United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. JOHNSON BRASS & MACHINE FOUNDRY, INC., Respondent.	Docket No. 21-1294

DECISION AND ORDER

APPEARANCES:

For the Complainant:
Travis W. Gosselin, Trial Attorney
U.S. Department of Labor
Chicago, Illinois

For the Respondent:
Scott T. Allen, Esquire
Daniel A. Kaplan, Esquire
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Madison, Wisconsin

BEFORE: William S. Coleman
Administrative Law Judge

INTRODUCTION

Johnson Brass & Machine Foundry, Inc. (JBM) operates a foundry in Saukville, Wisconsin, where it uses pit-mounted centrifugal casting machines called "spinners" to produce metal castings for a variety of commercial/industrial uses. (T. 20-21, 49, 579; Stip. ¶ 3.f). Two of the spinners at the foundry are known as the A Spinner and the B Spinner (identified in this

Decision as "Spinner" or "Spinners").[1] The A and B Spinners are substantially identical and are situated next to each other.

On April 26, 2021, a JBM employee was seriously injured when he was dragged around inside the A Spinner pit after his clothing snagged on a rotating die that he was cleaning while standing inside the pit. An inspection and investigation by the Occupational Safety and Health Administration (OSHA) ensued, which resulted in OSHA issuing to JBM a Citation and Notification of Penalty (Citation) pursuant to section 9(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (Act). The Citation proposed penalties totaling $36,046 for five alleged serious violations of OSHA standards as follows: one violation of a fall protection standard [29 C.F.R. § 1910.28(b)(6)(i)]; three violations of the control of hazardous energy (lockout/tagout) [LOTO] standard [§ 1910.147]; one violation of a machine guarding standard [§ 1910.212(a)(1)].[2]

JBM timely contested the Citation and the proposed penalties pursuant to section 10(a) of the Act, thereby bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Act. (Stip. ¶ 3.a.; T. 20). The undersigned Commission judge was assigned the matter and conducted a three-day evidentiary hearing in Milwaukee, Wisconsin in November 2022. Post-hearing briefing was completed on April 13, 2023.

The principal issues presented, and the decisions thereon, are as follows:

- Did the Secretary prove by a preponderance of the evidence that employees working less than four feet above dangerous equipment

[1] JBM operates other spinner machines at its foundry, but the alleged violations pertain only to the A and B Spinners. This decision does not adjudicate whether any alleged violative conditions or practices exist with respect to any other spinner machines.

[2] At the outset of the hearing, the Secretary withdrew the alleged machine guarding violation. That alleged violation is thus formally vacated herein.

were not protected from falling onto the dangerous equipment by either a guardrail system or a travel restraint system? (Citation Item 1; § 1910.28(b)(6)(i))

Decision. Yes. The Secretary proved non-compliance with § 1910.28(b)(6)(i).

- Did the Secretary prove by a preponderance of the evidence that JBM was required to utilize LOTO procedures when setting up a die because the Spinner motor could start up unexpectedly and injure an employee? (Citation Item 2a, § 1910.147(c)(4)(i))

  Decision. Yes. The Secretary proved non-compliance with § 1910.147(c)(4)(i).

- Is the alleged violation of § 1910.147(d) that JBM did not *implement* LOTO procedures when setting up a die duplicative of the proven violation of § 1910.147(c)(4)(i) that JBM did not *utilize* LOTO procedures when setting up a die? (Citation Item 2b, § 1910.147(d)).

  Decision. Yes. As alleged, Item 2b is duplicative of the proven Item 2a violation of § 1910.147(c)(4)(i), so Item 2b is vacated.

- Did JBM fail to comply with the training requirements of the LOTO standard by failing to train spinner operators as "authorized employees"? (Citation Item 3, § 1910.147(c)(7)(i)).

  Decision. Yes. The alleged training violation was proven.

- Did JBM establish the affirmative defenses of estoppel, infeasibility, or limitations as to the proven violations?

  Decision. No.

For reasons set forth below, Citation Items 2b and 4 are vacated. Items 1, 2a, and 3 are affirmed as serious violations, and Items 2a and 3 are grouped for penalty purposes. Penalties totaling $15,020 are assessed.

FINDINGS OF FACT

Except where the following numbered paragraphs expressly state that evidence respecting a matter of fact was not presented, the following facts were established by at least a preponderance of the evidence:

1. JBM produces centrifugal metal castings for a variety of commercial/industrial uses at its foundry in Saukville, Wisconsin. JBM employs employees and is engaged in a business affecting commerce. (Stip. ¶¶ 3.b–d; T. 20, 579).

The A and B Spinners

2. In the part of the foundry that JBM calls the Big Bay, JBM operates two substantially similar pit-mounted centrifugal casting "spinner" machines that JBM identifies as the A Spinner and the B Spinner (Spinner or Spinners). (Stip. ¶¶ 3.f–g; T. 21, 357; Ex. R-1).

3. The Spinners were originally manufactured in the 1970's, but there is no evidence of the identity of the manufacturer. (T. 685-86).

4. The Spinners are "pit-mounted" in that the rotating components are contained in a pit (each Spinner has a separate pit) in the foundry floor.

5. The Spinner pits have a footprint of about 10x10 feet. (T. 202).

6. The floors of the Spinner pits are about 62 inches lower than the foundry floor. (T. 211; Ex. J-12).

7. The floors of the Spinner pits are formed by removable metal plates. A variable speed electric motor and related equipment is housed underneath the removable pit floors. A drive shaft connects the electric motor to a "spinner table" that is above the removable pit floor. There is a space of about four to six inches between the pit floor and the underside of the spinner table. The top surface of the spinner table is about eight to ten inches higher than the pit floor. (T. 215).

8. To produce a centrifugal metal casting, molten metal is poured into a die (mold) that has been bolted onto the spinner table. The die rotates at up to 450 RPM during normal production operations. (T. 106, 633).

9. All the components of the Spinners, both below and above the removable pit floor, operate in concert for the singular purpose of producing a centrifugal metal casting. (T. 579).

10. The largest diameter die in use at the foundry is known as the "Anthem" die. The Anthem die is used only in the A and B Spinners. The Anthem die is about 35 to 40 inches tall, and its diameter (width) is about 75 inches. (T. 214-15, 247, 420-21). When installed in the Spinners, the bottom of the Anthem die is elevated approximately 8-10 inches above the pit floor. (T. 215). With the floor of the pit being 62 inches lower than the surrounding foundry floor, when the Anthem die is installed in the Spinners, its top is less than 20 inches lower than the foundry floor. (*See* Ex. J-9).

11. Each Spinner pit is outfitted with a hinged metal door that when closed covers the entire pit opening. Some JBM employees call this door a "splash cover." (T. 659). The hinged splash cover is opened and closed using a one-ton capacity electric hoist.

12. The hinge of the splash cover is attached to a frame that lines the interior of each Spinner pit. (*See* hinge at Ex. R-25 at 38 & 39). The upper edge of the frame protrudes above the foundry floor. When the splash cover is closed and covers the pit, the splash cover rests on the upper edge of the frame, as depicted in the photograph at Exhibit J-16. The frame is adjustable up and down so that it can be adjusted to protrude from about six to thirty-six inches above the foundry floor to accommodate dies of varying heights. (T. 58, 114-15; Exs. J-9, J-10, R-25 at 11).

13. When the splash cover is fully open, three sides of the square-shaped pit constitute "unprotected edges" within the meaning of 29 C.F.R. § 1910.21(b).[3] The fourth, "hinged," side of the pit does not constitute an "unprotected edge" when the splash cover is fully open. (*See* Ex. J- 9).

14. When the splash cover is closed, none of the four sides of a Spinner pit constitute an unprotected edge because the splash cover covers the entire pit (except for a droplet-shaped hole in the center of the splash cover through which molten metal is poured). (T. 195, 202, 376-77, 402-03, 423-25, 435-36, 501-02, 661; Exs. J-9, J-16).

15. Prior to the commencement of the OSHA inspection on April 26, 2021, JBM did not use a guardrail system as fall protection for the Spinner pits when the splash cover was open. (T. 471, 679). Sometime after OSHA commenced the inspection, JBM began to use movable guardrails around the unprotected edges of the Spinner pits. (T. 383-84, 684).

Setting Up a Die in a Spinner Pit

16. Employees called "spinner operators" are responsible for installing and setting up dies in the Spinners in preparation for molten metal being poured into a rotating die.

17. The spinner operators perform all the tasks to set up a die in the Spinner pit with the splash cover in the open position. For some setting up tasks, the spinner operator is positioned outside the Spinner pit at or near its three unprotected edges. For other setting up tasks, the spinner

[3] The term "unprotected sides and edges" is defined in § 1910.21(b) as follows: "*Unprotected sides and edges* mean any side or edge of a walking-working surface (except at entrances and other points of access) where there is no wall, guardrail system, or stair rail system to protect an employee from falling to a lower level."

operator is positioned inside the Spinner pit. The sequential tasks for setting up a die in a Spinner pit are as follows:

- lower the die (weighing as much as 5,000 pounds [T. 80]) into the pit with an overhead crane (T. 61-62)
- enter the pit and reach underneath the spinner table to bolt the die to the spinner table (T. 391)
- lower the bottom plate into the die with the use of the overhead crane (the record is unclear whether any employee is in the pit for any part of the installation of the bottom plate [T. 82-83, 100])
- if the bottom plate does not fit perfectly, then from a position at the edge of the pit *while the die is rotating* at low RPM, heat the die with torches to expand it so that the bottom plate fits in the die (T. 361-62)
- from a position at the edge of the pit *while the die is rotating* at low RPM, use a torch to heat the die for cleaning (T. 68, 362)
- from a position either at the edge of the pit (or for some smaller diameter dies, while standing inside a corner of the pit on a portable stairway) and *while the die is rotating*, clean the interior walls of the die and the bottom plate with a long-handled wire brush (T. 82)
- from a position at the edge of the pit for larger dies (and for some smaller dies, while standing inside the pit), vacuum or shovel out from inside the die the debris generated by the cleaning (T. 65, 75-76)
- from inside the pit, seal the seam between the die and the bottom plate by applying a mortar-like material ("mud") to "patch" (or "mud") the seam (T. 69, 334-35)
- from a position outside the pit *while the die is rotating*, use a torch to heat the die to dry the "mud" (T. 68; Ex. R-19)
- from a position at the edge of the pit *while the die is rotating*, spray ("paint") a substance onto the interior wall of the die to prevent the molten metal from adhering to the die (T. 78, 96-97)

- from a position outside the pit *while the die is rotating*, use a gas torch to heat the die to pouring temperature, which can be up to 400ºF (T. 68, 430-31)
- from a position outside the pit, use an overhead crane to place a "top plate" over the upper opening of the die (T. 83; Ex. J-14)
- from inside the pit, install "wedges" into the wedge posts to secure the top plate in place (T. 83)
- from a position outside the pit *while the die is rotating*, use a torch to heat the top plate to pouring temperature (T. 82; Ex. J-14)

(T. 57-91, 391, 445-46, 644-51, 659; Ex. R-19). After these setting up tasks are completed, normal production operations commence with the following tasks: the splash cover being lowered to cover the pit, and employees pour molten metal into the rotating die through the drop-shaped aperture in the center of the splash cover. (Ex. R-19).

18. JBM calls the production of a single centrifugal metal casting a "shot." Depending on the size of the die being used, the Spinners can produce between two and four "shots" during one ten-hour shift. (T. 658-59).

19. In situations where the die must be changed between "shots," all the activities listed in the Finding of Fact ¶ 17 must be performed again to produce the next "shot." Where the same die is used for the subsequent "shot," the task sequence for producing the next shot would commence with heating the die for cleaning. (T. 641, 658; Ex. R-19).

20. The electric motor that powers the spinner table can be isolated from its energy source by an energy isolating device that is capable of being locked out,[4] but JBM neither trains nor

[4] The terms "lockout," "locked out," and "locking out" as used in this decision carry the meaning assigned to the term "lockout" in § 1910.147(b), which is as follows: "*Lockout*. The placement of a lockout device on an energy isolating device, in accordance with an established procedure, ensuring that the energy isolating device and the equipment being controlled cannot be operated until the lockout device is removed."

authorizes Spinner operators to lockout the Spinners. Spinner operators perform all the tasks described in the Finding of Fact ¶ 17 in which the die is not rotating without the Spinner being locked out. (Tr. 70-76, 394-95).

DISCUSSION

JBM is an "employer" as defined in section 3(5) of the Act and thus subject to the compliance provisions of section 5(a). (Stip. ¶ 3.e; T. 20). 29 U.S.C. §§ 652(5), 654(a).

To prove a violation of an OSHA standard, the Secretary must prove that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees were exposed to, or had access to, the violative condition, and (4) the employer knew or, through the exercise of reasonable diligence, could have known of the violative condition. *See Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980).

Protection from Falling onto Dangerous Equipment
(Citation Item 1 -- § 1910.28(b)(6)(i))

Citation Item 1 alleges a serious violation of the fall protection standard at § 1910.28(b)(6)(i), which requires an employer to protect employees from falling onto dangerous equipment that is less than four feet lower than a walking-working surface. Section 1910.28(b)(6)(i) provides:

> (6) *Dangerous equipment*. The employer must ensure:
> (i) Each employee less than 4 feet (1.2 m) above dangerous equipment is protected from falling into or onto the dangerous equipment by a guardrail system or a travel restraint system, unless the equipment is covered or guarded to eliminate the hazard.

"Dangerous equipment" is a defined term that "means equipment, such as vats, tanks, electrical equipment, machinery, equipment or machinery with protruding parts, or other similar units, that,

because of their function or form, may harm an employee who falls into or onto the equipment." § 1910.21(b).

The citation item alleges that JBM violated § 1910.28(b)(6)(i) with respect to the A Spinner only in the following manner:

> On or about April 26, 2021, the employer did not ensure that employees working at or around the edge of the pit were protected from falling into the spinner pit or onto the spinner machine while the spinner machine was spinning. This exposed employees to a fall hazard of five feet two inches (5'2") to the bottom of the spinner pit, and a fall hazard onto rotating spinning machine equipment. This hazard area is exposed during spinner machine setup operations, and maintenance and servicing operations. [5]

Standard Applies

The diameter of the Anthem die is 74 or 75 inches. (T. 420-21). When the Anthem die is installed in the Spinners, the top of the die is less than two feet from the interior sides of the pit at the mid-point of each side.[6] (Exs. J-10, J-11). The top of the Anthem die was no more than thirty-eight inches below the walking-working surface of the foundry floor, and thus when the die is installed in the A Spinner, its top is less than four feet lower than the surrounding foundry floor. (T. 251-52).

[5] Other provisions of § 1910.28 generally require an employer to provide fall protection for fall hazards of four feet *or more*. E.g., § 1910.28(b)(1)(i) (requiring fall protection for employees on walking-working surface with an unprotected side or edge that is four feet or more above a lower level). Even though the citation item avers that the pit floor is more than five feet lower than the foundry floor, the Secretary did not cite JBM for an alleged violation of § 1910.28(b)(1)(i).

[6] If the square-shaped pit's interior length and width is 116x116 inches (upon the assumption that the thickness of the interior frame is about two inches on all four sides), then the distance between the Anthem die at the midpoint of each interior side of the pit would be about 20 inches. (*See* the photograph at Exhibit J-10 showing tape measure near the top edge of the interior frame.)

Exhibit J-13 is a photograph of the Anthem die as it was installed in the pit for the A Spinner on April 26, 2021, and is shown here:

The Anthem die has 28 evenly spaced hard-edged vertical wedge posts[7] that extend pillar-like around its upper circumference. The distance between the midpoints of adjacent wedge posts is about eight inches. There is no direct evidence of the dimensions of the wedge posts, but the known calculated distance of about 8.3 inches between the centers of adjacent wedge posts[8] would indicate that each post extends about five inches above the top rim of the Anthem die. (T. 80, 251; Exs. J-10 & J-13).

The wedge posts constitute "protruding parts" as that term is used in the definition of "dangerous equipment" quoted above. It is manifest that anyone falling from the foundry floor into the pit and onto the hard corners and edges of any of the Anthem die's 28 wedge posts could sustain serious or even fatal injuries from impact with the wedge posts. (*See* Exs. J-10, J-15, J-18).

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[7] The wedge posts (called "wedge points" by some witnesses) seem to be so named because the circular top plate for a die is placed inside the wedge posts and is secured in place by metal wedges (called "spikes" by another witness) being hammered into the rectangular hole near the top of each wedge point. (T. 61, 80-81, 217-18, 376-77; *see also* Ex. R-25 at 1, and Ex. J-7 at 3 [describing the job step of "[w]edges are hammered into wedge posts," and identifying an attendant "potential hazard" during that job step to include "[s]harp edges on equipment" and "[s]lipping and tripping"]).

[8] Calculated based upon the die having a circumference of about 19.5 feet.

The great weight of evidence is that when the Anthem die is installed in a Spinner pit, its wedge posts are less than four feet below the surrounding walking-working surface of the foundry floor and that the die constitutes "dangerous equipment" as defined in § 1910.21(b). The cited standard applied on the date alleged (April 26, 2021) when the Anthem die was installed in the A Spinner pit and the splash cover to the pit was in the raised (open) position as depicted in the photograph as Exhibit J-9.

JBM's argument that the standard does not apply because employees do not work directly above the installed Anthem die is rejected. Section 1910.28(b)(6)(i) by its terms is intended to protect employees "from falling *into or onto* … dangerous equipment" (emphasis added). The only reasonable meaning of the standard's text and structure is that the standard applies to situations where employees work directly over or adjacent to dangerous equipment that is less than four feet below the walking-working surface. The spinner operators perform various tasks while positioned at the edge of the open pit, with the top of the Anthem die less than two feet from the edge of the pit, so that if an operator fell into the pit (whether by tripping, slipping, stumbling, losing balance, fainting, being bumped, or otherwise) they could fall "into or onto the dangerous equipment" from a position above the dangerous equipment. (E.g., T. 99, 250).

Noncompliance, Employee Exposure & Employer Knowledge

Section 1910.28(b)(6)(i) requires that employees be "protected from falling into or onto the dangerous equipment by a guardrail system or a travel restraint system."

There is no dispute that as of the date of the alleged violation (April 26, 2021), employees regularly performed tasks while positioned at the edge of the A Spinner pit when the splash cover/lid for the pit was in the raised/open position, and that no guardrail system or travel restraint system was in place to protect them from falling into the open pit and onto the dangerous equipment installed in it. (T. 68-69, 83, 97-102, 250-51, 361, 391-92, 471-73, 679). There is

further no dispute that JBM management expected employees to perform tasks from the unprotected edge of the spinner pits. The foundry supervisor testified: "We know they're working around the spinner pits. That's part of their job." (T. 451).

The only reasonable view of the evidence is that JBM did not comply with the cited standard, that employees working at the unprotected edge of the pit on the day of the alleged violation were exposed to a fall hazard onto dangerous equipment, and that JBM had actual knowledge of the violative condition.

Estoppel Defense to Fall Protection Violation Not Proven

JBM argues that the Secretary is estopped from seeking to hold JBM responsible for the fall protection violation based on OSHA having inspected the foundry in 2017 in the wake of an employee being injured from molten metal burping from the B Spinner. OSHA did not issue a citation to JBM in connection with the 2017 inspection. JBM argues that over the course of that inspection OSHA officials communicated to JBM that the absence of fall protection around the open pit was not a violative condition. (Resp't Br. at 31-33) (T. 142-44, 165, 531, 653-54, 713-14; Ex. R-30).

"To establish a traditional estoppel defense against a litigant, a party must prove: (1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment." *Erie Coke Corp.*, 15 BNA OSHC 1561, 1569-70 (No. 88-611, 1992), *aff'd*, 998 F.2d 134 (3d Cir. 1993). However, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Cmty. Health Serv. of Crawford Cnty., Inc*., 467 U.S. 51, 60 (1984). "In addition to the traditional elements of an estoppel claim, a party must show affirmative misconduct before estoppel can be applied against the government." *Fluor Daniel*, 19 BNA OSHC 1529, 1533 (No. 96-1729, 2001) (consolidated), *aff'd*, 295 F.3d 1232 (11th Cir. 2002). Affirmative

misconduct "requires an affirmative act to misrepresent or mislead" and "is more than mere negligence." *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000). Moreover, establishing estoppel against the government "additionally requires a showing that the government's wrongful act will cause serious injustice, and the public's interest will not suffer undue damage if estoppel is imposed." *Fluor Daniel*, 19 BNA OSHC at 1533.

JBM identifies no express representation by OSHA officials during the 2017 inspection that the unguarded pit was not a violative condition when the splash cover for a Spinner pit was in the raised/open position. Indeed, the JBM managerial official who was the lead contact with OSHA over the course of the 2017 inspection acknowledged that no one from OSHA informed him that the unprotected pit was compliant with OSHA standards. (T. 670, 675-76).

The gist of JBM's estoppel argument is that the conduct and actions of the OSHA officials during the 2017 inspection amounted to an implicit representation that the unprotected sides of the open pit was not a violative condition. (Resp't Brief-in-Chief 31-32; Resp't Reply Br. 19-22). *Cf. Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 431 (5th Cir. 2001) (determining that OSHA had indicated "implicit, if not explicit, approval" of an employer practice by having withdrawn a citation that addressed the practice but "failing to specifically warn" the employer that the practice was nevertheless noncompliant, and thus the employer lacked fair notice that the practice was noncompliant).

An active misrepresentation is an essential component of the "affirmative misconduct" element for establishing estoppel against the government. The absence of any such active misrepresentation here is fatal to JBM's estoppel defense. *See Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1149 n. 15 (No. 88-1250, 1993) (indicating that "to establish affirmative misconduct" requires proof of an "active misrepresentation and resulting injustice"), *rev'd on other*

grounds, 25 F.3d 653 (8th Cir. 1994); *see also Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C. Cir. 1978) (declining to allow an employer to rely on OSHA's failure to identify a violative condition that was present during a prior inspection because to do so "would discourage self-enforcement of the Act by businessmen who have far greater knowledge about conditions at their workplaces than do OSHA inspectors").

Limitations Defense to Fall Protection Violation Not Established

JBM contends the violation of § 1910.28(b)(6)(i) is time-barred by the six-month limitations period of section 9(c) of the Act, which provides: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). JBM's theory is that OSHA recognized or should have recognized the identified fall hazard during the 2017 inspection and that the six-month limitations period commenced then. (Resp't Brief-in-Chief at 33-34).

In *Safeway Store No. 914,* 16 BNA OSHC 1504, 1509 (No. 91-373, 1993), the Commission addressed "the question of whether conditions which existed and could have been detected during a prior inspection may be the subject of citations issued more than six months later if the Secretary conducts a subsequent inspection." The Commission ruled:

> The fact that the Secretary may have had the opportunity to become aware of similar violative conduct and issue a citation during an earlier inspection does not prohibit future citations issued within six months after conduct constituting a violation is discovered during a *subsequent* inspection or within six months after the Secretary knew or should have known of the violative conditions as a result of a subsequent inspection.

Id.; see also AKM LLC v. Sec'y of Lab., 675 F.3d 752, 763 (D.C. Cir. 2012) ("where a regulation ... imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied, and the statute of limitations will not begin to run until it does") (Garland, J., concurring).

As discussed above, the violative condition existed on the date alleged in the citation item (April 26, 2021). The Citation was issued on October 20, 2021, less than six months after the proven occurrence. The alleged and proven occurrence of the condition that violated § 1910.28(b)(6)(i) is thus not time barred by the six-month limitations period of section 9(c).[9]

Technical Infeasibility Defense to Fall Protection Violation Not Proven

JBM argues that it is technically infeasible to install either a guardrail system or travel restraint system as § 1910.28(b)(6)(i) requires.

A cited employer has the burden to prove that compliance with a standard is technically infeasible by showing (1) literal compliance with the terms of the standard was infeasible under the existing circumstances, and (2) an alternative protective measure was used or there was no feasible alternative measure. *Otis Elevator Co*., 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *aff'd* 762 F.3d 116 (D.C. Cir. 2014). It is "not the Secretary's burden to show feasibility as an element of his case." *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1433 (No. 90-1349, 1993).

In its brief-in-chief, JBM argues that it is technically infeasible to install a *permanent* guardrail system to comply with § 1910.28(b)(6)(i). (Resp't Brief-in-Chief at 29). The cited standard, however, does not require that a guardrail system be *permanent* (i.e., fixed in place) to comply with the standard's option for utilizing a "guardrail system" for fall protection. *See* definition of "guardrail system" in § 1910.21(b) ("*Guardrail system* means a barrier erected along an unprotected or exposed side, edge, or other area of a walking-working surface to prevent employees from falling to a lower level"), and § 1910.29(b) (specifying minimum requirements

[9] The limitations arguments that JBM advances with respect to the other citation items are also rejected for the same reason.

for "guardrail systems"). In its brief-in-chief, JBM makes no argument that some non-permanent barrier that meets the requirements of § 1910.28(b)(6)(i) would be infeasible.

In its subsequently filed reply brief, JBM acknowledges that the standard does not require a permanent guardrail system but argues instead that it had proved that it was technically infeasible to utilize a non-permanent guardrail system. (Resp't Reply Br. at 15-16). JBM advances this argument notwithstanding that sometime after the inspection JBM identified and began to use some form of a non-permanent guardrail around the open Spinner pits. (T. 684). JBM argues that it "was not aware of" that guardrail system "until after" OSHA commenced the inspection. (Resp't Reply Br. at 16). The evidentiary foundation of JBM's argument is the testimony of its chief operating officer that "we were able to come up with an idea to make that work," and that prior to the inspection JBM had "never tried that particular idea." (T. 684). JBM presented no evidence that the guardrail system it began to use after the inspection was not available prior to the inspection. A reasonable inference from this testimony is that the guardrail system that JBM began using was available prior to the OSHA inspection and that JBM simply discovered it once it started to look. *See Pitt Des Moines, Inc.*, 16 BNA OSHC at 1433 (observing that achieving compliance with some standards "will, in some instances, require some creativity on the part of employers"). JBM has failed to meet its burden to establish that the use of a guardrail system was technically infeasible as of the date of the proven violation. *Cf. CSA Equip. Co., LLC*, No. 12-1287, 2019 WL 1375918, at *8 (OSHRC, Mar. 19, 2019) (determining evidence that procedures implemented after an inspection constituted "prima facie evidence that [the] procedures were capable of being put into effect at the time" of the inspection); *Pitt-Des Moines, Inc.*, 16 BNA OSHC at 1434 (rejecting infeasibility defense because employer "proved the technological feasibility of [abatement] by eventually developing and installing [the subject devices]" after the citation was issued); *FMC*

Corp., 12 BNA OSHC 2008, 2012 n.5 (No. 83-488, 1986) ("Under . . . Fed. R. of Evid. 407, evidence of post-accident measures are admissible to establish feasibility.").

Serious Classification

The Secretary classified the violation of § 1910.28(b)(6)(i) as having been a "serious" violation. A violation is "serious" if "there is substantial probability that death or serious physical harm could result" from a violative condition. 29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an accident would occur, only that if an accident did occur, there was a substantial probability that death or serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010).

The great weight of the evidence establishes that if an employee fell onto the dangerous equipment that the employee could sustain serious or even fatal injuries from contact with hard-edged wedge posts on the Anthem die. (T. 99, 250-52). The violation is appropriately classified to have been serious.

Utilization of Energy Control Procedures
(Citation Item 2a -- § 1910.147(c)(4)(i))

Citation Item 2a alleges a serious violation of paragraph (c)(4)(i) of the control of hazardous energy (lockout/tagout) (LOTO) standard, § 1910.147, which provides: "(4)(i) *Energy control procedure*. Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section."

The focus of the citation item is the requirement that LOTO procedures be "utilized," not the provision's other requirements that LOTO procedures be "developed" and "documented."[10]

[10] JBM had both developed and documented energy control procedures for the electric motor that powered the spinner table, but only JBM's maintenance personnel utilized these procedures. (T. 234-36; Exs. J-3, R-1).

The citation item alleges that as to both Spinners, JBM failed to utilize energy control procedures during unspecified set up and maintenance tasks as follows:

> On or about April 26, 2021, the employer did not ensure lockout procedures were utilized to protect employees working at, on, or around the spinner from unexpected start-up and operation while performing tasks associated with the set up and maintenance of the spinning machine. This exposed employees to caught-on and crushing hazards.

The only energy source that the alleged violation addresses, and the only source of potentially hazardous energy that the parties litigated, is the electricity to the electric motor that supplied power to the spinner table to make it rotate at operating speeds of 300 to 450 RPM. (T. 106, 267, 495, 626, 633, 644). The electric motor and associated equipment are located underneath the removable metal plates that form the pit's floor.

Standard Applies

The LOTO standard's "scope" provision is contained in paragraph (a)(1)(i) and provides in pertinent part: "(i) *Scope.* This standard covers 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."

The Setting Up Tasks Performed by Spinner Operators Constitute "Servicing and/or maintenance" within the Scope of the LOTO Standard

The term "servicing and maintenance" that appears in the LOTO standard's "scope" provision quoted above is defined in § 1910.147(b) as follows:

> *Servicing and/or maintenance*. Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

The term "setting up" that is used in the definition of "servicing and/or maintenance" is itself a defined term, as follows: "*Setting up*. Any work performed to prepare a machine or equipment to perform its normal production operation." *Id.*

The term "normal production operation" that is used in the definition of "setting up" is also itself a defined term, as follows: "*Normal production operations*. The utilization of a machine or equipment to perform its intended production function." *Id.*

Distinct from the LOTO standard's "scope" provision [paragraph (a)(1)(i)] is the standard's "application" provision in paragraph (a)(2), which provides that the standard does *not* apply to servicing and/or maintenance done during normal production operations *except* for servicing and/or maintenance that is performed under the conditions specified in subparagraphs (a)(2)(ii)(A) & (B) *or* when the conditions described in the so-called "minor servicing exception" that is set forth in the "Note" to subparagraph (a)(2)(ii) are present.

The entirety of paragraph (a)(2) and its subparagraphs and "Note" are as follows:

> (2) *Application.* (i) This standard applies to the control of energy during servicing and/or maintenance of machines and equipment.
>
> (ii) Normal production operations are not covered by this standard (See subpart O of this part). Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if:
>
> (A) An employee is required to remove or bypass a guard or other safety device; or
>
> (B) An employee is required to place any part of his or her own body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle."
>
> NOTE: *Exception to paragraph (a)(2)(ii):* 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. (See subpart O of this part).

JBM argues that the setting up activities identified in Finding of Fact ¶ 17 do not constitute "servicing and/or maintenance" but rather are "normal production operations" to which the LOTO standard is generally inapplicable under subparagraph (a)(2)(ii). (Resp't Brief-in-Chief 21-23; Resp't Reply Brief at 4-5). This argument is rejected as contrary to the standard's plain meaning. The tasks identified in Finding of Fact ¶ 17 are definitionally "setting up" activities because they are "work performed to prepare a machine or equipment to perform its normal production operation." Normal production operations for producing a centrifugal casting commence after the die has been fully set up, with the pouring of molten metal into a rotating die after the pit's splash cover has been closed. (T. 82, 358; Ex. R-19). Such setting up tasks, by definition, do not constitute "normal production operations," because the terms "setting up" and "normal production operations" are mutually exclusive. *Westvaco Corp.*, 16 BNA OSHC 1374, 1379-80 (No. 90-1341, 1993) (concluding that an employee's adjustments to a machine that were performed between production runs constituted "setting up" and "cannot, based on the standard's definition of that term, be considered to take place 'during normal production operations'").

JBM contends further that "neither the pit nor the die constitutes 'machines or equipment' that can unexpectedly energize," but rather only the electric motor and associated equipment located beneath the removable pit floor (and that are inaccessible when setting up a die) are the "machines and equipment" for which locking out may be necessary. (Resp't Brief-in-Chief at 22-23). This argument is rejected. The intended function of the Spinners is to produce centrifugal castings. The metal castings are produced by the coordinated operation of all components of the Spinner. The cited standard applies to the entire Spinner apparatus to the extent that any component of that apparatus (here, the spinner table and the die bolted onto it) exposes employees

to unexpected energization or startup that could cause injury during servicing and/or maintenance of any component of the Spinner apparatus. *See Sec'y of Lab. v. Action Elec. Co.*, 868 F.3d 1324, 1333 (11th Cir. 2017) ("To consider a single complex mechanical system a 'machine' under the LOTO regulation—even if its components are not tightly and permanently connected—accomplishes the central purpose of the regulation, which is to minimize foreseeable harms arising from energized machinery.").

Application of Minor Servicing Exception Not Established

JBM argues further that the LOTO standard does not cover the setting up tasks identified in Finding of Fact ¶ 17 because those tasks come within what is sometimes referred to as the "minor servicing exception" set forth in the "NOTE" quoted in full above that establishes an exception to paragraph (a)(2)(ii).

JBM has the burden of proving the minor servicing exception applies to any given servicing or maintenance activities by proving the activities "are (1) minor, (2) take place during normal production operations, and that (3) effective alternative protection is provided." *Westvaco Corp.*, 16 BNA OSHC at 1378. JBM has failed to prove any of these elements.

First, the setting up tasks set forth in Finding of Fact ¶ 17 are hardly "minor," either individually or collectively. Rather, the multiple sequential tasks preparatory to pouring molten metal into a preheated spinning die to produce a single centrifugal casting are complex and can take hours to perform. *Cf. J.C. Watson Co.*, 22 BNA OSHC 1235, 1239-40 (No. 05-0175, 2008) (consolidated) (concluding employer had failed to show that activities such as changing motors and fixing air leaks constituted "minor tool changes and adjustments" within the meaning of the minor servicing exception) *aff'd*, 321 F.App'x 9 (D.C. Cir. 2009) (unpublished). For example, lowering a multi-ton die into a 10x10-foot pit using an overhead crane hardly constitutes a "minor

tool change or adjustment" or "other minor servicing adjustment[]" within the meaning of the exception. Nor are the tasks that the spinner operators perform when they must be positioned in the pit "minor," such as (1) bolting the die onto the spinner table from a kneeling, supine, or prone posture while on the floor of the spinner pit, (2) mudding (patching) the seam between the die and the bottom plate, or (3) installing the wedges into the wedge posts to secure the heated top plate in place. Nor are the other tasks that spinner operators commonly (though not necessarily) perform from a position inside the pit "minor," such as (1) cleaning dies with a wire brush (which for larger dies takes about 15 to 20 minutes when the die is rotating and about 30 to 40 minutes if the die is not rotating), and (2) vacuuming or shoveling out debris created by the cleaning. (T. 121-22, 132-34, 372-73).

Second, as previously discussed, the setting up activities that are preparatory to pouring molten metal into the rotating die do not take place during "normal production operations," and thus the minor servicing exception simply has no application to those setting up activities. *Westvaco Corp.*, 16 BNA OSHC at 1379-80; Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, 36662 (Sept. 1, 1989) (to be codified at 29 C.F.R. pt. 1910) (explaining the intent of the minor servicing exception is "to exclude from coverage those actions which would otherwise fit within the definition of 'servicing or maintenance,' but which are actually routine, repetitive actions which are integral to the operation of the equipment for production, and which are necessary to allow production to proceed without interruption").

Third, JBM contends the minor servicing exception's requirement "that the work [be] performed using alternative measures which provide effective protection" is satisfied by the administrative measures and processes that JBM has in place to avoid an unexpected start up during the setting up the die. This argument is also rejected. JBM's administrative measures do

not prevent employee exposure to unexpected start up as effectively as implementing lock out procedures or by any effective machine guarding,[11] as is addressed infra in the discussion of whether the spinner operators could be injured from an unexpected startup of the electric motor while setting up a die to get the Spinners ready for normal production operations.

Requirements that Unexpected Start Up
(1) Could Occur, and
(2) Could Cause Injury

To establish that the LOTO standard applies to a setting up task identified in Finding of Fact ¶ 17 requires proving that if LOTO procedures were not utilized (1) the spinner table and attached die could start rotating unexpectedly, and (2) this unexpected startup could cause injury to an employee. *See* § 1910.147(a)(1)(i) ("This standard covers 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"); *accord Otis Elevator Co. v. Sec'y of Lab.*, 762 F.3d 116, 121 (D.C. Cir. 2014) (quoting § 1910.147(a)(1)(i)); *Gen. Motors Corp., Delco Chassis Div.*, 17 BNA OSHC 1217, 1218 (No. 91- 2973, 1995) (consolidated) *aff'd*, 89 F.3d 313 (6th Cir. 1996); 54 Fed. Reg. at 36666 ("If an energy source does not have the capability of causing injury to employees, it is not 'hazardous energy' within the scope of this standard.").

[11] The reference in the minor servicing exception to the machine guarding standard [29 C.F.R. pt. 1910, subpt. O] indicates that the exception contemplates effective machine guarding to constitute an appropriate form of "alternative protection." *See also* 54 Fed. Reg. at 36662 (alternative measures contemplated by the minor servicing exception "will generally involve compliance with OSHA's machine guarding requirements throughout the production process); *id.* at 36666 ("If servicing or maintenance is performed during normal production operations without the removal or bypassing of the machine guarding required by subpart O, this standard does not apply").

Unexpected Start Up Could Occur

The LOTO standard's scope provision addresses the *unexpected* (1) energization, (2) start up, or (3) release of stored energy. Only the matter of unexpected *start up* of the spinner table is germane to the analysis here of whether the standard applies during any setting up tasks identified in Finding of Fact ¶ 17.[12, 13]

When performing any of the setting up tasks identified in Finding of Fact ¶ 17, a spinner operator is positioned either (1) on the foundry floor near the edge of the pit, or (2) in the pit itself.

The greater weight of the evidence establishes that during the tasks that are performed when the spinner table is stationary and the operator is positioned either inside the pit or on the foundry floor at the edge of the pit, that the spinner table could start without the foreknowledge of a Spinner Operator performing those tasks. The administrative measures and processes that JBM has established to avoid such an unexpected start up are insufficient to assure the spinner operator would always have foreknowledge of any such start up. JBM's administrative measures and processes are: (1) only one spinner operator is assigned to operate a given Spinner, (2) one "helper"

[12] Neither "unexpected energization" nor the "unexpected release of stored energy" is implicated here. JBM does not isolate the electric motor from its energy source during any of the setting up tasks identified in Finding of Fact ¶ 17, and so the motor is "energized" when those tasks are being performed. [The terms "energized" and "energy source" are defined in § 1910.147(b) as follows: "*Energized*. Connected to an energy source or containing residual or stored energy;" "*Energy source.* Any source of electrical, mechanical, hydraulic, pneumatic, chemical, thermal, or other energy."] Since the motor is energized during all the setting up tasks, its energization during those tasks could not be unexpected. And there is no evidence that there is any "residual or stored energy" present in the motor that could be released during those setting up tasks.

[13] JBM does not explicitly argue that the standard is inapplicable on the ground that any startup of the spinner table during the setting up activities could *not* be unexpected, although it advances a similar argument in other contexts. (Resp't Brief-in-Chief at 14, 23, 29; Resp't Reply Br. 6–7, 13–14). To the extent these arguments could be reasonably construed to address the "standard applies" element of the Secretary's burden of proof, such a contention is addressed here.

employee assists both the A and B spinner operators (T. 433)), and (3) only the spinner operator in charge of a respective Spinner is permitted to manipulate the start and stop buttons and the RPM dial on a Spinner's control panel[14] or to instruct the helper employee to manipulate those controls. (Resp't Br. at 12-13, citing to T. 432-33).

The separate control panels for the A and B Spinners are situated against the wall behind each Spinner pit. (T. 384-85; Exs. J-15 & J-16). When the splash cover/lid to the pit for the A Spinner is in the up/open position, the spinner operator's view to the A Spinner's control panel (and the view vice versa) may be blocked in whole or in part. (*See* Ex. J-15). As for the control panel for the B Spinner, the photographs at Exhibits J-16 and J-19 suggest that its open splash cover would likely not obstruct the view between a spinner operator engaged in setting up tasks and the control panel, although either the spinner operator or the helper employee could easily be facing away from the other at any given time.

The weight of the evidence is that to date these administrative measures have succeeded in averting any inadvertent or unexpected start up of the Spinners, but it is not difficult to envision a confluence of events that could result in these administrative measures failing and the machine starting up unexpectedly and tragically while a spinner operator is performing some setting up tasks. *Cf. B.C. Crocker Cedar Prods.*, 4 BNA OSHC 1775, 1777 (No. 4387, 1976) ("While the fact that there have been no injuries . . . may be some evidence of no probability of the hazard causing an accident, it is not conclusive on the question of whether a hazard existed"); *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012) (noting that the "purpose of the Act is to prevent the first accident"). For example, a spinner operator could be kneeling or laying

[14] *See* Ex. R-18 at 3 for partial photo of Spinner control panel that was taken after the inspection and after JBM had installed an interlock device, of which the orange-colored knob depicted in the photo is a part.

prone or supine on the pit floor while bolting the die to the spinner table, and another employee could fail to recognize the spinner operator's position and manipulate the controls to start the spinner table rotating.

Moreover, JBM's administrative measures and processes are not integral to the design and construction of the Spinner such as to make it a practical impossibility for a start up to be unexpected. *See Reich v. Gen. Motors Corp., Delco Chassis Div.*, 89 F.3d 313, 315 (6th Cir. 1996) (observing that there can be no unexpected start up "when a machine is designed and constructed so that it cannot start up without giving a servicing employee notice of what is about to happen"); *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1023 (No. 91-2950, 2007) ("Energization is 'unexpected' in the absence of some mechanism to provide adequate advance notice of machine activation"); *see also S. Hens, Inc. v. OSHRC*, 930 F.3d 667, 677 (5th Cir. 2019) (observing that "[o]ccupational safety regulations exist because people are distractible," that "[f]unctioning with less than perfect focus and control is our ordinary condition," and that "OSHA standards serve to protect workers from common human errors such as neglect, distraction, inattention or inadvertence").

It is also conceivable that a malevolent employee could start up a spinner while a spinner operator is performing setting up tasks. (T. 405). Moreover, a simple control circuit failure could lead to a spontaneous and thus unexpected startup at any time. *See* § 1910.147(b) (defining "energy isolating device" *not* to "include a push button, selector switch, and other control circuit type devices"). Isolating the electric motor from its energy source and locking it out would foreclose either an intentional or spontaneous start up, which is the object of LOTO standard. *See* 54 Fed. Reg. at 36644 ("This standard addresses practices and procedures that are necessary to

disable machinery or equipment and *to prevent* the release of potentially hazardous energy while maintenance and servicing activities are being performed." [emphasis added]).

And so, while an unexpected startup of the spinner table may be unlikely, there exists a reasonable possibility that it could occur.

Moreover, as previously noted, when cleaning some dies that are smaller in diameter than the Anthem die, spinner operators typically stand on a portable stairway positioned in a corner of the pit while the die rotates at low RPM. (T. 368; Ex. J-18). Even though a spinner operator cleaning from this position is aware the die is rotating, the LOTO standard nonetheless applies if the employee could be injured while doing the cleaning. *See Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2139 n.4 (No. 04-475, 2005) (finding laborers cleaning near running conveyor were "positioned in such a way" that conveyor "could have unexpectedly caught hold of their tools, clothing, or body parts—all types of hazards § 1910.147 was intended to eliminate"). For the same reason, when a spinner operator is performing setting up tasks from outside the pit near its unprotected edge when the die is rotating, the LOTO standard applies notwithstanding that the employee knows the spinner table and attached die are rotating.

Unexpected Start Up Could Cause Injury

The great weight of the evidence establishes that the unexpected startup of a spinner table and affixed die could cause injury to employees. Spinner operators perform some of the setting up activities while positioned inside the spinner pit, to include bolting the die onto the spinner table, which requires that the spinner operators get low on the floor of the pit to reach underneath the spinner table, whose underside is about four to six inches above the pit floor. (T. 215, 403). And as of the date of the alleged violation (April 26, 2021), spinner operators performed other setting up tasks while positioned on the foundry floor at the unprotected edge of the pit and without any compliant form of fall protection to prevent them from falling into the open pit or falling onto

dangerous equipment installed in the pit. Some of the setup activities identified in Finding of Fact ¶ 17 are performed while the spinner table and die are rotating at 25 to 35 RPMs. When cleaning some smaller diameter dies, the spinner operator stands on portable steps placed in a corner of the Spinner pit. (T. 361, 369-70; Ex. J-18 [showing spinner operator cleaning die while inside the pit, on a portable stairway with a double guardrail that JBM started to use after the OSHA inspection here—Exs. J-6, R-4; T. 378-80]).

A spinner operator was seriously injured on April 26, 2021, when his clothing snagged on the rotating die, and he was spun around inside the pit. JBM originally deduced that the operator had fallen into the spinner pit while using a long-handled brush to clean the interior walls of the Anthem die from the edge of the pit, but JBM later learned that the employee had been cleaning the die while standing in the pit next to the rotating die (which JBM asserts was in violation of an unwritten work rule). (Ex. J-8). *Cf. Ormet Corp.*, 14 BNA OSHC 2134, 2138 (No. 85-531, 1991) ("The specific facts of *this* accident are not determinative of whether there was a violation," and that a "violation still would have been committed" under the circumstances proven "even if there had been no accident"). Regardless of whether the injured spinner operator was violating a work rule when he was injured, his injuries readily demonstrate that the performance of setting up activities while the spinner motor is rotating the spinner table and attached die presented a risk of injury to the spinner operators working in proximity to the spinner table and attached die, whether while working inside the pit or at its unprotected edge. *See* supra the quotation in *Burkes Mech., Inc.*, 21 BNA OSHC at 2139 n.4.

JBM also argues that the seriousness of an injury would be minimized because upon startup the spinner table "may take one to two minutes to get to a decent speed." (T. 663; Resp't Brief-in-Chief at 35; T. 106 [spinner operator testifying it takes 90 to 120 seconds for Spinner to go from

zero to 70 RPM). The weight of the evidence establishes that even with a gradual increase in RPMs an employee could sustain serious injuries, much in the same fashion that the Spinner Operator sustained serious injury on April 26, 2021. (T. 109-110, 222).

Noncompliance, Employer Knowledge, Employee Exposure or Access, and Violation Classification

There is no dispute that JBM requires spinner operators to set up a die in a Spinner when the energy source to the electric motor is not isolated and locked out. (T. 263). And, as discussed above in addressing the "standard applies" element of the Secretary's burden of proof, the spinner operators were exposed to the risk of serious injury from hazardous energy when performing at least some of these setting up tasks.

The Secretary has proven that JBM violated § 1910.147(c)(4)(i) in the manner alleged in Citation item 2a. That violation was "serious" within the meaning of section 17(k) of the Act.

Unforeseeable Employee Misconduct Defense to LOTO Violation

To establish the affirmative defense of unforeseeable employee misconduct (UEM), an employer must show that: (1) it established work rules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012).

JBM asserts that it is not responsible for the proven LOTO violation on the ground that the employee whose serious injury on April 26, 2021, precipitated the OSHA inspection and investigation sustained those injuries because he was violating an unwritten work rule not to stand in the spinner pit to clean the inside surfaces of the Anthem die while the die is rotating. (Resp't Brief-in-Chief at 30-31; Resp't Reply Br. at 16-19).

JBM has not proven that the work rule on which it relies was "designed to prevent the violation" proven here. The employee's asserted violation of the unwritten work rule would not have prevented the proven violation. JBM requires that the electric motor be energized when a die is set up in a Spinner pit. At least some of the setting up tasks, particularly those performed from inside the pit, exposed employees to the risk of serious injury from the unexpected start up of the spinner table and attached die. (E.g., T. 76, 97-100, 137, 373-74, 468). Spinner operators who complied with JBM's work rules and established procedures when setting up a die invariably failed to comply with the cited standard.

JBM's established procedures entail employees violating the cited standard as a matter of course, and so the UEM defense is not established. *TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at *4 (OSHRC, June 2, 2022) ("To prove a UEM defense, the employer must establish it had a work rule that effectively implemented the requirements of the standard"), *aff'd*, 74 F.4th 347, 359-60 (5th Cir. 2023).

Affirmative Defenses of Technical and Economic Infeasibility of Compliance with § 1910.147(c)(4)(i)

JBM argues that it is both technologically and economically infeasible to utilize energy control procedures when setting up a die in the Spinners. *See Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Lab.*, 674 F.2d 1177, 1189 (7th Cir.1982) ("Feasibility, in the context of safety regulations, refers not only to technical feasibility but also to economic feasibility"); *accord V.I.P. Structures, Inc.,* 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994).

The elements of the affirmative defense of technical infeasibility are stated *supra* in connection with the fall protection violation. *See Otis Elevator Co.*, 24 BNA OSHC at 1087.

To succeed in establishing that compliance with a standard is *economically* infeasible, the employer "must demonstrate both that it is extremely costly for the employer to comply with the

Secretary's order and that the employer cannot absorb this cost." *Faultless*, 674 F.2d at 1190. "[E]conomic feasibility is established only when the employer's existence as an entity is financially imperiled by compliance." *Id.*; *Gregory & Cook, Inc.*, 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995) (indicating that proof of economic infeasibility must include specific evidence to show that an "employer's existence as a company would have been adversely affected" by the cost of compliance). "[M]atters of economic feasibility are properly considered on a company-wide basis." *W. Point Pepperell, Inc*., 9 BNA OSHC 1784, 1796 (No. 77-4297, 1981).

The evidentiary foundation of JBM's technological and economic infeasibility arguments consists almost entirely of the testimony of its chief operating officer, Thomas Kempke.

Mr. Kempke started working at JBM in 2006 as the machine shop supervisor. He became the foundry's chief operating officer around 2016. (T. 578).

Mr. Kempke is not an electrician and has never performed any electrical work for JBM. He has no formal education related to electrical work or electrical engineering other than having attended "tech school for machinery repair" for about a year or so. (T. 586, 666).

Mr. Kempke is *not* JBM's chief financial officer, and he provided no testimony addressing the economics of the company's business or its overall financial condition. (Nor did any other witness.)

Kempke's testimony in support of both the technological and economic infeasibility arguments was facile and conclusory. As discussed below, that testimony does not withstand scrutiny and falls far short of establishing by a preponderance of reliable evidence that compliance with the cited standard is either technically or economically infeasible.

Asserted Technical Infeasibility of Compliance with § 1910.147(c)(4)(i)

Exhibit R-15 is an electronic schematic diagram dated September 22, 2003, and titled "Spinner Control Electronic Schematic."[15] The schematic diagram shows where in the Spinners' existing circuitry a disconnect is located that can isolate the Spinner's electric motor from its energy source. (T. 618). The schematic diagram also shows where in the existing circuitry the Spinner is designed to accommodate a second disconnect, but in which no disconnect presently exists. JBM asserts that installing such a second disconnect is technically infeasible, as is discussed below.[16] (T. 614-15).

If employees perform setting up tasks from the edge of the pit and are protected from falling into the pit by a compliant guardrail system, the guardrail system is likely also to protect employees from (1) being injured while they are performing setting up tasks in which the die is rotating, or (2) being injured from any unexpected start up of the spinner table and die when the spinner table

[15] Exhibit R-15 was received in evidence over the Secretary's objections respecting the timing of its disclosure to the Secretary and Kempke's competence to testify about it as a non-expert witness. (T. 605-11, 616-17; Joint Prehr'g Statement at n. 12). The undersigned determined that Kempke's knowledge and experience in overseeing the operation and maintenance of the Spinners for the more than fifteen years constituted sufficient personal knowledge of the Spinners' existing circuitry for him to be competent to testify about that circuitry. *See* Fed. R. Evid. 602, which provides in part: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony."

[16] The location in the circuit that is designed to accommodate a second disconnect is shown at the top right of Exhibit R-15 with the annotation "USER TO SUPPLY" directly over the annotation "MOTOR DISCONNECT." The location of this potential second disconnect is between the diagram's labeled "Variable Frequency Drive" and the motor, which is represented by a circle with the letter "M" inside. (T. 614-17).

and die are stationary. And so, during setting up tasks performed from a *protected* edge of the open pit, the LOTO standard likely would not apply, and lockout would not be required.[17]

The analysis is different for setting up tasks performed from inside the pit. The LOTO standard requires the motor's energy source to be isolated and locked out whenever an employee is performing setting up tasks from inside the pit. During all but one of those tasks, the die is stationary, just as it would be if the motor's energy source were locked out. The only task performed from inside the pit while the die is rotating is the cleaning the inside of smaller diameter dies[18] with a wire brush. (T. 102, 136-37, 373-74). JBM expects spinner operators to do this cleaning while standing on a portable stairway placed in a corner of the pit while the die rotates at 25 to 35 RPM.[19] (T. 369-70, 466).

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[17] Even if spinner operators would be exposed to the risk of injury while performing setting up tasks from behind a compliant guardrail system, as to those setting up tasks performed from the edge of the pit while the die is rotating (heating the bottom plate, the die, the "mud," and the top plate; "painting" the inside surface of the die; cleaning larger dies [Ex. R-19]), there is no evidence that the heating and "painting" could not be accomplished with the die stationary rather than rotating at low RPM. And as discussed in the next paragraph of the text, a preponderance of the evidence establishes that the dies may be cleaned even when stationary.

[18] The Anthem die has the largest diameter of any die used in the Spinners. When it is installed in the pit there is not enough room for the portable stairway to be placed in a corner of the pit. Unlike smaller diameter dies, JBM expects spinner operators to clean the Anthem die from the edge of the pit using a long-handled brush. (T. 369-70, 466; Ex. J-17).

[19] After the date of the alleged violation, JBM began to require spinner operators to use a guardrail that is mounted inside the pit and whose top rail is slightly lower than the top of the adjustable frame (as depicted in Exhibit J-18) when cleaning a die while standing on the portable stairway inside the pit while the die rotates. (T. 468-69). That guardrail protects the Spinner Operator from falling off the portable stairs and onto the die or the floor of the pit. Because the guardrail was not in use at the time of the alleged violation or during the OSHA inspection, OSHA did not assess whether a spinner operator who cleaned a rotating die with the guardrail in place was either conforming or violative of the LOTO standard. Accordingly, the effect that the use of the guardrail mounted in the interior of the pit on the alleged LOTO violation was not a matter at issue at the hearing and was not litigated with the parties' expressed or implied consent. Whether the installation and use of that guardrail inside the pit would make the LOTO standard inapplicable

A preponderance of the evidence establishes that dies can be cleaned when the die is not rotating, although doing so increases the cleaning time for the largest of the dies used at the foundry by about 15 to 20 minutes.[20] This evidence supports the reasonable inference that the motor's energy source (and thus the spinner table) could be isolated and locked out when a spinner operator cleans a die while standing either in the stairwell inside the pit or while positioned on the pit's floor with the spinner table and die stationary.

A preponderance of the evidence establishes that when setting up a die in a Spinner, the spinner table need not be rotating, and so there is no need for the motor that drives the spinner table to be energized.

Kempke testified that under the Spinners' existing circuitry, if the electric motor is isolated from its energy source, the energy source for the Spinners' cooling and lubrication systems are also isolated. (T. 616-17). That testimony is credited. But Kempke's further testimony that a Spinner's cooling and lubrication systems must be operating during setting up tasks even when the spinner table is stationary is not credited. That testimony is as follows (T. 612-13):

> Q: …. Does the spinner require lubrication and cooling to maintain its operational capacity?
>
> A Yes.
>
> Q Why?
>
> A Well, you have a hot die and 2000 degree metal in the die. All that heat travels down [into] the machine, and it would transfer to the bearings that are underneath. So there is a

to cleaning smaller dies from the stairway while the die is rotating is not adjudicated herein. (*See* T. 380-84).

[20] The only evidence of how much longer cleaning takes when a die is not rotating relates to the largest die in use at the foundry—30 to 40 minutes when the die is not rotating, versus 15 to 20 minutes when the die is rotating. (T. 121-22, 132-34, 372-73). [JBM cites to no record evidence supporting its contention that it takes "all day" to clean a die that is not rotating. (Resp't Brief-in-Chief 8).]

[cooling] and lubrication system that must be on anytime that machine is running to ensure that there is no bearing failure.

Q And, in fact, is the cooling lubrication system on even when the spinner is not turning?

A Yes, it must be.

Q And is it fair to say that there's a lot of heat in that pit at various times?

A Oh, yes. I mean there's, you're pouring steel at 2800 degrees.

Kempke's conclusory testimony that the cooling and lubrication systems must be operable during all setting up tasks to protect the bearings, even when the motor is not rotating the spinner table and there is no molten metal inside the pit, is unpersuasive. Kempke provided no explanation why the bearings would require either cooling or lubrication when the spinner table is not rotating and there is no molten metal in the spinner pit. Other than this spare and conclusory testimony, there is no documentary evidence (e.g., an operating manual) or other testimonial evidence that the cooling and lubrication system must be operable during setting up activities in which the motor is not running and there is no molten metal in the spinner pit.

Even assuming for the sake of analysis that the cooling and lubrication systems for the Spinners must be operable during all setting up tasks (whether the spinner table is rotating or stationary), JBM's technical infeasibility argument still fails for lack of reliable evidentiary support.

Kempke testified that the Spinners' existing circuitry would permit a second disconnect to be installed between a Spinner's variable frequency drive and the Spinner's electric motor, and that disconnecting the motor at that location in the circuit would isolate the motor *and* would enable a Spinner's cooling and lubrication systems to continue operating. (T. 614-16; Ex. R-15). This testimony of Kempke is credited. (*See* footnote 15 supra.)

Kempke testified further, however, that installing such a second disconnect at that point in the circuit is technically infeasible for two reasons. Kempke's first asserted reason is that there is no safe location in the foundry to physically mount the energy isolating device (EID)[21] for such a second disconnect for either Spinner. This testimony is conclusory and not convincing. As to the A Spinner, Kempke testified that an EID *could* be placed on the foundry wall behind the A Spinner, but that if the EID were installed in that location the electrical wiring connecting the EID to the A Spinner's control panel would be contained inside a conduit that would be mounted on the wall behind the A Spinner.[22] Kempke testified that if molten metal splashed on that conduit in the process of pouring molten metal into the rotating die, the heat from the molten metal could melt the wire inside the conduit even though the conduit would remain intact. (T. 619-21). Kempke testified that this has happened in the past, though he provided no details of the frequency or what if anything JBM has done or considered doing to avert this.

As previously noted, Kempke is neither an electrician nor an electrical engineer. His testimony did not address whether JBM had explored potential solutions to the problem of wires

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[21] The term "energy isolating device" is defined in § 1910.147(b). as follows:

> *Energy isolating device.* A mechanical device that physically prevents the transmission or release of energy, including but not limited to the following: A manually operated electrical circuit breaker; a disconnect switch; a manually operated switch by which the conductors of a circuit can be disconnected from all ungrounded supply conductors, and, in addition, no pole can be operated independently; a line valve; a block; and any similar device used to block or isolate energy. Push buttons, selector switches and other control circuit type devices are not energy isolating devices.

[22] Kempke testified that the area behind the A Spinner for the installation of the EID would have to be modified in some fashion to meet clearance requirements, but he did not articulate the details of such modification and did not testify that the modification itself would be infeasible. (T. 620).

melting inside the conduit.[23] Whether there is or is not a design solution to the "melting wire in the conduit" problem that Kempke described would have been an appropriate matter for an expert witness to address, but JBM chose not to identify any expert witnesses to testify, and no testimony that would be admissible under Fed. R. Evid. 702 was presented at the hearing. Kempke's testimony alone is insufficient to establish that the problem Kempke described is insoluble from an electrical engineering and design standpoint.[24] *Cf. Quick Transp. of Ark., LLC*, No. 14-0844, 2019 WL 1466256, at *4 (OSHRC, Mar. 27, 2019) (concluding that a condition resulting from an industrial process was "hardly a matter of common experience and, in our view, necessitates consideration by an expert qualified in this field of work").

Kempke's testimony regarding there being no safe location for placing a second EID for the B Spinner is even less convincing and is insufficient to establish that installing a second EID for the B Spinner is technically infeasible. The B Spinner is located next to the A Spinner and has the same orientation in relation to the foundry wall as the A Spinner, so that the control panel of the B Spinner is set up against the same wall as the control panel for the A Spinner. (There is no

[23] On direct examination, in response to a question as to whether he had spoken to anyone about his view that it was technically infeasible to lockout the electric motor when setting up a die, Kempke testified that he had "had experts in to verify that I'm not looking at it incorrectly." (T. 630). On cross-examination, he testified that about a month before the hearing, he had asked an electrician to assess the feasibility of installing a second disconnect for each Spinner, and that this electrician had concluded that doing so was not feasible. (T. 689-91). In the joint prehearing statement, JBM listed an individual who was identified as the owner of a company called Relative Electric as a person who JBM might call to testify as a fact witness, but JBM chose not to call this individual to testify. (Joint Preh'rg Statement at 8). Kempke's testimony that an electrician had confirmed his view that locking out the electric motor during setting up is technically infeasible hearsay and is not accepted for the truth of what Kempke testified the electrician had said to him.

[24] One example of the shortcomings in Kempke's testimony is that he did not address the feasibility of installing some kind of protective covering for the conduit that could deflect or dissipate the heat from any splashed molten metal and thereby avert the potential for the wiring inside the conduit to melt. (*E.g.*, T. 690-91).

evidence of the precise distance between the two spinner pits or between the two control panels.) Kempke did not testify that an EID for the B Spinner could not be mounted on the same wall as the EID for the A Spinner. Rather, his testimony suggests that he believed the same wall was not an appropriate location for a second EID for the B Spinner for the same reasons he testified about in connection with the A Spinner, i.e., the potential for wires inside the conduit to melt. (T. 622). Kempke testified to other considerations to support his belief that it would be technically infeasible to mount a second EID for the B Spinner on the opposite side of the B Spinner's control panel: (1) that installation in that location would be along a passage where there is forklift traffic and where ladles of molten metal traverse; and (2) that the pit for the B Spinner was not entirely visible from where the EID would be mounted on the side of the control panel that is opposite from the side he believed was infeasible for the A Spinner. (T. 623-24). Nothing in the LOTO standard suggests that either of these factors, whether considered individually or collectively, are disqualifying with respect to placement of the EID. This testimony fails to establish that it would be technically infeasible to locate a second EID for the B Spinner on the opposite side of the B Spinner's control panel (i.e., to the left of the B Spinner's control panel depicted in the photograph at Exhibit J-16).

Kempke testified further that a second reason it would be technically infeasible to install a second disconnect that would enable the Spinners' cooling and lubrication systems to be energized while the motor was deenergized (which Exhibit R-15 indicates the present circuitry was designed to accommodate) is that installation of a disconnect at that point of the circuitry carried the potential of a catastrophic event occurring if the EID were to be manipulated when molten metal is being processed in the die (i.e., during normal production operations). (T. 625-29). Kempke testified that if during normal production operations the EID was manipulated to disconnect the motor from its power supply, the rotating die would "free wheel" for up to 15-20 minutes until it

came to a stop. If the EID were manipulated to reconnect the motor to its power supply during this freewheeling, or even after the die came to a full stop, the re-engagement of the motor could break the power train and potentially splash the molten metal. (T. 627-30). The flaw in Kempke's testimony is that manipulation of the EID during normal production operations is never called for. The purpose of the EID is to manipulate it to isolate the energy source during servicing and/or maintenance, not during normal production operations. The catastrophe scenarios Kempke painted involve the EID being mistakenly or inadvertently manipulated during normal production operations. Kempke's testimony did not address whether it would be infeasible to configure the EID in such a way to prevent it from being manipulated during normal production operations. Evidence addressing the catastrophe scenarios Kempke hypothesized might also have been a subject upon which some expert witness in the field of electrical engineering might have been competent to offer reliable opinion testimony. However, as noted previously, JBM did not offer any testimony that would have been admissible under Federal Rule of Evidence 702.

JBM has failed to present any sufficiently reliable evidence to establish that compliance with the cited standard is technologically infeasible.

Economic Infeasibility

Kempke testified that if LOTO procedures were required to be utilized when setting up a die, then the process for producing a single centrifugal casting would take longer than a normal ten-hour shift, in contrast to JBM's existing operations in which a Spinner can produce two to four castings in a ten-hour shift. (T. 641-42, 658). One factual assumption underlying Kempke's assessment is that there would be multiple two-hour intervals between certain setting up tasks because it takes about two hours for the die to cool down after it has been heated for some setting up tasks. This assumption is flawed because the Secretary's theory of the violation is that the only source of potentially hazardous energy to which the spinner operators are exposed during setting

up is the electrical energy to the motor. The Secretary did not allege and did not present any evidence that the spinner operators are exposed to the risk of serious injury from residual thermal energy during any of the setting up tasks.[25] There is simply no reliable evidence presented regarding the quantum of time that would be added to setting up a die by utilizing LOTO procedures when required during die setup.

Even if Kempke's testimony that implementing LOTO procedures during setting up would result in lengthening the time to produce a single casting to more than ten hours was credited, JBM's economic infeasibility contention would still fail. As previously noted, neither Kempke nor any other witness testified about the impact of compliance with the cited standard on the company's financial condition. There is thus no evidence that could reasonably support the conclusion that JBM would be unable to absorb the costs of compliance or that JBM's "existence as an entity [would be] financially imperiled by compliance." *Faultless*, 674 F.2d at 1189-90.

JBM has failed to establish that it is economically infeasible to comply with § 1910.147(c)(4)(i).[26]

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[25] In response to questions on cross-examination, the OSHA Compliance Safety and Health Officer (CO) who led the inspection and investigation testified that thermal energy was present during setting up tasks from the heating of the die, but he did not testify that he regarded that thermal energy to constitute potentially hazardous energy to which the LOTO standard would apply. Rather, he expressly testified that in his view JBM was not required to allow a heated die to cool before continuing with the next setup task. (T. 490-91, 495).

[26] JBM asks that in the event it is found to have violated § 1910.147(c)(4)(i), that it be adjudicated to have abated that violation by virtue of having installed an interlock device on both Spinners after the inspection. (Resp't Brief-in-Chief at 24-26). This request is denied. The matter of whether JBM's post-inspection installation and utilization of the interlock device abates the violation is not adjudicated herein. If this decision becomes a final order of the Commission, then JBM will have a period following the date of the final order to abate the violation and thereafter to provide abatement certification to OSHA. 29 C.F.R.§ 1903.19(a)(2)(ii) & (c). If OSHA were then to determine that JBM had not failed to abate the violation, OSHA could then issue a notification of failure to abate, and JBM could contest that determination pursuant to section 10(b)

Citation 1, Item 2b
(§ 1910.147(d) – Lockout/tagout)

Citation item 2b alleges a serious violation of paragraph (d) of the LOTO standard, which provides: "*Application of control*. The established procedures for the application of energy control (the lockout or tagout procedures) shall cover the following elements and actions and shall be done in the following sequence," following which subparagraphs (d)(1)–(6) set forth requisite steps for performing the LOTO procedure. The citation item alleges that JBM violated § 1910.147(d) as to both Spinners in identical fashion as follows (emphasis added):

> On or about April 26, 2021, the employer did not ensure employees *implemented* energy control procedures prior to entering the machine pit to perform die setup procedures. The [Spinner] machine was not isolated from energy sources prior to engaging in these setup and maintenance activities.
>
> As a result, the applicable energy control elements, involving preparation for shutdown [1910.147(d)(1)], machine or equipment shutdown [1910.147(d)(2)], machine isolation [1910.147(d)(3)], lock-out/tag-out device application [1910.147(d)(4)], dissipation of residual energy [1910.147(d)(5)(i)], and verification of isolation [1910.147(d)(6)], *were not implemented* to protect employees from the unexpected energization, startup, or release of stored energy during machine servicing and maintenance activities.

The CO testified that Citation Item 2b was grouped for penalty purposes with the § 1910147(c)(4)(i) violation (Item 2a) "because they covered similar items, and the same abatement would take care of both items." (T. 274).

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of the Act. Only then would the issue of whether the interlock device abates the violation be ripe for adjudication before the Commission. *See* § 1903.18.

Adjudication of that issue in this decision would be inappropriate on the additional ground that the Secretary did not expressly or impliedly consent to litigate that issue. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) ("Trial by consent [under Fed. R. Civ. P. 15(b)] may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue").

The undersigned perceives no substantive difference between the proven allegation that JBM violated § 1910.147(c)(4)(i) by failing to "utilize" LOTO procedures, and the allegation of Citation Item 2b that JBM violated § 1910.147(d) by failing to "implement" LOTO procedures.[27] The CO in his testimony affirmatively stated that the gist of citation item 2b was "application of the procedures." The CO did not testify that the citation item 2b was grounded in any asserted deficiency in the content of JBM's established LOTO procedures. (T. 284). The Secretary's evidence that JBM violated § 1910.147(c)(4)(i) similarly proves the alleged violation of § 1910.147(d). JBM's affirmative defenses to the § 1910.147(d) violation are similarly not proven.

"Violations are duplicative where the abatement of one violation necessarily results in the abatement of the other." *N.E. Precast LLC*, 26 BNA OSHC 2275, 2279 (No. 13-1170, 2018), *aff'd*, 773 F. App'x 70 (2d Cir. 2019) (unpublished). The CO correctly assessed that the abatement of the violation alleged in Citation Item 2a would also abate the violation of Citation Item 2b. The Secretary has not posited any argument in response to JBM's contention that the violations alleged in Items 2a and 2b are duplicative, and the undersigned discerns no grounds on which to distinguish *North Eastern Precast* from the circumstances present here. The remedy for duplicative violations

[27] The CO testified about what he viewed to be deficiencies in the content of JBM's existing LOTO procedures in addressing the elements and actions for implementing LOTO procedures as required by § 1910.147(d)(1)–(6). (T. 258-66). However, the violation as alleged does not aver that the content of JBM's established procedures did not meet the requirements of § 1910.147(d)(1)–(6), but rather it straightforwardly alleges that those written procedures (regardless of the adequacy their content) were not implemented. Consonant with that allegation, the Secretary makes no argument that the content of JBM's written procedures was inadequate. Accordingly, the adequacy of the content of JBM's LOTO procedures was not a matter that the parties tried by either expressed or implied consent and is not adjudicated herein. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) ("Trial by consent [under Fed. R. Civ. P. 15(b)] may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue").

is to vacate one of them. *N.E. Precast LLC*, 26 BNA OSHC at 2281-82. Accordingly, the proven violation of § 1910.147(d) (Citation Item 2b) is vacated as being duplicative of the proven violation of § 1910.147(c)(4)(i).

Citation 1, Item 3
(§ 1910.147(c)(7)(i) – LOTO training)

Citation Item 3 alleges a violation of the training requirements of the LOTO standard, specifically § 1910.147(c)(7)(i), which provides: "The employer shall provide 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." The Secretary alleges that JBM violated this standard by failing to provide the training to spinner operators that the standard requires be provided to employees who perform service and/or maintenance during which energy control procedures must be utilized. Employees who do so have the status of "authorized employees" by definition, even if their employer has not authorized them and does not expect them to execute lockout procedures. There is no dispute that JBM does not train spinner operators as authorized employees but rather trains them as "affected employees," who are not authorized to utilize lockout procedures.[28] (T. 83-84, 111-13, 272-73, 393) (Resp't Brief-in-Chief 24).

[28] The terms "affected employee" and "authorized employee" are defined in § 1910.147(b) as follows:

> *Affected employee.* An employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed. 29 C.F.R. 1910.147(b).
>
> *Authorized employee.* A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an

Because the spinner operators have the status of "authorized employee" but did not receive the training that the cited standard requires to be provided to authorized employees, JBM did not comply with the standard. The spinner operators were exposed to the violative condition of lacking the training required for employees who perform servicing and/or maintenance tasks on the Spinners for which energy control procedures were required to be utilized. JBM had actual knowledge that it had not trained the spinner operators as authorized employees under the standard. The violation of the cited training standard has been proven.

JBM contends that the violation of the LOTO training standard is duplicative of the other two LOTO violations. This argument is rejected. The abatement of the § 1910.147(c)(4)(i) violation would not result in the abatement of the training violation, or vice versa. *See Dayton Tire*, 23 BNA OSHC 1247, 1267 (No. 94-1374, 2010) (ruling a violation of § 1910.147(c)(7)(i) not duplicative of violation of § 1910.147(c)(4)(i)), *aff'd in pertinent part,* 671 F.3d 1249 (D.C. Cir. 2012).

The training violation is appropriately classified as serious. The lack of required training essentially exposed the spinner operators to the same hazard to which they were exposed from the violation of § 1910.147(c)(4)(i) of performing servicing and/or maintenance tasks on the Spinners without the knowledge and training necessary to recognize that the Spinners were required to be locked out during those tasks in which they were exposed to potentially hazardous energy.

Penalty Determination

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the

> authorized employee when that employee's duties include performing servicing or maintenance covered under this section.

Commission's authority to raise or lower penalties within those limits"), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

Section 17(j) of the Act requires the Commission, in assessing an appropriate penalty, to give "due consideration" to the "gravity of the violation," the "size of the business of the employer," the "good faith of the employer," and the employer's "history of previous violations." 29 U.S.C. § 666(j). Of these factors, gravity is the principal factor "and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The maximum penalty for each of the three serious violations affirmed here is $13,653. 29 C.F.R. § 1903.15(d)(3) (2021).

The Secretary formulated proposed gravity-based penalties as follows: (1) $7,510 for the fall protection violation [§ 1910.28(b)(6)(i); Item 1] by assessing the probability of injury being "lesser" and the severity of any injury being "high"; (2) $10,513 for the LOTO violation [§ 1910.147(c)(4)(i); Item 2a] by assessing the probability of injury being "greater" and the severity of any injury being "high"; and (3) $7,510 for the LOTO training violation [§ 1910.147(c)(7)(i); Item 3] by assessing the probability of injury being "lesser" and severity of any injury being "high." (T. 279, 282).

JBM argues that the proposed penalties are excessive because in calculating the gravity-based proposed penalties OSHA overstated the probability of injury and the severity of any injury in view of the evidence that (1) no employee has ever fallen into an unguarded spinner pit, (2) the Spinners have never unexpectedly started up during setting up activities, (3) that there generally are only two spinner operators and one helper employee in the Big Bay area during setting up activities (so that the number of exposed employees is small), and (4) the spinner table starts to

rotate slowly from a standstill, with speed building gradually (and so the probability of injury upon unexpected startup is diminished). JBM argues further that it should receive a reduction in the gravity-based penalty for good faith in having relied on OSHA not having cited JBM for either a fall protection or a LOTO violation in connection with OSHA's inspection in 2017. (Resp't Brief-in-Chief at 35).

JBM's assertion that its claimed good faith in relying on the non-issuance of a citation in 2017 merits a reduction in the gravity-based penalties for the three violations is rejected. Any claimed reliance would have been unreasonable in the absence of an affirmative representation by OSHA officials over the course of that inspection that JBM's practices conformed with those standards in 2017.

JBM makes no argument challenging the Secretary's consideration of the statutory penalty factors for "size of the business of the employer" or the employer's "history of previous violations," and the undersigned perceives no reason for varying from the Secretary's consideration of those factors as described at the hearing. (T. 253-54, 277, 281).

OSHA's gravity-based penalty formulation overstated the probability of injury for the Item 2a LOTO violation for the reasons JBM posits, but given the serious injuries sustained by a spinner operator when he was spun around inside the spinner pit after his clothing became snagged on a rotating die, the undersigned concurs in OSHA's assessment that the gravity of any injury resulting from both the fall protection and the two LOTO violation is high. This determination results in an adjustment to the gravity-based penalty for the LOTO violations, after appropriate adjustments for the other statutory penalty factors, to the same amount as that for the fall protection violation.

While JBM's argument that the LOTO training violation was duplicative of the violation of § 1910.147(c)(4)(i) has no merit, the undersigned determines to group the violations of Items

2a and 3 for penalty purposes, so that only one penalty is assessed for the two LOTO violations. While the spinner operators definitionally have the status of "authorized employee," JBM did not authorize them to lockout the Spinners and thus did not train them to do so. Since the spinner operators never locked out the Spinners, their lack of training on the knowledge and skills necessary to execute lockout procedures did not expose them to any hazards other than those hazards to which they were exposed by virtue of the violation of § 1910.147(c)(4)(i). Accordingly, it is appropriate to group the violations of Citation Items 2a and 3 for penalty purposes. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1394 (No. 97-0755, 2003) (grouping for penalty purposes two distinct but overlapping fall protection items).

Accordingly, a penalty of $7,510 is assessed for Citation Item 1, and a penalty of the same amount is assessed for the grouped violations of Citation Items 2a and 3.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that as to Citation 1:

1. Item 1, alleging a violation of 29 C.F.R. § 1910.28(b)(6)(i), is AFFIRMED as a serious violation and a penalty of $7,510 is ASSESSED.

2. Item 2a alleging a violation of 29 C.F.R. § 1910.147(c)(4)(i), is AFFIRMED as a Serious violation.

3. Item 2b, alleging a violation of 29 C.F.R. § 1910.147(d), being duplicative of Item 2a, is VACATED. [N.B.: This paragraph reflects the correction of a clerical error pursuant to the undersigned's order dated November 6, 2024.]

4. Item 3, alleging a violation of 29 C.F.R. § 1910.147(c)(7)(i), is AFFIRMED as a serious violation.

5. Items 2a and 3 are grouped for penalty purposes and a single penalty of $7,510 is ASSESSED for the two violations.

6. Item 4, alleging a violation of 29 C.F.R. 1910.212(a)(1), having been withdrawn by the Secretary at the outset of the hearing, is VACATED.

SO ORDERED.

s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: November 15, 2024