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| **IN THE MATTER OF** | * | **BEFORE THE** |
| **TATE & LYLE NORTH** | * | **COMMISSIONER OF LABOR** |
| **AMERICAN SUGARS, INC.** | * | **AND INDUSTRY** |
| | * | **MOSH CASE NO. M8462-005-01** |
| | * | **OAH CASE NO. DLR-MOSH-41-200000111** |

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## FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. Following an inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued a citation to Tate & Lyle North American Sugars, Inc. ("Employer"), alleging various violations. Following an evidentiary hearing, William L. England, Jr., Hearing Examiner, issued a Proposed Decision recommending that the citations be affirmed. On July 20, 2001, the Commissioner of Labor and Industry ("Commissioner") issued an Order Correcting Proposed Decision and Order in which the Commissioner corrected certain scriveners errors related to citation sections recited by the Hearing Examiner in the Proposed Decision.

Thereafter, by letter dated, July 11, 2001, pursuant to Labor and Employment Article, § 5-214(e), *Annotated Code of Maryland*, the Employer requested review. On October 4, 2001, the Commissioner held the review hearing and heard argument from the parties. Based upon a review of the entire record and consideration of relevant law and the positions of the parties, the Commissioner, for the reasons set forth below, has decided to affirm the Hearing Examiner's

proposed decision as corrected by the Order Correcting Proposed Decision and Order, and as modified below.[1]

## DISCUSSION

The Employer is a cane sugar refiner producing Domino Sugar products at its Baltimore Maryland location. During processing in the "Wash House", melted raw sugar, heated between 160 and 185 degrees Fahrenheit (called slurry), is pumped though pipes into very large tanks where it is mixed with chemicals as part of the "carbonation process". Before moving on to other stages of processing, the slurry is pumped through strainers which are designed to trap and collect impurities as well as to protect the pump that sends the slurry on to the next tank in the refining process. Accumulated impurities in the strainer slow the flow of slurry from one tank to the next. For this reason, the strainers are regularly cleaned every eight hours by Wash House employees with the job title "Earth Systems Operator". In July, 2000, Earth Systems Operator Patricia Martin died after sustaining second degree burns over 60 per cent of her body when she fell into hot slurry that spewed from the open strainer of the 2-3-8 tank ("strainer 2-3-8").

The Employer contends, *inter alia*, that Citation 1, Items 1, 2, and 3, mandating the addition of certain personal protective equipment for strainer cleaning, should be dismissed, because the personal protective equipment and safety procedures required by the Employer at the time of the accident were sufficient to protect employees from the hazards associated with the cleaning of strainers. The Employer further contends that Citation 2, Items 2 and 3, alleging the Employer's failure to provide employees with equipment and training for the

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[1] In this Decision, the transcript of the hearing before the Hearing Examiner is "T1; MOSH exhibits are "MOSH Ex."; Employer's exhibits is "R. Ex."; the Hearing Examiner's Proposed Decision is "Proposed Decision"; Findings of Fact by the Hearing Examiner are "FF"; and the transcript of the hearing on review is "T2".

lockout/tagout of strainers, should be dismissed because they are duplicative of Citation 2, Item 1, requiring the Employer to develop, document, and utilize lockout/tagout procedures for unclogging activities.

There was considerable testimony at the hearing regarding the definition and difference between cleaning and unclogging as it pertains to strainer 2-3-8. MOSH and the Employer agree, as the Hearing Examiner found, that cleaning and unclogging are "distinct tasks." Proposed Decision at 9, 11; T1 at 55, 92, 187, 221, 233, 240-41. Strainer cleaning involves the routine scheduled task of removing assorted debris or impurities from the strainer. Unclogging is required when there is an unanticipated stoppage of the flow of slurry from one tank through the strainer to the next tank in the refining process. The Hearing Examiner found, without exception by the parties, that an unanticipated flow stoppage "may be solely the result of the strainer becoming clogged with impurities between the scheduled cleanings every eight hours. Alternately, the unanticipated stoppage of flow maybe the result of a blocked system. The procedure for 'unclogging' a strainer is the same as for a scheduled cleaning every eight hours…" up to a point. FF 7; Proposed Decision at 8; T2 at 14-15. The parties also agree that the hazard, with respect to Citation 2 concerning lockout/tagout procedures, is the unexpected release of stored energy in the form of extremely hot slurry under pressure. T1 at 102-03, 242-43. Additionally, the parties agree that Citation 2 does not apply to the routine scheduled cleaning of strainers performed every eight hours. T1 at 163; T2 at 34.

With respect to Citation 1, Items 1, 2, and 3, the Employer asserts that the personal protective equipment required at the time of the accident, when used in conjunction with its established safety procedures, was adequate to protect employees when performing the routine task of cleaning strainer 2-3-8. At the time of the accident, the Employer maintained several job

safety analyses for cleaning strainers, none specifically denoted as applying to the 2-3-8 strainer. Each job safety analysis required safety glasses, bump cap, safety shoes, and rubber gloves as personal protective gear. Each additionally recommended a face shield and an apron or raincoat. Citation 1, Items 1 and 2, allege that rubber boots, a raincoat, and face shield, should have been required rather than optional equipment for strainer cleaning.

The Employer argues that since the acknowledged hazard of hot slurry releasing under pressure does not arise during routine strainer cleaning, MOSH failed to establish a hazard associated with routine strainer cleaning that would necessitate additional personal protective equipment. According to the Employer, its safety procedures for routine strainer cleaning required the employee to open and close various valves to drain and vent the system before removing the strainer cover. If no slurry drained from the system when the valves were opened, the employee was required to call a supervisor before proceeding to open the strainer cover. The responsibility of the employee ended with calling a supervisor. T2 at 15-16. The Employer argues that by following this procedure, exposure of the employee to hot slurry would be minimal, and the requirement for the additional protective gear sought by MOSH unnecessary.

A number of factors undermine the Employer's argument. The evidence shows that the Employer maintains two job safety analyses for strainer cleaning, one for Earth System Operators "Cleraning (sic) 2-5-4 Tk Strainer" (MOSH Ex. 12; R. Ex. 6), and another for "Sweetland Press Operator[s]" "Cleaning 2-1-2Tk Strainer" (R. Ex. 7). Each identifies a potential hazard as contact with hot slurry. The Employer concedes that at the time of the accident, it did not have a job safety analysis unique to strainer 2-3-8. T1 at 232. During the investigation, the Employer represented to MOSH that MOSH Ex. 12, the procedure for cleaning the 2-5-4 strainer, applied to the cleaning of strainer 2-3-8. T1 at 47-48. This procedure, dated

"10/11/98", lists the "job sequence" for isolating the strainer and draining the system before cleaning the strainer. Steps I through III, list the job sequence to isolate and drain the system. Step IV instructs the employee to loosen the clamp-down bolt holding the strainer cover in place. Step V instructs the employee to carefully remove the strainer cover. Steps VI through IX instruct the employee to pull out, clean, and replace the strainer. The job safety analysis for strainer 2-5-4 does not instruct employees in what the Employer claims to be the standard procedure of calling a supervisor in the absence of drainage before opening the strainer basket. In fact, it gives no instruction concerning whether or not the employee should expect drainage from the system and is totally silent on what measures an employee should take if the system does not drain once the drain valves are opened.

At the hearing, the Employer introduced the job safety analysis for strainer 2-5-4, and the job safety analysis for strainer 2-1-2. R. Ex. 6, 7. According to Processing Manager Stuart Fitzgibbon, who claimed to have the final authority to approve job safety analyses, there is no distinction in cleaning any of the strainers and that both documents contain the same "generic process" and apply to cleaning strainer 2-3-8. T1 at 232. The job safety analysis for strainer 2-1-2, dated "10/28/98", lists the job sequence to isolate and drain the system and, at step V, contains the instruction, "[I]f no liquid drains call the foreman, the drain valve may be blocked." As noted above, this instruction does not appear in the job safety analysis for strainer 2-5-4, initially relied upon by the Employer, even though the two documents were prepared at about the same time. The instructions contained in the job safety analysis for strainer 2-1-2 are more in line with the Employer's declared policy. Even so, they do not highlight the instruction to call a foreman. More importantly, they do not instruct the employee that if there is no drainage, they should stop immediately, and not proceed to the next steps of loosening the clampdown bolts on

the strainer cover and removing the strainer lid as called for in the procedure. Furthermore, they do not expressly state that if the system does not drain, the employee has no responsibility other than to call a supervisor. These job safety analyses show the inconsistency and lack of clarity in the Employer's written safety policy for strainer cleaning.

The record also contains evidence not discussed by the Hearing Examiner that contradicts the Employer's contention that immediately calling a supervisor in the absence of drainage was a practice routinely accepted and followed. Employer witness and supervisor, Joe Carlson, a refining foreman of 15 years, testified without contradiction that he is responsible for training employees on the refining process and the Employer's safety procedures, in addition to being responsible for enforcing the company safety policies and rules. T1 at 290, 292. According to Carlson, if opening and closing the proper valves does not drain and vent the system between the tank and the pump, it is a common and accepted practice for an employee, before calling a supervisor or removing the strainer cover, to insert, at the various drain valves, a rod and a water hose to flush out any blocking material. T1 at 303-04, 313-15. Carlson unequivocally testified that he has trained employees in this procedure. T1 at 304.[2] This evidence establishes that other procedures, not incorporated in any job safety analysis in evidence, were taught to, and followed by employees when no slurry drained from the valves and before they sought the intervention of a supervisor. T1 at 304, 305; MOSH Ex. 12, 14, 15; R. Ex. 6 and 7.

[2] Given supervisor Joe Carlson's regular and long term involvement with the observation and training of employees, the Commissioner credits his candid account of normal operating procedures for cleaning and unclogging strainers that deviate from the various written job safety analyses relied upon by the Employer. In this regard, the Commissioner notes that the Employer did not directly refute Carlson's testimony that employees routinely use a rod and a hose to remove blocking materials from the line. Further, to the extent that Processing Manager Stuart Fitzgibbon accused employees of deviating from standard procedures when, at the time of the accident, they attempt to unblock the line using of a rod and hose (T1 at 266), Fitzgibbon's testimony is not credited.

Based on the job safety analyses, the record fails to establish that the Employer had a clear and consistent written safety procedure for cleaning strainer 2-3-8 that was communicated to employees. Evidence that the strainer cleaning taught to employees by first line supervisors deviated substantially from the Employer's written safety procedures further illustrates the inconsistency in the Employer's safety policy. Based on this evidence, the Employer has failed to establish that the required personal protective equipment for strainer cleaning, when used in conjunction with existing safety procedures, was sufficient to protected employee from the potential hazard of exposure to hot slurry associated with routine strainer cleaning.

It also should be noted that despite the parties' agreement at the hearing that cleaning and unclogging are distinct tasks, nowhere in the Employer's job safety analyses are these tasks distinguished. An employee embarking on the routine task of strainer cleaning may find in that process that the system is blocked, and, with little notice or time to don additional personal protective equipment, may unexpectedly be exposed to the release of hot slurry.[3] The potential for employee exposure to this elevated hazard is demonstrated by the facts of this case where the drain valve of tank 2-3-8 was intentionally or inadvertently opened after the strainer cover had

[3] Although Citation 1, Items 1 and 2 use the word "clean" exclusively, rather than the words "cleaning and unclogging" used in Item 3, the record is clear that the intent of the Citation 1 is to reduce employee exposure to the hazards associated with contact with hot slurry. The Commissioner finds that the citations are drafted broadly enough to put the Employer on notice to the nature of violations alleged. See *Blocksom and Company*, 11 OSHC 1255, 1259 (1983). In *Blocksom*, the employer sought dismissal of the citation on the grounds that it did not violate the cited standard "in the precise manner alleged in the citation." *Id*. Citing *Baroid Division of NL Industries v. OSHRC*, 660 F.2d 439, 449, 10 OSHC 1001, 1008 (10th Cir. 1981), *quoting National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257, 1264, 1 OSHC 1422, 1425-1461 (D.C. Cir. 1973). The OSHA Review Commission found that "[s]o long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue."

been removed, spewing hot slurry under pressure out of the strainer and onto employees.[4] To require the Employer to add a raincoat, face shield and rubber boots to the list of personal protective equipment mandated for strainer cleaning is a reasonable alternative effective safeguard to lockout/tagout during strainer cleaning and necessary to protect employees against exposure to this potential hazard.

Based on this evidence, the Commissioner finds that, at the time of the accident, the Employer's safety policy with respect to cleaning strainer 2-3-8 was not clearly understood by, or effectively communicated to, employees or supervisors, and did not adequately protect employees from the potential hazard of exposure to hot slurry. Given these facts, the personal protective equipment required by the Employer was not sufficient to protect employees from exposure to a hazard capable of causing injury. Accordingly, the Commissioner sustains the violation finding for Citation 1, Items 1, 2, and 3.

Citation 2, Item 1, of this case charges the Employer with violating 29 CFR §1910.147(c)(7)(4) by failing to develop, document, and utilize procedures to control hazardous energy while unclogging strainers. Citation 2, Item 2, charges the Employer with violating 29 CFR §1910.147(c)(1) by failing to provide employees with equipment to perform lockout/tagout when unclogging strainers. Citation 2, Item 3, charges the Employer with violating 29 CFR §1910.147(c)(5) by failing to adequately train employees to use the lockout/tagout procedures for strainer unclogging. Employer asserts that Citation 2, Items 2 and 3, are duplicative of Citation 2, Item 1 and should be dismissed. The Employer argues, *inter alia*, that since it has a

[4] Even if the system is drained and vented before the strainer cover is removed, as the Employer urges should have been done in this case, opening the drain valve of tank 2-3-8 while the strainer cover is off will result in the unexpected and hazardous release of large amounts of hot slurry under pressure.

lockout/tagout procedure in place, provides lockout/tagout equipment to employees, and does related employee training, implementation of a lockout/tagout procedure specific to the 2-3-8 tank would effectively remedy Citation 2, Items 2 and 3.

The concept of duplicate violations has been considered by MOSH in two distinct contexts. The first, arising in *Crane Company*, 4 OSCH 1015, 1019, (1976) and its progeny, addresses the situation where a citation informing an employer how to reduce contamination from toxic and hazardous substances, is duplicative of a citation alleging employee exposure under the same standard. The second line of cases involves multiple citations for the same violation. Neither theory supports the Employer's allegation of duplication in this case.

In *Crane*, OSHA cited the employer for violating three separate provisions of 29 CFR1910.1000 relating to exposure to toxic and hazardous substances. The first two citations, alleging violations of subsection (b)(1) and (c), related to employee exposure to various specific airborne contaminants. The third citation charged the employer with violating subsection (e) failing to implement feasible engineering or administrative controls to reduce such exposure. The OSHA Review Commission found that since the third citation merely informed the employer how to achieve compliance with the first two citations, the third citation was dependent on the preceding subsections and could not be cited as a separate violation.

Unlike the situation in *Crane*, none of the items in Citation 2 allege a specific exposure violation. Nor do any of the items involve overall feasibility or administrative controls. Rather, each item addresses a discrete dimension of an effective lockout/tagout program. The first requires the Employer to establish a lockout/tagout procedure specific to strainer 2-3-8; the second requires the Employer to provide employees with the equipment necessary to carry out this procedure; and the third requires the Employer to train employees to perform the procedure.

Thus, the violations alleged are distinct and separate offenses requiring different remedial action. Unlike the situation in *Crane*, Citation 2, Items 2 and 3 are not duplicative of, or encompassed by, one another. Accordingly, *Crane* does not support a finding of duplication in this case.

OSHA has also addressed the charge of duplication in cases where the Secretary of Labor issued separate citations and penalties for multiple incidents of the same conduct at one or more job sites. In *Secretary of Labor v. Andrew Catapano Enterprises Inc.*, 17 OSHC 1776, 1786 (1996), the OSHA Review Commission affirmed the discretion of the Secretary to issue separate citations and penalties for multiple violations of the same standard at different work sites. In *Catapano*, certain citations covered overlapping time periods and the same standard was at times cited more than once, albeit not more than once at any one work site. Here, there is no issue of multiple occurrences, and no one violation is alleged more than once. Further, in *Catapano*, the OSHA Review Commission affirmed multiple citations of the same standard, in part, based upon the fact that, as in this case, abatement of one violation would not abate the other violations. The Commission also noted that, as in this case, the gravity of the violations potentially exposed employees to serious injury or death. For the reasons set forth above, the Commissioner finds no merit to the Employer's claim that the Items 2 and 3 of Citation 2 are duplicative to Item 1 and should therefore be dismissed.

## ORDER

For the reasons set forth above, the Commissioner, on this 2nd day of August, 2002, hereby **ORDERS**:

1. Citation No. 1, Item No. 1 alleging a serious violation of MOSH Standard 29 C.F.R. § 1910.132(a) (1999), with penalty of $5,800.00 is **AFFIRMED**.

2. Citation No. 1, Item No. 2 alleging a serious violation of MOSH Standard 29 C.F.R. § 1910.133(a)(1) (1999), with a proposed penalty of $5,800.00 is **AFFIRMED**.

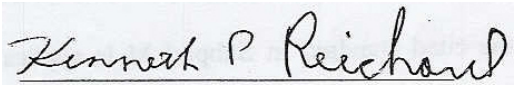
3. Citation No. 1, Item No. 3 alleging a serious violation of MOSH Standard 29 C.F.R. § 1910.132(f)(1)(ii) (1999), with a proposed penalty of $5,800.00 is **AFFIRMED**.

4. Citation No. 2, Item No. 1 alleging a serious violation of MOSH Standard 29 C.F.R. § 1910.147(c)(4)(I) (1999), with a proposed penalty of $5,800.00 is **AFFIRMED**.

5. Citation No. 2, Item No. 2 alleging a serious violation of MOSH Standard 29 C.F.R. § 1910.147(c)(5)(i) (1999), with a proposed penalty of $5,800.00 is **AFFIRMED**.

6. Citation No. 2, Item No. 3 alleging a serious violation of MOSH Standard 29 C.F.R. § 1910.147(c)(7)(I) (1999), with a proposed penalty of $5,800.00 is **AFFIRMED**.

7. This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. Consult Labor and Employment Article § 5-215, *Annotated Code of Maryland*, and Maryland Rules, Title 7, Chapter 200.



**KENNETH P. REICHARD**
Commissioner of Labor and Industry