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. SOFIDEL AMERICA, Respondent.	OSHRC DOCKET NO. 23-0204

Appearances: Seema Nanda, Solicitor of Labor
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U.S. Department of Labor, Office of the Solicitor, Nashville, TN

For the Complainant

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For the Respondent

Before: Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

Due to a workplace injury, the Occupational Safety and Health Administration (OSHA) inspected a facility owned and operated by Sofidel America (Respondent) in Hattiesburg,

Mississippi on June 23, 2022. As a result of the inspection, OSHA issued to Respondent a Citation and Notification of Penalty (Citation) on December 8, 2022. The Citation alleges various violations of OSHA's general industry standards, and a violation of a reporting standard, promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act), and proposes a total penalty of $156,002.

Respondent filed a timely notice of contest to the Citation, bringing this matter before the Occupational Safety and Health Review Commission (Commission).[1] A hearing was held on January 24, 2024. Both parties filed post-hearing and post-hearing reply briefs.

JURISDICTION AND COVERAGE

The Commission gains jurisdiction to adjudicate an alleged violation of the OSH Act by an employer if the employer is engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act, and, if the employer timely contests the citation. 29 U.S.C. §§ 652(5), 659(c). The record establishes that Respondent, as of the date of the alleged violation, was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. 29 U.S.C. § 652(5); (Tr. 10-11). Respondent also timely filed a notice of contest to the Citation in this case. 29 U.S.C. § 659(c). The undersigned concludes that Respondent is covered under the Act and that the Commission has jurisdiction over this matter.

BACKGROUND

At its Hattiesburg facility, Respondent converts paper products into finished products such as rolls of toilet paper and paper towels. (Tr. 10.) The paper products are run through machinery operated by Respondent's employees. One of these machines is the R74 Line Rewinder (Rewinder) machine. (Tr. 10-11; Ex. C-1.) The Rewinder transforms a 10-foot by 10-foot giant

[1] Respondent later withdrew its notice of contest to Citation 3, Item 1 at the hearing. (Tr. 11-12.)

roll of toilet paper into the smaller more commonly sized roll of toilet paper. (Tr. 43.) The Rewinder will take paper from the 10-foot roll, sometimes combine plies of paper, sometimes emboss the paper, and then wrap the finished paper onto the commonly sized cardboard roll, apply glue, and cut the paper to finish the product. (Tr. 43-44.)

Every now and then, the material within the Rewinder tears and/or jams. (Tr. 45.) Respondent's employee must clear the jam and/or rethread the paper within the Rewinder, which typically is a solitary task that takes six to seven minutes to do. (Tr. 31, 37, 44-46, 54-55, 58-59, 62-63.) To accomplish this task, the operator shuts down[2] the Rewinder from inside the control panel (where he had been controlling the machine); he then leaves the control panel, enters the Rewinder itself through an interlock gate, leaving the gate door open, and manually unjams and/or rethreads the paper. (Tr. 18, 27, 30, 83.)

With the interlock gate door open, the employee is unable to operate the Rewinder except to "jog" or to "reset" it. (Tr. 27, 32, 38-39, 46, 48.) "Jogging" the machine is "moving the Rewinder slowly, at a creep speed, and done to make sure the paper getting cut in the Rewinder is cut properly, to allow tape on the paper to come off, or pulling paper that is not long enough to meet the other paper." (Resp't Br. 5 citing Tr. 31, 39, 99, 207-208.) The employee himself "jogs" the machine from inside the Rewinder and then finishes the rethreading task. (Tr. 35, 40, 80-81, 275.)

Once the unjamming and/or rethreading task is complete, the operator then must "reset" the Rewinder before restarting the Rewinder so that the machine runs properly. (Tr. 57-58.) Unlike jogging, the "reset" function is performed on the outside of the Rewinder, inside the

[2] The record establishes that the Rewinder shuts itself down in the event of a paper tear. (Tr. 30.) It is not established that the Rewinder shuts itself down in the event of a jam.

control panel, by pressing the "reset" button. (Tr. 46-47, 82-83, 223, 275.) To perform the "reset," the employee has "to go to the settings, recycle it and home it." (Tr. 84.) The "reset" function was described as follows:

> it's the sync roll pad. Just like a – you know how you have a pitcher's arm, a mechanical, and if it gets stuck, you have to reset, you know, get it back to the home position so that what it – that basically what that's like. Forward – I think it's a forward and backwards motion.

(Tr. 101.) The record establishes that the "reset" function is a two-second movement, where the machine returns to "home position" as the roller moves forward and back. (Tr. 56.) The record also establishes that, during the "reset," a "blade comes out. That's what caught me[...] And a blade moves too." (Tr. 56-57.) Only after the "reset" has been completed – *i.e., after the "reset" blade movement* – does the Rewinder restart. (Tr. 99-100.) When the Rewinder restarts, an alarm sounds and there is a short delay before the Rewinder starts moving. (Tr. 100, 294.)

The Incident

On June 8, 2022, Employee 1[3] was clearing out a paper jam within the Rewinder. (Tr. 10-11.) After the machine had stopped due to the jam, Employee 1 left the control panel (which is located outside the Rewinder), entering inside the Rewinder through the interlocked door and leaving the gate door open, which prevented the Rewinder from running. (Tr. 26-27.) Employee 1 stuck his hand inside the Rewinder to locate the broken trail of paper, grab hold of it, and manually pull, push, wrap and rethread the paper back "through the proper loops" such that the paper could resume being mechanically wound onto the cardboard roll by the Rewinder. (Tr. 21-25, 29, 39; Ex. C-2.) Unbeknownst to Employee 1, Employee 2 had entered the control panel

[3] The names of the employees in this matter have been removed from this Decision and Order for privacy purposes.

(which, again, is located outside the Rewinder) with the purpose of assisting Employee 1.[4] (Tr. 29-30, 86-87.) Employee 2 testified that he could see through a "window"/"door" Employee 1 inside the Rewinder. (Tr. 85, 98.) Employee 2 testified:

> And as he was threading the paper, you know, I noticed he was up top. I saw his fingers – well, his hand – the paper moving up top, and so the core was taken – you have to take the core out before you can reset it. So once the core is removed, I reset and it was done.

(Tr. 84.)

When asked why he "reset" the machine, Employee 2 testified that he "looked" and saw the "paper moving up top," thought Employee 1 was "through with his procedure," and agreed that he "thought [Employee 1] was clear of danger." (Tr. 86, 89, 98, 108.) Employee 1 testified that in fact he was not done with the rethreading procedure yet, he "had to stick [his] hand under there to bring [the paper] back to the other side again." (Tr. 56.) When asked, "But there was no reason for you to have your hand down there, was there?", Employee 1 testified, "Yeah, to grab the paper." (Tr. 57.) When Employee 2 "reset" the machine from the control panel, Employee 1 sustained a "partial traumatic amputation" of his left middle finger from the blade inside of the Rewinder. (Ex. C-27.)

After the Incident

That same day, Employee 1 went to the hospital accompanied by Respondent Environmental Health and Safety (EHS) Manager Michael Norton. (Tr. 249, 283.) Mr. Norton took pictures of Employee 1's injured finger at the hospital. (Ex. 259-260; Ex. R-3 (under seal).

[4] Employee 2 testified that unjamming and rethreading is "really not a two-person job." (Tr. 86.) The record shows that during training, however, Employee 1 and Employee 2 worked together inside the Rewinder to clear a jam or rethread the paper when Employee 2 was training Employee 1. (Tr. 31, 54.) Even so, on June 8, 2022, Employee 1 was no longer in training, did not expect Employee 2 to assist him and had never seen someone operate the Rewinder from the control panel while someone else was inside the Rewinder. (Tr. 29-30, 41, 53, 108).

Employee 1 was discharged with an After Visit Summary containing a diagnosis from the hospital visit. (Tr. 125; Ex. C-27.) This medical document states the following in pertinent part:

> **Diagnoses**
>
> - Open displaced fracture of distal phalanx of left middle finger, initial encounter
> - Laceration of left middle finger without foreign body with damage to nail, initial encounter
> - Partial traumatic amputation of finger through phalanx, initial encounter

(Ex. C-27) (emphasis added). Mr. Norton received a copy of this medical document that same day, June 8, 2022. (Tr. 125-126, 187-188.)

Mr. Norton did not report an amputation to OSHA that day. He testified that he did not read the medical report section that mentioned "partial traumatic amputation." (Tr. 283.) Instead, Mr. Norton testified:

> At the beginning of the document from the doctor, it says laceration. When completing the workers' comp, I read the document, laceration, and entered it into the document. That was done the afternoon of the incident when I had to get - [Employee 1] was in my office just after we left the hospital.

(Tr. 261.) Mr. Norton testified that he "became aware" of the "amputation" later on June 17, 2022, when he received notification from "worker's comp":

> So I reported the incident on the 17th because I received an e-mail from workers' comp and on the bottom of the gentleman's e-mail it said that – about the amputation, and I said – replied back, what amputation? I was unaware of an amputation. And so I became aware, at this point, aware.

(Tr. 262; Ex. C-28 at 00157.) Mr. Norton then reported the "amputation" to OSHA on June 17, 2022. (Tr. 235-236.)

OSHA Inspection and Citation

On June 23, 2022, OSHA Health and Safety Specialist (HSS) Ralph Brown conducted an inspection of Respondent's workplace.[5] (Tr. 115, 120-122.) HSS Brown arrived at the worksite, presented his credentials and asked to speak to Respondent's manager or safety director. (Tr. 121.) EHS Manager Norton met with HSS Brown and accompanied him during the walk-around of the facility. (Tr. 122, 156-157.)

During the walk-around of the facility, HSS Brown noticed two bolts sticking up about an inch to an inch and a quarter out of the floor. (Tr. 181-182; Ex. C-32.) HSS Brown pointed out those bolts to Mr. Norton, who explained that those bolts connect a guardrail to the floor, that maintenance must have removed the guardrail, and that he did not know why the guardrail was not re-installed. (Tr. 183-184.)

During the inspection, and in e-mails after the inspection, HSS Brown requested certain documents from Mr. Norton. (Tr. 123-128; Exs. C-27, C-28, C-29, R-13.) In particular, HSS Brown requested the energy control procedure for the Rewinder but was never provided with it. (Tr. 140-141.)

[5] HSS Brown began working for OSHA in the Jackson, Mississippi office in 2015. (Tr. 115.) Prior to that, HSS Brown was the Safety Director for the 778 Civil Engineering Squadron at Robins Air Force Base in Warner Robins, Georgia. (Tr. 115-116.) HSS Brown has a bachelor's degree in safety, and regularly takes training courses at the OSHA Training Institute in Chicago, Illinois. (Tr. 116-117.) The training classes he takes include topics such as lockout-tagout, machine guarding and scaffolding. (Tr. 116.) HSS Brown conducts approximately 80 inspections per year, about 50 percent of which involve lockout-tagout, and 75 percent of which involve walking-working surfaces. (Tr. 118-119.) HSS Brown served one year as the Assistant Area Director of his OSHA area office and during that time he supervised about 150-200 inspections. (Tr. 118.) Approximately 10-15 percent of his inspections involve the paper manufacturing industry. (Tr. 118-119.)

Evidence Relating to Respondent's Training and Safety Programs

Both Employee 1 and Employee 2 were trained on Lockout/Tagout (LOTO) and Machine Safety by Mr. Norton. (Tr. 254-255; Exs. R-10, R-15, R-19, R-20, R-21.) Respondent's OSHA and general LOTO policies are in the record. (Tr. 127, 253; Exs. R-13, R-14.) The LOTO policy does *not* contain specific procedures for the Rewinder. (Tr. 286.) Employee 1 and Employee 2 were issued tags but not locks for LOTO purposes by Respondent. (Ex. R-21 at 5, 9.)

Respondent's Machine Safety Training is in the record. (Ex. R-15.) One section of the Machine Safety Training states the following:

> **Jog Policy**
>
> "The employee that is setting the machine in motion is the only person that is allowed to be working on the machine."
>
> - Multiple accidents have occurred due to other employees activating a part of the equipment while another is working.
> - In the event of an injury, the person jogging the machine and the injured employee will receive the same disciplinary action.

(Ex. R-15 at 3) (emphasis in the original).

It is noted that Respondent did not discipline either Employee 1 or Employee 2 for any safety infractions due to the incident. (Tr. 285.) There is also no evidence of any other disciplinary actions for safety infractions in this record.

Stipulations

The following stipulations were entered into the record at the hearing.

1) Respondent owns and operates a facility at 176 WL Runnels Industrial Drive, Hattiesburg, Mississippi 39401, known as the work site;

2) Respondent converts paper products into finished products such as toilet paper and paper towels at the work site;

3) The principal place of business of Respondent is at 176 WL Rennels Industrial Drive, Hattiesburg, Mississippi 39401;

4) Respondent had a place of employment at 176 WL Rennels Industrial Drive, Hattiesburg, Mississippi 39401 on the dates of the alleged violations;

5) OSHA Part 1910 applies to Respondent's workplace;

6) Respondent utilizes a 22 R74 Line Rewinder known as the R74 Rewinder in one of its production lines in its operations;

7) On June 8th, 2022, an employee, [Employee 1], went inside an interlock door with the R74 Rewinder to clear a jammed material;

8) A second employee, [Employee 2], accompanied [Employee 1];

9) [Employee 2] operated the process controls to rotate the machine rollers while [Employee 1] began to remove the jam by hand;

10) [Employee 1's] left hand was caught in the R74 Rewinder;

11) [Employee 1] suffered an injury to his left hand;

12) As a result of the June 8th, 2022 accident, OSHA conducted an inspection of the work site;

13) Ralph Brown is the compliance officer and health officer who conducted the inspection following the June 8th, 2022 accident;

14) OSHA issued a citation and notification of penalty to Respondent as a result of its inspection.

(Tr. 10-11) (stipulations read into the record).

DISCUSSION

> To establish an employer has violated an [OSHA] regulation, the Secretary has the burden to prove (1) 'that the cited standard applies'; (2) that the employer has not complied with the cited standard; (3) that employees have 'access or exposure to the violative conditions'; and (4) 'that the employer had actual or constructive knowledge of the conditions,' i.e., that it actually knew of the conditions or, with the exercise of reasonable diligence, should have known.

S. Hens, Inc. v. OSHRC, 930 F.3d 667, 675 (5th Cir. 2019) (quoting *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016)). The Secretary has the burden of establishing each element by a preponderance of the evidence. *Id*. A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

Serious Citation 1, Item 1(a): Walking-Working Surface Maintenance

Serious Citation 1, Item 1(a) alleges a violation of 29 C.F.R. § 1910.22(a)(3), which provides that:

> (a) *Surface conditions.* The employer must ensure:
>
> (3) Walking-working surfaces are maintained free of hazards such as sharp or protruding objects, loose boards, corrosion, leaks, spills, snow, and ice.

29 C.F.R. § 1910.22(a)(3). The Secretary alleges that Respondent violated 29 C.F.R. § 1910.22(a)(3) when:

> At the R-74 Rewinder machine - On or about June 23, 2022 the employer allowed their employees to work around the R-74 rewinder machine where there were two bolts protruding up from the floor exposing them to trip hazards.

(Citation at 6.) The Secretary proposed a $6,837 penalty for this item.

1) Does the cited standard apply?

The Secretary states that the cited standard applies because, as stipulated, Respondent's business qualifies as general industry and therefore falls under Part 1910.[6] (Sec'y Br. 6.)

[6] The Secretary does not expand beyond this generic statement in the Post-Hearing Brief regarding why this particular cited standard or any of the other cited standards apply in this matter. The undersigned appreciates Respondent's argument in its Post-Hearing Reply Brief that the Secretary's post-hearing brief contained insufficient legal authority to support much of the prima facie case. (Resp't Reply Br. 1.) The undersigned notes that the Secretary did cite some legal authority in its Post-Hearing Reply Brief, but only regarding Citation 1, Item 2 and Citation 2, Item 1. (Sec'y Reply Br. 1-3.)

Respondent argues that the area where the bolts were located was not a "walking-working surface," and so the cited standard does not apply. (Resp't Br. 15.)

"Walking-working surface means any horizontal or vertical surface on or through which an employee walks, works, or gains access to a work area or workplace location." 29 C.F.R. § 1910.21(b) (Definitions). As the Secretary points out, HSS Brown testified that he watched Respondent's worker walking back and forth, stepping "around them bolts, stepping in that area that he could have easily tripped over because he was looking up the whole time [at the paper overhead.]" (Sec'y Br. at 6; Tr. 183; Exs. C-31, C-32). HSS Brown testified that the worker was "using it as" and "created" a walking-working surface when he stepped around, on and near the bolts. (Tr. 229-230.)

Respondent argues that the pathway for employee travel was a set of stairs crossing over a trough which was usually blocked by a guardrail (fastened in place by the two installed bolts at issue in the floor). (Resp't Br. 9-10, 15; Tr. 182-183; Exs. C-31, C-32.) Respondent claims that the presence of the "trough eliminates this area as a walking-working surface." (Resp't Br. 15.) The undersigned disagrees.

Regarding applicability of the cited standard, the undersigned looks to the definition as promulgated by OSHA. 29 C.F.R. § 1910.21(b). Here, the record establishes that Respondent workers disregarded the trough, and would traverse in the area around and on the bolts in question as they walked back and forth doing their job duties. The cited standard applies.

2) Did Respondent comply with the cited standard?

The cited standard requires Respondent to maintain the walking-working surface "free of hazards such as sharp or protruding objects." 29 C.F.R. § 1910.22(a)(3). The immovable bolts protruded up an inch to an inch and quarter through this walking-working surface at Respondent's

worksite. Respondent did not maintain the walking-working surface free of protruding bolts at its worksite. Respondent failed to comply with the cited standard.

3) Did Respondent's employees have access or exposure to the violative condition?

The Secretary argues that Respondent's workers "were exposed to tripping hazards posed by the bolts protruding from the floor." (Sec'y Br. 7.) Respondent argues that the Secretary failed to show that the bolts presented a hazard because HSS Brown did not see Respondent's worker trip "as he watched an employee step around and on the two bolts during the inspection" and also because HSS Brown "did nothing to stop them from stepping on or around the bolts." (Resp't Br. 15.) HSS Brown, however, testified that the bolts presented a tripping hazard to Respondent's workers and that they "could have" tripped over the bolts. (Tr. 229-230); *see also S&G Packaging Co.,* 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (access established if it is "reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger"). The undersigned finds that the Secretary has established that Respondent's workers were exposed to a tripping hazard by the protruding bolts on the walking-working surface.

4) Did Respondent have actual or constructive knowledge of the violative conditions?

The record fails to establish that Respondent had actual knowledge of the protruding bolts on Respondent's walking-working surface. When asked by HSS Brown during the inspection how long the bolts had been there without the guardrail attached to them, Mr. Norton did not know. (Tr. 183-184, 282-283.) The Secretary, however, claims that Respondent should have known, i.e., had constructive knowledge, that the violation existed. (Sec'y Br. 7.)

> To establish constructive knowledge, the Secretary must prove that, with the exercise of reasonable diligence, the employer should have known of the conditions constituting the violation. *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218

> (No. 10-2659, 2015). 'The knowledge element is directed to the physical conditions that constitute a violation, and the Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous.' *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001) (citation omitted), *aff'd*, 319 F.3d 805 (6th Cir. 2003); *see also S. Hens, Inc. v. OSHRC*, 930 F.3d 667, 676 (5th Cir. 2019) ('The showing required to establish knowledge is of the physical conditions constituting the violation, not of the specific OSHA regulation or of the probable consequences of the violation.'). Reasonable diligence is based on several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, take measures to prevent violations from occurring, and enforce work rules when violations are discovered. *See S.J. Louis Constr. of Tex.*, 25 BNA OSHC 7 1892, 1894 (No. 12-1045, 2016); *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012).

AJM Packaging Corp., No. 16-865, 2022 WL 1102423, at *5 (OSHRC, Apr. 1, 2022) (*AJM*).

The Secretary claims that the tripping hazard of the protruding bolts was "open and obvious," and was created by Respondent when its workers removed the guardrail and did not reattach it. (Sec'y Br. 7.) The Secretary further suggests that Respondent failed to exercise reasonable diligence, and thus should have known about the protruding bolts, because Mr. Norton did not know when the last time an inspection of the walking-working surface had been conducted. (Sec'y Br. 7-8.)

Respondent claims that the Secretary failed to present any evidence regarding "how long the [guardrail] had been removed or how long the bolts presented a trip hazard to employees." (Resp't Br. 16.) Respondent also claims that the Secretary failed to present any evidence regarding whether Mr. Norton "or any other manager for the Company observed any employees stepping over the trough as [HSS Brown] said." (Resp't Br. 16.)

The undersigned agrees with Respondent. The Secretary has failed to put forth sufficient evidence to establish constructive knowledge for this citation item. The record does not establish how long the bolts presented a trip hazard to Respondent's employees. *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2086 (No. 06-1542, 2012) (rejecting knowledge argument based in

part on unknown duration of violative condition). The Secretary also did not introduce any evidence establishing, with regard to the protruding bolts and walking-working surfaces, Respondent's work rules and training programs, supervision of employees, anticipation of the hazards, measures taken to prevent violations from occurring, and enforcement of work rules when violations are discovered. *AJM*, 2022 WL 1102423, at *5.

The record establishes that Mr. Norton inspects the walking-working surface three to five times per year. (Tr. 281.) The question remains if anyone else inspects the walking-working surface during the year. The record establishes that Respondent's workers removed the guardrail exposing the protruding bolts. (Tr. 281-282.) The questions remain of who, what, when and why the guardrail was removed and whether Respondent had rules, training programs, supervision, anticipation, measures taken, and enforcement of work rules regarding the guardrail removal. *AJM*, 2022 WL 1102423, at *5. The Secretary would have the undersigned find constructive knowledge based solely on one question posed to Mr. Norton, the timing of his last inspection. His answer – not knowing when he last inspected the walking-working surface – is insufficient to carry the burden of establishing constructive knowledge of the protruding bolts when the Secretary failed to produce any additional evidence related to this issue.

Constructive knowledge having not been established, this citation item is vacated.

Serious Citation 1, Item 1(b): Walking-Working Surface Inspection

Serious Citation 1, Item 1(b) alleges a violation of 29 C.F.R. § 1910.22(d)(1), which provides that:

> (d) *Inspection, maintenance, and repair.* The employer must ensure:
>
> (1) Walking-working surfaces are inspected, regularly and as necessary, and maintained in a safe condition;

29 C.F.R. § 1910.22(d)(1). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.28(a) when:

> a) Throughout the facility - On or about June 23, 2022 the employer did not perform regular inspections of factory where it would have been noticed that the [guardrail] at the R-74 rewinding machine was removed exposing employees to trip hazards.

(Citation at 7.) The Secretary proposed a $0 penalty for this item.

1) Does the cited standard apply?

As discussed above for Citation 1, Item 1(a), the area around the two protruding bolts is a walking-working surface as defined by OSHA. The cited standard applies.

2) Did Respondent comply with the cited standard?

The Secretary claims that "Respondent failed to inspect the walking working surfaces as necessary to ensure they are maintained in a safe condition." (Sec'y Br. 6.) The Secretary argues that Respondent violated the standard because Mr. Norton "did not know the last time that an inspection had been conducted." (Sec'y Br. 6.) HSS Brown testified that Mr. Norton failed to "go out periodically" to inspect the walking-working surfaces. (Tr. 183.)

Respondent claims that it complied with the cited standard because Mr. Norton "conducted inspections in the workplace once per quarter, and the Company had checklists for walking-working surfaces to be used to look for the presence of hazards." (Resp't Br. 17-18.) Respondent also argues that it had previously hired an outside safety consultant "to review the entire facility and do a walkthrough for potential corrective actions" prior to the OSHA inspection. (Resp't Br. 18.)

The Secretary has failed to provide the undersigned with the facts, argument and legal basis to establish non-compliance with the cited standard in this instance. HSS Brown testified that Mr. Norton failed to "periodically" inspect, but Mr. Norton testified that he did inspect once

per quarter. Perhaps the Secretary believes that the inspections should be more "frequent," but this argument was not set forth nor was there any evidence or case law to support it. As noted above for Citation 1, Item 1(a), the Secretary set forth no evidence regarding Respondent's other possible means of inspections, but Respondent has introduced evidence that it had a prior relationship with a safety consultant to inspect its workplace. Accordingly, the undersigned is unable to find that the Secretary has established by the preponderance of the evidence that Respondent failed to comply with the cited standard for this citation item.

This citation item is vacated.

Serious Citation 1, Item 2: Energy Control Procedural Steps

Serious Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1910.147(c)(4)(ii)(B), which provides that:

> (c) (General)
>
> (4) *Energy control procedure*
>
> (ii) The procedures shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance including, but not limited to, the following:
>
> (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;

29 C.F.R. § 1910.147(c)(4)(ii)(B). The Secretary alleges that Respondent violated 29 C.F.R. § 1910.147(c)(4)(ii)(B) when:

> (a) Rewinding - On or about June 23, 2022 employees are required to perform service on the R -74 rewinder machine without having specific written Lockout procedures to isolate all energy sources exposing employees to struck by hazards

(Citation at 8.) The Secretary proposed a $14,502 penalty for this item.

1) Does the cited standard apply?

The LOTO 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.' 29 C.F.R. § 1910.147(a)(1)(i) (second emphasis added). It 'applies to the control of energy during servicing and/or maintenance of machines and equipment.' 29 C.F.R. § 1910.147(a)(2)(i). For purposes of the LOTO standard, '[s]ervicing and/or maintenance" means "[w]orkplace activities . . . where the employee may be exposed to the unexpected energization or startup of the equipment or release of hazardous energy.' 29 C.F.R. § 1910.147(b).

AJM, 2022 WL 1102423, at *3. There is no dispute that the tasks that Respondent's workers performed on the Rewinder – clearing paper jams and rethreading paper – are a servicing and maintenance activity covered by the LOTO standard. 29 C.F.R. § 1910.147(b). Respondent, however, argues that none of the LOTO standards found at 29 C.F.R. § 1910.147 apply "to the cited condition for Citation 1 Item 2 because the minor service exception applies to the activities described in the Citation." (Resp't Br. 19.)

The "minor servicing exception" is located at the end of 29 C.F.R. § 1910.147(a)(2)(ii) and provides:

> Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See subpart O [Machinery and Machine Guarding of this part).

29 C.F.R. § 1910.147(a)(2)(ii) (Note: Exception to paragraph (a)(2)(ii)). As the Secretary states, "the Commission has held that the exception only applies to activities that are "(1) minor, (2) take place during normal production operations, and that (3) effective alternative protection is provided." (Sec'y Reply Br. at 2 citing *Westvaco Corp.*, 16 BNA OSHC 1374, 1378 (No- 90-1341, 1993). Respondent has the burden to prove this exception. *Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1389 (No. 92-262, 1995) ("A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception.").

The undersigned finds that Respondent has not shown that it provides "effective alternative protection" against the "reset" function of the Rewinder. The record establishes that Employee 1 was inside the Rewinder finishing the rethreading task, and Employee 2 was able to "reset" the Rewinder from outside the Rewinder. The "reset" activated a blade, which moved as a result of the "reset," and injured Employee 1 whose hand was within the blade's movement radius. Respondent claims that Employee 2's actions were "intentional," which may be relevant to other aspects of the violation analysis, but it is irrelevant to analyzing applicability. (Resp't Br. 21.) The record establishes that Respondent did not have effective protection against the "reset" function, therefore Respondent has failed to meet the minor servicing exception.

Respondent next argues that "there is no unexpected reenergization absent an intentional act as there was in this case by [Employee 2]" and therefore the cited standard does not apply. (Resp't Br. 21-22.) Respondent claims that "there is also no evidence on how short or long the delay is after restart is initiated, measurements showing exposure, or instances of injury during this task prior to [Employee 1's] incident." (Resp't Br. 22.)

"Energization is 'unexpected' in the absence of some mechanism to provide adequate advance notice of machine activation." *Dayton Tire*, 23 BNA OSHC 1247, 1250 (No. 94-1374, 2010) citing *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1023 (No-91-2843E, 2007) (consolidated), *aff'd in relevant part*, 671 F.3d 1249 (D.C. Cir. 2012). The record establishes that the "reset" was unexpected to Employee 1 as a result of Employee 2's actions. As noted above, unlike the "restart" function, there is no audible alarm associated with the "reset" and the "reset" movement lasts two seconds. (Tr. 56.) Finally, the record also establishes that, during the "reset," a "blade comes out. That's what caught me[...] And a blade moves too." (Tr. 56-57.) Employee

1's hands were within the movement radius of the blade which was energized as a result of the "reset" performed by Employee 2.

Accordingly, the undersigned finds that the cited standard applies to the "reset" function of Respondent's Rewinder as Respondent's workers were clearing paper jams and rethreading paper. As the record establishes that the "reset" function was always performed after the unjamming and rethreading task was completed, the undersigned finds that the cited standard applies.

2) Did Respondent comply with the cited standard?

The Secretary claims that the cited standard "requires step-by-step instructions for shutting down, isolating, blocking, and securing machines or equipment to control hazardous energy." (Sec'y Br. 10.) The Secretary claims that HSS Brown requested documents pertaining to these required instructions, but Respondent never provided them and therefore did not comply with the cited standard. Respondent claims that "without more evidence, such as specific testimony from the Company during the hearing that, at the time of the accident, it did not have a machine-specific LOTO procedure for the [Rewinder], the Secretary cannot prevail[.] (Resp't Br. 23.) The undersigned disagrees and finds that the Secretary has established noncompliance of the cited standard by the preponderance of the evidence.

HSS Brown testified that Mr. Norton told him that Respondent "knew they didn't have a specific [lockout tagout policy for the Rewinder], they've been trying to upgrade the system and they had one that they had done on another machine." (Tr. 157; *see also* Sec'y Br. 10.) While Mr. Norton testified that each machine had a lockout-tagout specific procedure at the time of the accident, he did not testify that the procedures had "specific procedural steps for shutting down,

isolating, blocking and securing [the Rewinder] to control hazardous energy," including that for the "reset" function.[7] (Tr. 278-279); 29 C.F.R. § 1910.147(c)(4)(ii)(B).

Mr. Norton testified that even though he was asked to provide such documents during HSS Brown's inspection, he did not provide them at the time because "they're located on a computer drive," and did not provide them later during this matter because HSS Brown never asked for them again. (Tr. 271-272.) Mr. Norton did not submit the documents even though HSS Brown told him at the inspection's closing conference about the "anticipated" alleged violations OSHA would cite, including those violations "for not having machine specific lockout tagout." (Tr. 277.)

At no time in this matter were the documents requested by HSS Brown produced when they could have helped Respondent's case, and thus the undersigned makes an adverse inference that any such documentation in Respondent's possession would not have helped Respondent's case. *Capeway Roofing Sys., Inc.*, 20 BNA OSHC 1331, 1342-1343 (No. 00-1968, 2003) (holding that "when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case.") *aff'd*, 391 F.3d 56 (1st Cir. 2004). The adverse inference here does not involve a discovery dispute[8], and is limited in scope and reasonable under the circumstances. *UHS of Denver, Inc., d/b/a Highlands Behav. Health Sys.*, No. 19-0550, 2022 WL 17730964, *4 (OSHRC, Dec. 8, 2022). Neither Employee 1 nor Employee 2 testified to the existence or utilization of any such procedures relating to their operation of the Rewinder, during the "reset" function or otherwise.

[7] Similarly, with regard to repeat Citation 2, Item 1, Mr. Norton did not testify that Respondent "developed, documented and utilized [procedures] for the control of potentially hazardous energy" when Employee 1 and Employee 2 were unjamming and rethreading the Rewinder. 29 C.F.R. § 1910. 147(c)(4)(i).

[8] The undersigned notes that neither party claimed a discovery dispute throughout this proceeding.

There is no other evidence of the existence of such documents in this record, and Respondent has not pointed to any such documents either at the hearing or in its Post-Hearing Briefs.

The undersigned finds that the Secretary has established by the preponderance of the evidence that Respondent failed to comply with the cited standard.

3) Did Respondent's employees have access or exposure to the violative condition?

The record establishes that Respondent's workers – namely, Employee 1 and Employee 2 – were exposed to struck by hazards when they unjammed and rethreaded paper on the Rewinder at Respondent's workplace without "[s]pecific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy." 29 C.F.R. § 1910.147(c)(4)(ii)(B). Respondent does not claim that its employees were not exposed to the violative condition. The Secretary has established exposure to the violative condition.

4) Did Respondent have actual or constructive knowledge of the violative condition?

Respondent does not argue that it had no knowledge of the violative condition. Mr. Norton was asked by HSS Brown during the inspection for Respondent's documentation satisfying the cited regulation. Mr. Norton had the opportunity to provide the documentation throughout this legal proceeding but did not do so. The undersigned finds that Respondent had actual knowledge of the violative condition.

This citation item is affirmed.

Serious Citation 1, Item 3: Locks

Serious Citation 1, Item 5 alleges a violation of 29 C.F.R. § 1910.147(c)(5)(i), which provides that:

(5) *Protective materials and hardware.*

> (i) Locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware shall be provided by the employer for isolating, securing or blocking of machines or equipment from energy sources.

29 C.F.R. § 1910.147(c)(5)(i). The Secretary alleges that Respondent violated 29 C.F.R. § 1910.147(c)(5)(i) when:

> (a) R74 Rewinder - On or about June 23, 2022 the employer did not provide all necessary lockout devices needed to isolate all the energy sources of the R74 Rewinder machine exposing employees to struck by hazards.

(Citation at 9.) The Secretary proposed a $14,502 penalty for this item.

1) Does the cited standard apply?

The Secretary states that the cited standard applies because Respondent's business is general industry. (Sec'y Br. 12.) Respondent claims that the cited standard does not apply due to the "minor servicing exception." (Resp't Br. 23.) As discussed above, the undersigned rejects the "minor servicing exception argument." The record establishes that Respondent's workers perform activities on machines powered from energy sources. 29 C.F.R. § 1910.147(c)(5)(i).

The cited standard applies.

2) Did Respondent comply with the cited standard?

It is undisputed that Respondent did not provide locks to Employee 1 or Employee 2 for the job tasks on the Rewinder. It is also undisputed that Employee 1 and Employee 2 are not authorized to lock out the Rewinder. Respondent claims that it does provide locks, but only to its authorized employees. (Resp't Reply Br. 2.)

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

29 C.F.R. § 1910.147(b) (Definitions applicable to this section) (emphasis added).

Here, the record establishes that Employee 1 and Employee 2 worked with machinery powered from energy sources. As discussed above, these workers performed servicing and maintenance activities as defined by OSHA on the Rewinder. These workers were therefore considered "authorized employees" as defined by OSHA because they performed servicing or maintenance covered by the LOTO standards. 29 C.F.R. § 1910.147(b). Neither of these employees were provided locks. (Ex. R-21 at 5, 9.)

Respondent failed to comply with the cited standard.

3) Did Respondent's employees have access or exposure to the violative condition?

The record establishes that Employee 1 and Employee 2 performed servicing and maintenance activities as defined by OSHA on the Rewinder. They were not provided locks to perform their tasks. Respondent does not argue that these employees were not exposed to violative condition. The Secretary has established employee exposure to the violative condition.

4) Did Respondent have actual or constructive knowledge of the violative conditions?

The undersigned finds that the record establishes that Respondent had actual knowledge that Employee 1 and Employee 2 were not issued locks to perform their job tasks on the Rewinder. (Ex. R-21 at 5, 9.)

5) Is Citation 1, Item 3 duplicative of Citation 1, Item 2 and Citation 2, Item 1?

Respondent claims that Citation 1, Item 3 must be vacated as a duplicate citation, as abatement of Citation 1, Item 2 and Citation 2, Item 1 would necessarily [abate] Citation 1, Item 3. (Resp't Br. 23-24.) Respondent states that "utilization of a compliant LOTO procedure" for the Rewinder (as the Secretary alleges Respondent failed to do in Citation 1, Item 2 and Citation

2, Item 1) "would require the employees to have used locks to isolate the energy sources" of the Rewinder. (Resp't Br. 23.)

"Violations are duplicative where the abatement of one violation necessarily results in the abatement of the other." *Flint Eng'g & Constr. Co.*, 15 BNA OSHC 2052, 2056-57 (No. 90-2873, 1992) (*Flint*). Citation 1, Item 2 and Citation 2, Item 1 requires written procedures and instructions for the tasks surrounding the Rewinder. Such abatement of those citation items would not necessarily abate the violation in Citation 1, Item 3, which requires the provision of locks to Employee 1 and Employee 2.

Respondent's duplicative argument is rejected. This citation item is affirmed.

Serious Citation 1, Item 4: Safely Positioned Employees

Serious Citation 1, Item 4 alleges a violation of 29 C.F.R. § 1910.147(e)(2)(i), which provides that:

> (e) *Release from lockout or tagout.* Before lockout or tagout devices are removed and energy is restored to the machine or equipment, procedures shall be followed and actions taken by the authorized employee(s) to ensure the following:
>
> (2) *Employees.*
>
> (i) The work area shall be checked to ensure that all employees have been safely positioned or removed.

29 C.F.R. § 1910.147(e)(2)(i). The Secretary alleges that Respondent violated 29 C.F.R. § 1910.147(e)(2)(i) when:

> (a) Rewinder area - On or about June 23, 2022 an employee was instructed to enter the machine to clear jammed material from the R-74 rewinder machine and the authorized machine operator failed to remove the employee from the machine before he turned the power back on exposing employee to struck by hazards.

(Citation at 10.) The Secretary proposed a $14,502 penalty for this item.

1) Does the cited standard apply?

The Secretary states that the cited standard applies because Respondent's business is general industry. (Sec'y Br. 12.) Respondent claims that the cited standard does not apply due to the "minor servicing exception." (Resp't Br. 24.) As discussed above, the undersigned rejects the "minor servicing exception argument." The record establishes that Respondent's workers perform servicing and maintenance activities on machines that were restored with power during and after their servicing and maintenance tasks. 29 C.F.R. § 1910.147(e)(2)(i). The cited standard applies.

2) Did Respondent comply with the cited standard?

The Secretary claims that the cited standard required Respondent to ensure that the Rewinder work area was safe prior to restarting the Rewinder. (Sec'y Br. 13.)

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

29 C.F.R. § 1910.147(b) (Definitions applicable to this section) (emphasis added).

As noted above in the discussion of Citation 1, Item 3, the record establishes that Employee 1 and Employee 2 performed servicing and maintenance activities as defined by OSHA on the Rewinder. These workers were therefore considered "authorized employees" as defined by OSHA because they performed servicing or maintenance covered by the LOTO standards. 29 C.F.R. § 1910.147(b). Employee 2 failed to ensure that Employee 1 had been removed from the work area inside the Rewinder before Employee 2 "reset" the machine. Respondent did not comply with the cited standard.

3) Did Respondent's employees have access or exposure to the violative condition?

The record establishes that Employee 1 and Employee 2 performed servicing and maintenance activities as defined by OSHA on the Rewinder. Employee 1 was inside the Rewinder when Employee 2 failed to ensure that Employee 1 had been removed from the work area inside the Rewinder before Employee 2 "reset" the machine. Respondent does not argue that these employees were not exposed to violative condition. The Secretary has established employee exposure to the violative condition.

4) Did Respondent have actual or constructive knowledge of the violative conditions?

The Secretary claims that "the burden is on the employer to ensure that an authorized employee inspects the work area prior to re-energization. Again, the Respondent cannot claim that it did not know of its own policies." (Sec'y Br. 14.)

Respondent claims that Employee 2 intentionally reset the machine "because he believed [Employee 1] had finished the task." (Resp't Br. 24.) Respondent also suggests that Employee 1 "intentionally reached inside the machine after startup." (Resp't Br. 24.) Respondent then claims that there is "no evidence that [Respondent] actually knew an employee would not be removed from the machine before startup," or with the exercise of reasonable diligence, that Respondent could have known that Employee 1 would not have been removed prior to startup, that Employee 2 would "commit this isolated, intentional act," or that other employees had been inside machines when they were reset and restarted. (Resp't Br. 24-25.)

The record does not establish that Respondent had actual knowledge that Employee 2 failed to ensure that Employee 1 was removed from the work area prior to "resetting" the Rewinder. There is no evidence of any supervisor around the Rewinder at the time of the incident. There is no evidence that what Employee 2 did was even part of the standard routine practice

while working on the Rewinder. The record establishes that, aside from training, working the Rewinder was a solitary job, and it is undisputed that Employee 1 was not being trained on the day of the incident. Even in training, the record establishes that both employees would be inside the Rewinder. Employee 1 testified that he had never before witnessed Employee 2 or any other worker "reset" the Rewinder while someone else was inside. (Tr. 41.)

Regarding constructive knowledge, even though it is her burden, the Secretary did not introduce any evidence or make any argument about Respondent's work rules and training programs, supervision of employees, anticipation of the hazards, measures taken to prevent violations from occurring, and enforcement of work rules when violations are discovered regarding the Rewinder.[9] *AJM*, 2022 WL 1102423, at *5. Respondent, however, produced some training documentation, which noted that "the employee that is setting the machine in motion is the only person that is allowed to be working on the machine." (Ex. R-15 at 3) (emphasis in the original); *see also* Exs. R-10, R-13, R-14, R-19, R-20, R-21 (other evidence showing Respondent's safety efforts). It is noted that Respondent did not discipline either Employee 1 or Employee 2 for any safety infractions due to the incident, however, this testimony came into the record after the Secretary rested her case. (Tr. 285.)

Based on the above, the undersigned finds that the Secretary failed to carry her burden of establishing, by the preponderance of the evidence, that Respondent with the exercise of reasonable diligence could have known that Employee 2 would fail to ensure that Employee 1 was out of the Rewinder work area before restarting the Rewinder.

[9] The undersigned notes that the LOTO documentation that is the subject of Citation 1, Item 2 and Citation 2, Item 1 provides procedures and step-by-step instructions on working with the Rewinder. This documentation is necessary, but not sufficient for the Secretary to establish constructive knowledge for this violation.

This citation item is vacated.

Serious Citation 1, Item 5: Special Hand Tools

Serious Citation 1, Item 4 alleges a violation of 29 C.F.R. § 1910. 212(a)(3)(iii), which provides that:

> (a) *Machine guarding*
>
> (3) *Point of operation guarding.*
>
> (iii) Special handtools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided.

29 C.F.R. § 1910.212(a)(3)(iii). The Secretary alleges that Respondent violated 29 C.F.R. § 1910. 212(a)(3)(iii) when:

> (a) Rewinder R-74 machine - On or about June 23, 2022 the employees are instructed to clear jammed material from the R-74 rewinder roller area by placing their hands inside the rollers, remove jam and smooth out the new material against the roller with their hands exposing employees to struck by hazards.

(Citation at 11.) The Secretary proposed a $14,502 penalty for this item.

1) Does the cited standard apply?

The Secretary first claims that this standard applies because Respondent's business "qualifies as general industry." (Sec'y Br. 14.) The Secretary later states that Employee 1 "testified that he often had to place his hands inside the machine to clear jams or rethread paper." (Sec'y Br. 14.) Respondent claims that the cited standard does not apply to the instance here because "the Secretary failed to establish what the zone of danger was for the [Rewinder] and also failed to show that [Respondent's] employees were within a zone of danger." (Resp't Br. 26.)

The undersigned finds that both parties have missed the mark in reading the cited standard. The cited standard requires that "special hand tools" have certain characteristics – "such as to

permit easy handling of material without the operator placing a hand in the danger zone." 29 C.F.R. § 1910.212(a)(3)(iii). The standard specifically states that these tools "can only be used to supplement [machine guarding] protection provided." *Id*. Nowhere in the plain language of the cited standard does OSHA *require* "special hand tools." *See generally H-E-B, LP*, No. 19-1832, 2021 WL 973939 (OSHRC, Feb. 1, 2021) (ALJ Augustine)[10](unreviewed administrative law judge decision analyzing cited provision in context of summary judgment).

Here, there is no evidence that either Employee 1 or Employee 2 used tools to perform their work on the Rewinder. The Secretary also did not allege any other violation of the machine guarding standard. Accordingly, the undersigned finds that the Secretary failed to establish that the cited standard applies.

This citation item is vacated.

Repeat-Serious Citation 2, Item 1: Energy Control Procedure Utilization

Repeat-Serious Citation 2, Item 1 alleges a violation of 29 C.F.R. § 1910. 147(c)(4)(i), which provides that:

> (4) *Energy control procedure.*
>
> (i) 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.

29 C.F.R. § 1910. 147(c)(4)(i). The Secretary alleges that Respondent violated 29 C.F.R. § 1910. 147(c)(4)(i) when:

> (a) Rewinder R-74 machine - On or about June 23, 2022 employee(s) are instructed to enter the machine area to perform servicing without utilizing the lockout/tagout procedure and instead rely on a warning system, exposing employees to struck by hazards.

[10] *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (An unreviewed administrative law judge decision is not binding precedent for the Commission).

> Sofidel America Corp. was previously cited for a violation of this occupational safety and health standard or its equivalent standard 1910.147(c)(4)(i), which was contained in OSHA inspection number 1523196, citation number 1, item number 1, and was affirmed as a final order on October 25, 2021, with respect to a workplace located at 1006 Marley Dr. Haines City, FL. 33844

(Citation at 12.) The Secretary proposed a $79,761 penalty for this item.

1) Does the cited standard apply?

As discussed in Citation 1, Item 2, the LOTO standards apply to the unjamming and rethreading activities performed on the Rewinder at Respondent's workplace. Respondent claims that the "minor servicing exception" applies, but for the reasons discussed above, the undersigned finds that Respondent has not carried that burden. The record establishes that the "reset" function was always performed after the unjamming and rethreading task was completed. The cited standard applies.

2) Did Respondent comply with the cited standard?

For the same reasons as discussed in Citation 1, Item 2, the Secretary has established by the preponderance of the evidence that Respondent failed to "develop, document and utilize procedures for the control of potentially hazardous energy" when Employee 1 and Employee 2 worked inside the Rewinder. 29 C.F.R. § 1910. 147(c)(4)(i).

3) Did Respondent's employees have access or exposure to the violative condition?

For the same reasons as discussed in Citation 1, Item 2, the Secretary has established that Respondent's employees were exposed to the violative condition.

4) Did Respondent have actual or constructive knowledge of the violative conditions?

For the same reasons as discussed in Citation 1, Item 2, the Secretary has established that Respondent had actual knowledge of the violative condition.

5) Is Citation 2, Item 1 duplicative of Citation 1, Item 2?

Respondent claims that Citation 2, Item 1 should be vacated as duplicative. (Resp't Br. 27.) "Violations are duplicative where the abatement of one violation necessarily results in the abatement of the other." *Flint*, 15 BNA OSHC at 2056-57. In *Flint*, the Commission rejected the duplicative argument and held:

> Taking measures to abate the one hazard would not in and of itself result in the abatement of the other hazard. In this case, the hazards and their respective abatement methods are sufficiently distinct so as to constitute separate violations deserving of separate penalties.

Flint, 15 BNA OSHC at 2057.

The Secretary claims that, here, the "abatement of one violation would not result in the abatement of the other." (Sec'y Br. 11.) Respondent claims that "given the allegation that [Respondent] did not have a machine-specific procedure for the [Rewinder], by definition [Respondent] cannot have utilized a procedure that did not exist." (Resp't Br. 28.)

The Secretary explains that "with Regard to Citation 1, Item 2, the Respondent must implement step-by-step written instructions explaining *how* employees lockout and tagout the Rewinder machine when conducting a particular task." (Sec'y Br. 12) (emphasis in original). Whereas "[w]ith regard to Citation 2, Item 1, Respondent must abate this violation by 'developing, documenting, and utilizing' procedures that identify the potential sources of hazardous energy applicable to the Rewinder machine and *when* employees must isolate those energy sources." (Sec'y Br. 11-12) (emphasis added).

The undersigned understands the Secretary's explanation to mean that regarding Citation 1, Item 2, Respondent must implement step-by-step written instructions explaining *how* Respondent's workers lockout and tagout the Rewinder when they perform the "reset" function for the unjamming or rethreading task. For Citation 2, Item 1, on the other hand, Respondent

must develop, document and utilize procedures that identify all of the sources of energy of the Rewinder and *when* Respondent's workers must isolate those energy sources. Achieving compliance with the standard cited in Citation 2, Item 1 does not necessarily achieve compliance with the standard cited in Citation 1, Item 2, and vice versa. *Flint*, 15 BNA OSHC at 2057.

The undersigned rejects the argument that Citation 2, Item 1 is duplicative of Citation 1, Item 2. This citation item is affirmed.

Other-Than-Serious Citation 3, Item 2: Reporting an Amputation

Other-than-Serious Citation 3, Item 1 alleges a violation of 29 C.F.R. § 1904.39(a)(2), which provides that:

> (a) *Basic requirement.*
>
> (2) Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.

29 C.F.R. § 1904.39(a)(2). The Secretary alleges that Respondent violated 29 C.F.R. § 1904.39(a)(2) when:

> (a) On or about June 23, 2022 an employee received an amputation injury on June 8, 2022 and the employer did not report the incident to OSHA until June 17, 2022 resulting in a late reporting.

(Citation at 14.) The Secretary proposed a $11,396 penalty for this item.

1) Does the cited standard apply?

The Secretary first claims that the cited standard applies because Respondent's business "qualifies as general industry," but the cited standard does not fall under Part 1910. (Sec'y Br. 15.) The Secretary later states that the "medical diagnosis labels [Employee 1's] injury as a 'partial traumatic amputation.' " (Sec'y Br. 15 citing Ex. C-27 at 1.) Respondent claims that "it is unclear if an amputation – partial or otherwise – occurred," suggesting that the record contains

"conflicting" evidence regarding this issue, and that therefore the cited standard does not apply. (Resp't Br. 29-30.)

> OSHA has provided guidance about the definition of "amputation" in its regulations.
>
> How does OSHA define "amputation"? An amputation is the traumatic loss of a limb or other external body part. Amputations include a part, such as a limb or appendage, that has been severed, cut off, amputated (*either completely or partially*); *fingertip amputations with or without bone loss*; medical amputations resulting from irreparable damage; *amputations of body parts that have since been reattached*. Amputations do not include avulsions, enucleations, deglovings, scalpings, severed ears, or broken or chipped teeth.

29 C.F.R. § 1904.39(b)(11) (emphasis added). On OSHA's website, OSHA further provides guidance that is relevant to the issue in this matter.

> How do you differentiate between an amputation without bone and avulsions?
>
> *If and when there is a health care professional's diagnosis available, the employer should rely on that diagnosis.* If the diagnosis is avulsion, the event does not need to be reported. *If the diagnosis is amputation, the event must be reported*. If there is no available diagnosis by a health care professional, the employer should rely on the definition and examples of amputation included in the regulatory text of section 1904.39. Examples of avulsion that do not need to be reported include deglovings, scalpings, fingernail and toenail avulsions, eyelid avulsions, tooth avulsions, and severed ears. Remember, employers are required to report amputations to OSHA when they **learn** that the reportable event occurred. The employer must report the event when he or she has information that the injury is a work-related **amputation**.

OSHA's Recordkeeping Rule, *New reporting requirements starting January 1, 2015: New FAQ's February 19, 2014*, www.osha.gov/recordkeeping/2014 (FAQs) (accessed June 3, 2024) (italicized emphasis added, bolded emphasis in original).

The undersigned is persuaded by the medical diagnosis stating that the injury was a "partial traumatic amputation." (Ex. C-27 at 1.) The undersigned rejects Respondent's suggestion that the placement of this diagnosis in the "third bullet" of the diagnosis sheet, and that the subsequent "care information" of the diagnosis packet did not mention amputation but instead "an avulsion fracture," renders the diagnosis in some way invalid. (Resp't Br. 30.)

According to OSHA's definition of amputation, which includes a [body] part…that has been…amputated (either completely or *partially*), Employee 1's injury qualifies as a reportable event. 29 C.F.R. § 1904.39(b)(11) (emphasis added).

Respondent further suggests that because Employee 1's fingertip was reattached, that the injury was not an amputation. (Resp't Br. 30.) But OSHA also accounts for this scenario in its definition of amputation: "amputations of body parts that have since been *reattached*." 29 C.F.R. § 1904.39(b)(11 (emphasis added). Finally Respondent claims, with no support, that the pictures under seal in the record establish that no partial amputation occurred. (Resp't Br. at 30 citing Ex. R-3.) The undersigned rejects this baseless argument and relies on the medical diagnosis.

The cited standard applies.

2) Did Respondent comply with the cited standard?

The cited standard required Respondent to report Employee 1's injury to OSHA within 24 hours of the amputation. 29 C.F.R. § 1904.39(a)(2). Employee 1's injury occurred on June 8, 2022. Mr. Norton reported the amputation on June 17, 2022, more than 24 hours after the injury occurred. The cited standard was violated.

3) Did Respondent's employees have access or exposure to the violative condition?

As found above, Employee 1 sustained a reportable injury on June 8, 2022. As the Secretary states, OSHA has a "strong interest in timely investigating serious workplace injuries. Thus, the failure to report exposes all subsequent employees to the same hazards posed by the hazard that cause the initial injury." (Sec'y Br. 16.) Respondent does not address this argument. Accordingly, the undersigned finds that Respondent's employees were exposed to the violative condition of failing to report Employee 1's injury within 24 hours. 29 C.F.R. § 1904.39(a)(2).

4) Did Respondent have actual or constructive knowledge of the violative condition?

The Secretary claims that because Mr. Norton accompanied Employee 1 to the hospital and received a copy of the medical diagnosis, that Mr. Norton "knew, or at the very least, should have known, that a report was required." (Sec'y Br. 16.) Respondent claims that Mr. Norton was under a misunderstanding regarding Employee 1's injury and that once he did understand that it was an amputation, Mr. Norton reported the injury within 24 hours. (Resp't Br. 30-31.) The record supports Respondent's claim.

HSS Brown testified that Mr. Norton "stated he received [the medical report] the day of the accident. He got it from – he got the information, what had happened, stated he didn't finish reading the whole thing and just laid it in his inbox." (Tr. 188.) HSS Brown testified that he did "not know when [Mr. Norton] knew about it. My understanding is he knew about it from the beginning. All I see here is on the 17th." (Tr. 237.) He testified that Mr. Norton "had known that [Employee 1] got the partial amputation, they called it, at the time of the injury." (Tr. 236.) HSS Brown confirmed that Mr. Norton "should have known at that time that he needed to report it." (Tr. 243.)

Mr. Norton testified that he did not realize that Employee 1 sustained an amputation until workers' compensation mentioned it after he had reported it to workers' comp. (Tr. 261-262.) At that point in time, he "found the original document from the doctor, noticed that it did say, after the fact, what I read laceration, it says something about amputation." (Tr. 262.) He further testified that, "I don't understand. Is that partial amputation the – is that what they're talking about, because the man that appeared in front of me had his finger." (Tr. 262; *see also* Ex. R-3 (sealed).) Mr. Norton then notified his previously contracted safety consultant about the matter and that he intended to report the amputation that same day. (Ex. C-28 at 00157.)

Under cross-examination, Mr. Norton testified to the following:

> Q: Looking at [Ex. R-3] now. Did I understand correctly that – the pictures of the finger, did you say that you took these at the hospital?
>
> A: Yes, sir.
>
> Q: So you took that photograph and you read the medical diagnosis. Did you read on the medical diagnosis that it said partial amputation?
>
> A: No, sir.
>
> Q: And so you didn't believe that was an amputation until the 17th?
>
> A: That is correct.

(Tr. 283.)

As noted above, OSHA has published guidance on its website that OSHA expects employers to report a reportable injury within 24 hours of "learning" that the injury is a "work-related *amputation*":

> Remember, employers are required to report amputations to OSHA when they **learn** that the reportable event occurred. The employer must report the event when he or she has information that the injury is a work-related **amputation**.

OSHA's Recordkeeping Rule, "New reporting requirements starting January 1, 2015: New FAQ's February 19, 2014," www.osha.gov/recordkeeping/2014 (FAQs) (accessed June 3, 2024) (bolded emphasis in original); *see also* SOL Interpretive Letter, Recordkeeping Regulation contained in 29 CFR 1904 (May 25, 2016), https://www.osha.gov/laws-regs/standardinterpretations/2016-05-25 (accessed June 3, 2024).

Based on the above facts, the record establishes that Mr. Norton did not have actual knowledge of the amputation until June 17, 2022.

It is the Secretary's burden to establish when Mr. Norton had constructive knowledge of the amputation. *Sanderson Farms, Inc. v. Perez*, 811 F.3d at 735. Here, the Secretary states that Mr. Norton should have known about the amputation when he received the medical diagnosis on

the hospital discharge sheet on June 8, 2017. The Secretary, however, has not explained why Mr. Norton should have known about the amputation given the following: 1) Mr. Norton accompanied Employee 1 to the hospital and took his own pictures of the injury, which to him did not appear to be an amputation; and 2) the diagnosis was located in the third bullet of a list of diagnoses on a hospital discharge sheet. The Secretary did not question Mr. Norton on the witness stand about his experience at the hospital or the nature of his reading of the hospital discharge sheet. Accordingly, Mr. Norton's testimony regarding how his judgment of the injury affected the nature of his reading of the hospital discharge sheet stands alone.

As it was the Secretary's burden, the Secretary has failed to establish constructive knowledge for this citation item. This citation item is vacated.

Characterization

The Secretary characterized both Citation 1 and Citation 2 in this matter as serious violations. A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition. *See* 29 U.S.C. § 666(k). The Secretary argues that "the citations were properly characterized as serious because of the likelihood of death or serious physical harm. In fact, one employee did suffer a serious injury. These employees were working with hazardous energy, and they were not provided with the information that they should have been provided." (Sec'y Br. 18.) Respondent does not claim that any of the affirmed citation items were improperly characterized as serious. Accordingly, both Citation 1 and Citation 2 are properly characterized as serious.

The Secretary also characterized Citation 2 as a repeat violation.

> A violation is repeated if the employer was previously cited for a substantially similar violation and that citation became a final order before the occurrence of the alleged repeated violation. *Bunge Corp.*, 638 F.2d 831, 837 (5th Cir. 1981); *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). The Secretary establishes

> a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994).

Deep S. Crane & Rigging Co., 23 BNA OSHC 2099, 2105 (No. 09-0240, 2012), *aff'd*, 535 F. App'x 286 (5th Cir. 2013) (unpublished). "[T]he principal factor to be considered in determining whether a violation is repeated is whether the prior and instant violations resulted in substantially similar hazards." *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No.88-310, 1990).

The Secretary introduced a prior violation of the same standard that became a final order on October 25, 2021, prior to the events of June 2022. (Exs. C-36, C-37.) Respondent claims that HSS Brown testified that he "was unaware of the similarities or differences between the alternative protective measures Respondent had in place in the two inspections." (Resp't Br. 29.) Respondent claims that the prior worksite was a paper mill, which is different from the Hattiesburg worksite, and that the "two facilities do not conduct the same activities or involve the same production of material." (Resp't Br. 29.)

The Secretary argues that "in both violations, Respondent relied upon an interlock door in lieu of a proper lockout/tagout procedure[.] Both pose a hazard of crushing/caught in injuries, amputation, and death." (Sec'y Br. 17.) The undersigned is not persuaded by Respondent's arguments because they are focused on the protective measures and type of facilities of each workplace, not the type of hazard. *Stone Container Corp.*, 14 BNA OSHC at 1762. Respondent does not address the hazard at its paper mill and how it might be different from the hazard in Hattiesburg.

Citation 2, Item 1 is properly characterized as Repeat.

PENALTIES

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in the penalty determination 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) (citation omitted). The proposed penalties for serious Citation 1, Items 2, 3, and 4 were the same for all violations – $14,502 each.[11] The proposed penalty for repeat-serious Citation 2, Item 1 was $79,761.[12]

HSS Brown testified as to how the penalty for each citation item was calculated and proposed. (Tr. 188-190.) In terms of gravity, HSS Brown testified that the severity was deemed "high" and the probability was deemed "greater" because of Employee 1's amputation injury. (Tr. 188.) HSS Brown testified that Respondent had over 400 employees working at the Hattiesburg location and 1,000 employees total. (Tr. 189.)

No reduction was given for size because the threshold for a reduction in penalty due to employer size is 200 employees. (Tr. 189.) HSS Brown testified that no reduction was given for good faith because Respondent was inspected and cited by OSHA within the last five years. (Tr. 189.) No reduction based on history was given because of the citations issued to Respondent within the last five years. (Tr. 189-190.)

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[11] The maximum penalty for the serious violations proven here is $14,502. 29 C.F.R. § 1903.15(d)(3) (2022).

[12] The maximum penalty for the repeat violation proven here is $145,027. 29 C.F.R. § 1903.15(d)(2) (2022).

The Secretary argues that the proposed penalties should be affirmed based on the record evidence. (Sec'y Br. 18.) Respondent did not address the calculation of the penalty amounts for the citation items at issue in its briefs.

After consideration of the statutory factors, the Court agrees with the calculation of the penalty amounts proposed by the Secretary for each citation item. The proposed penalty amounts are assessed for each affirmed citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* 29 C.F.R. 2200.90; Fed. R. Civ. P. 52(a); *see also L&L Painting Co.*, 23 BNA OSHC 1986, 1989 n.5 (No. 05-0055, 2012) (finding item not addressed in briefs deemed abandoned); *Midwest Masonry Inc.*, 19 BNA OSHC 1540, 1543 n.5 (No. 00-0322, 2001) (noting arguments not raised in briefs generally deemed abandoned). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1) Citation 1, Item 1(a), alleging a violation of 29 C.F.R. § 1910.22(a)(3), is VACATED.

2) Citation 1, Item 1(b), alleging a violation of 29 C.F.R. § 1910.22(d)(1), is VACATED.

3) Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1910.147(c)(4)(ii)(B), is AFFIRMED as SERIOUS and a penalty of $14,502 is ASSESSED.

4) Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1910.147(c)(5)(i), is AFFIRMED as SERIOUS and a penalty of $14,502 is ASSESSED.

5) Citation 1, Item 4 alleging a violation of 29 C.F.R. § 1910.147(e)(2)(i), is VACATED.

6) Citation 1, Item 5, alleging a violation of 29 C.F.R. § 1910.212(a)(3)(iii), is VACATED.

7) Citation 2, Item 1, alleging a violation of 29 C.F.R. § 1910.147(c)(4)(i), is AFFIRMED as REPEAT-SERIOUS and a penalty of $79,761 is ASSESSED.

8) Citation 3, Item 1, alleging a violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A), Respondent having withdrawn its Notice of Contest, is AFFIRMED and no penalty is ASSESSED as proposed.

9) Citation 3, Item 2, alleging a violation of 29 C.F.R. § 1904.39(a)(2), is VACATED.

SO ORDERED.

/s/*Covette Rooney*
Covette Rooney
Judge, OSHRC

DATE: June 17, 2024
Washington, D.C.