

REPORTER

Decision of the Appeal Division

Number: 92-0604
Date: March 13, 1992
Panel: Patrick L. Byrne
Subject: Lockout Violation

This is an appeal of the February 26, 1991 decision of the director of the Field Services Department, Occupational Safety and Health Division (O.S.H.) to impose a penalty assessment of \$5,500.00. The director concluded that the employer had violated *Industrial Health & Safety Regulations* 16.98, 16.100 and 16.102 on March 20, 1990 and the circumstances warranted a Type III penalty assessment.

The issues are whether the lock-out violation constituted a high risk to workers and whether the penalty assessment was properly imposed as a Type III.

The employer operates a sawmill. On March 20, 1990 the worksite was inspected by a W.C.B. occupational safety officer. The officer observed a millwright carrying out maintenance to the coremill chipper and discovered that the electrical disconnect was in the open (de-energized) position but was not locked-out. The officer recommended that the employer receive a penalty assessment and on May 2, 1990 the employer was sent a show-cause letter proposing a penalty assessment of \$11,000.00. The employer attended an oral hearing at the divisional level on October 30, 1990 and on February 26, 1991 the director imposed a penalty assessment of \$5,500.00.

He concluded that:

. . . There were violations of the lockout regulations for which a penalty assessment is warranted. We acknowledge your company does have lockout procedures and has provided training to the workers. We feel insufficient checks and supervision has been provided to ensure those lockout procedures are being followed.

The employer filed a Notice of Appeal on March 5, 1991 and forwarded written submissions dated April 10, 1991 and June 24, 1991. The O.S.H. Division provided two memoranda dated May 9 and May 13, 1991.

There is no dispute that a violation of the cited Regulations occurred or that workers were properly instructed.

The employer argued that they did provide adequate supervision and that the lack of proper lock-out did not constitute a high risk of injury to the workers.

Did the work activity constitute a high risk of injury?

The governors' policy 1.4.3 in the *O.S.H. Policy and Procedure Manual* states:

The work practices listed below have a high risk of death, serious injury or industrial disease. . . .

2. Working on equipment that is not locked-out when required.

The proper way to view this policy is as a presumption. That is, working on equipment that is not locked-out when required constitutes a high risk of injury unless the evidence shows otherwise.

The employer's evidence is that:

- (a) The Coremill had been completely dormant for at least three weeks prior to workers going to work on the chipper.
- (b) No other piece of equipment in the entire plant was running and was not going to be in operation in the near future.
- (c) The main disconnect to the entire plant was pulled and locked-out so that it was impossible to start any machinery in the entire plant.
- (d) The 110-volt lighting panel, which is from a separate transformer than the 440-volt transformer was the only power supply in the entire mill.
- (e) The head millwright and electrician had pulled the disconnect switch on the chipper, and had removed the fuses from the switch also.
- (f) The panel disconnect switch was also pulled and this switch along with the chipper switch are less than an arm's length from the chipper where one worker was cutting and another worker standing in front of the panel.

The officer concurred with the employer's statement of facts with the exception of point (c).

The O.S.H. Division stated in their memoranda that the employer's information that the main power supply was disconnected and locked was not brought to their attention during the initial investigation or at the divisional penalty hearing. Further, in their May 13, 1991 memorandum they state:

In addition it should be noted while the company alleges the main power supply was disconnected and locked, they have not indicated whose locks were on the switch. In order to satisfy the lockout requirements, the switch would have to be locked out with personal locks of the workers involved in maintenance.

The O.S.H. Division challenged the employer's assertion that the main power supply was disconnected and properly locked-out. The employer was provided with the O.S.H. Division's memorandum and did not provide further arguments.

The employer did not raise this important piece of evidence until the appeal and such evidence should have been available earlier to the employer. Also, the employer did not explain why this evidence was not brought forward prior to the appeal. The panel finds the evidence not to be credible. On the balance of probabilities the panel finds that the main power supply was not disconnected and locked-out.

However, in this case, the head millwright and electrician pulled the disconnect switch on the chipper and removed the fuses. Further, the panel disconnect switch was also pulled and both switches were only an arm's length from the chipper. In the panel's view these precautions, albeit in non-compliance with the Regulations, mitigated the risk factor associated with the violation. The panel finds that there is sufficient evidence to vary from the presumption in policy 1.4.3 and finds that the violation did not pose a high risk to workers.

Did the employer provide adequate supervision?

The employer argued that workers had been properly supervised. They provided two diaries and examples of warnings to workers who had violated Regulations. The panel notes, however, that one of the workers in this case who had violated the Regulations was a supervisor.

The governors' policy 1.4.1 in the *O.S.H. Policy and Procedure Manual* states:

... where an employer neglects to ensure that effectual training of workers has been carried out, or that work activities are being properly supervised, a penalty assessment will be considered.

The panel does not accept that the work was being properly supervised. The employer's evidence was that the supervisor was watching the worker and the panel. Assuming that the supervisor had been properly trained in lock-out procedures and was watching the work being conducted without proper lock-out constitutes improper supervision. The evidence points to improper supervision as a direct cause of the violation.

Was the penalty properly imposed as a Type III?

The panel reviewed the employer's history of compliance with respect to lock-out violations and notes that the employer received a penalty assessment in 1988. Considering the circumstances of this violation it is more appropriately placed in the Type I category. That is, non-compliance with Regulations where there is a moderate risk of injury and the employer has a history of non-compliance.

Conclusion

There was a violation of the cited Regulations, however, the violation was not a high risk to workers. The employer did not have a lawful excuse for the violation. There was a contravention of a published policy of the governors. The penalty assessment was improperly imposed as a Type III and is reduced to a Type I in the amount of \$2,500.00.

THE APPEAL IS ALLOWED IN PART.

Editors' note: This decision has been edited for publication.