to the rule provides: "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."

[40] Notice and Order for Hearing and Prehearing Conference (Jan. 12, 2022), Ex. 2 at 5; 29 C.F.R. § 1910.147(c)(4)(ii).

In this case, the decision on the adequacy of the LOTO policy is resolvable on the record and the undisputed facts (which are the contents of the policy) demonstrate the policy is not adequate, as a matter of law. In light of these undisputed facts, Respondent cannot establish that its lockout procedure meets the cited standard. As a matter of law, its lockout procedure must address the 221 end welder, and Respondent must concede that, on its face, it does not. Further, because its procedure is deficient as a matter of law, it cannot establish an employee misconduct defense in this item. Application of the law to the undisputed facts compels a determination[41] that there is no genuine issue of material fact that Respondent violated 29 C.F.R. § 1910.147(c)(4)(i).

2. Alleged violation of 29 C.F.R. § 1910.147(c)(7)(1).

The second item under Complainant's citation of Respondent is an alleged violation of 29 C.F.R. § 1910.147(c)(7)(i), which requires Respondent to:

> [P]rovide 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.[42]

The training includes the instruction of affected (as opposed to authorized) employees "in the purpose and use of the energy control procedure."[43]

It is undisputed that Vang has had some training as an affected employee. What is not yet established is whether Vang was trained to lockout the 221 end welder to make adjustments. In fact, Respondent appears to claim he was not. But this is a fact for which Complainant carries the burden. The parties are entitled to a hearing to establish the record surrounding the type, quality, and content of Vang's training as an affected employee. Summary disposition is not appropriate on this item.

3. Alleged violation of 29 C.F.R. § 1910.255(b)(4).

The third item under Complainant's citation of Respondent is an alleged violation of 29 C.F.R. § 1910.255(b)(4), which requires guarding of press welding machines. The rule states:

> All press welding machine operations, where there is a possibility of the operator's fingers being under the point of operation, shall be effectively guarded by the use of a device such as an electronic eye safety circuit, two hand controls or protection similar to that prescribed for punch press operation, § 1910.217 of this part. All chains, gears, operating bus linkage,

[41] Minn. R. Civ. P. 56.06(c) allows the district courts to "consider summary judgement on their own initiative after identifying for the parties the material facts that may not be genuinely in dispute." This does not violate due process where, as here, Respondent has raised the issue. *See Heisler v Metro. Council*, 339 F.3d 622, 631 (8th Cir. 2003).
[42] 29 C.F.R. § 1910.147(c)(7)(i).
[43] *Id.* at (i)(B).

and belts shall be protected by adequate guards, in accordance with § 1910.219 of this part.[44]

Respondent argues that its use of the safe-holding safeguarding method when machine 221 is operated shows that the requirement of 29 C.F.R. § 1910.255(b)(4) is met. Complainant argues that the operator's fingers are located very close to the point of operation on the machine, and the space between the pressure dies and welding electrodes is large enough to fit a finger or hand. Thus, according to complainant, a guarding device for the point of operation is required.

The question of whether there is a possibility of machine 221's operator's hand or fingers being under the point of operation is a material one. The parties disagree about it and have both presented evidence. Complainant points to how close the operator's fingers are to the point of operation to support its position. Respondent points to the negative pressure involved – pulling away from the point of operation when operating the machine – to support its position. This factual dispute is too close on the record at hand, and so must proceed to hearing to more fully develop the record. Summary disposition is not appropriate on this item.

4. Alleged violation of 29 C.F.R. § 1910.255(b)(6).

The fourth and final item under Complainant's citation of Respondent is an alleged violation of 29 C.F.R. § 1910.255(b)(6). This standard requires "[a]ll foot switches…be guarded to prevent accidental operation of the machine."[45]

Respondent argues that it is undisputed that the 221 end welder's foot switch is guarded, and therefore, Respondent is entitled to judgment as a matter of law. Complainant argues that the guard on the foot switch was not adequate to prevent accidental operation of the machine, and that this represents a material fact dispute foreclosing summary disposition.

Respondent's argument focuses on the positions of Complainant's investigator and expert witness. These individuals hold that any accidental operation of the machine via the foot switch would demonstrate the foot switch was not adequately guarded. This position, according to Respondent, is nonsensical.

Complainant argues, however, that these individuals have taken the positions that different types of guards would have significantly reduced the chance of accidental operation. Thus, according to Complainant, there is a material fact dispute about the guard used for the foot pedal.

Both parties raise valid points. The law, on its face, is clear. In operation, however, it may be impractical. Thus, the level of protection against accidental operation of the

[44] 29 C.F.R. § 1910.255(b)(4).
[45] 29 C.F.R. § 1910.255(b)(6).

machine remains a point of contention. This will only be resolved following a more fully developed record. Summary disposition is not appropriate on this item.

IV. Conclusion

There are genuine disputes of fact regarding three items contested by Respondent. Thus, Respondent's motion cannot be granted. Item 1 – whether the cited standard applies to Respondent and whether Respondent's LOTO policy is adequate – is resolvable on summary disposition, and it is resolved in favor of Complainant. The remaining questions must proceed to an evidentiary hearing.

J. R. M.