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. OTIS ELEVATOR COMPANY, Respondent.	OSHRC Docket No. 09-1278

ON BRIEFS:

Sarah Kay Marcus, Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Paul J. Waters, Esq.; Akerman Senterfitt, Tampa, FL
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

On June 16, 2009, a service mechanic employed by Otis Elevator Company ("Otis") injured his hand while unjamming the gate of a freight elevator at Boston Store, a department store in Brookfield, Wisconsin. Following an investigation of this accident, the Occupational Safety and Health Administration ("OSHA") issued a serious citation to Otis under the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. §§ 651-678.[1] The citation item at issue alleges that Otis violated 29 C.F.R. § 1910.147(f)(2)(i), a provision in the lockout/tagout ("LOTO") standard that requires an "outside employer" and an "on-site" employer to inform each other of their respective LOTO procedures.

[1] The citation included two items, one of which the Secretary withdrew prior to the hearing.

Administrative Law Judge Dennis L. Phillips vacated the item, concluding that the LOTO standard was not applicable and that, in any event, the cited provision did not require Otis, the outside employer, to inform Boston Store, the on-site employer, of its LOTO procedures. For the reasons that follow, we reverse the judge and affirm the citation item.

BACKGROUND

On the day of the accident, Otis assigned a service mechanic to repair a freight elevator at Boston Store. The Otis dispatcher who made the assignment informed the mechanic that the elevator's "car gate was hung up and not functioning." When functioning properly, the elevator's metal gate opened whenever an employee pushed a button in the hallway next to the elevator. The mechanism that controlled the gate included two chain assemblies located on the rooftop of the elevator car—one on each side adjacent to the gate. Each chain assembly included vertical and horizontal chains attached to separate sprockets. The horizontal chains were powered by one of the motor's pulleys which, when operating properly, raised and lowered the gate.

After he arrived at the store, the mechanic talked to "a couple [Boston Store] employees," who confirmed that "the gate was hung up on the [elevator] car." He then walked to the freight elevator and observed that the gate was partially open leaving a three-foot gap between it and the floor. He also observed an out-of-order sign in the hallway by the elevator. He tried to move the gate, yanking on it "[p]retty hard," but it did not budge. After ducking underneath the gate to enter the elevator car, he used a ladder to access the car's escape hatch and climbed on top of the car.

Once on top of the car, the mechanic flipped two switches to prevent anyone from calling the elevator or moving the gate electrically.[2] He then examined one of the gate's chain assemblies and determined that the gate could not move because the assembly's chain "was off the sprocket" and jammed. The mechanic decided that he would attempt to fix the gate by prying the chain back onto the sprocket. He testified that when he did this, the chain started moving as he had anticipated, and he "intentionally" grabbed it with his hand, resulting in his hand being "drug through the sprocket and chain." He explained that he grabbed the chain

[2] Otis's LOTO procedures required its mechanic to "block up [the gate] mechanically or with a Bi-Parting Door Tool to prevent unexpected gate movement." Otis does not dispute that the mechanic failed to do this.

because he "was worried about . . . the gate slamming and busting" the link that connected a counterweight to the gate. According to the mechanic, if the connecting link had broken, the repair would have taken longer because he would have had to "fish" the counterweight out of the box in which it was housed.

DISCUSSION

The cited provision of the LOTO standard, § 1910.147(f)(2)(i), states that "[w]henever outside servicing personnel are to be engaged in activities covered by the scope and application of this standard, the on-site employer and the outside employer shall inform each other of their respective lockout or tagout procedures." It is undisputed here that Otis was the "outside employer" and Boston Store was the "on-site employer," and Otis concedes that it did not inform Boston Store of its LOTO procedures.

Before us on review are the following issues: (1) whether the Otis mechanic, as "outside servicing personnel," was "engaged in activities covered by the scope and application" of the LOTO standard; (2) if so, whether the cited provision required Otis to inform Boston Store of its LOTO procedures; (3) whether compliance with the cited provision would have been infeasible; and (4) in the event a violation has been established, whether it is serious.

Scope and application of LOTO standard

The LOTO standard's scope "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) (emphasis in original). Its application section states that the "standard 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" includes activities such as "unjamming of machines or equipment . . . 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) (emphasis in original).

The judge concluded that the Otis mechanic's work did not fall within the scope of the LOTO standard, finding that "there was no potential for an unexpected release of stored [gravitational] energy while [the mechanic] performed his work on the gate chain and sprocket atop of the elevator car." In support of this conclusion, the judge found that the mechanic "expected and fully anticipated that the gate and the chain would begin moving" once the chain

was placed back onto the sprocket. The Secretary argues that the judge erred because the mechanic's unjamming work is specifically covered under the standard.

Contrary to the judge's conclusion, applicability of the LOTO standard does not turn on whether or not the unjamming process happened to proceed as the Otis mechanic expected. *See Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119, 2012 CCH OSHD ¶ 33,231, p. 56,071 (No. 07-1578, 2012) (noting that the " 'purpose of the Act is to prevent the first accident' " (citation omitted)). The standard applies if there was the *potential* for an unexpected release of stored energy that could cause injury to the mechanic. 29 C.F.R. § 1910.147(a)(1)(i); *see Gen'l Motors Corp.*, 22 BNA OSHC 1019, 1023, 2004-09 CCH OSHD ¶ 32,928, p. 53,606 (No. 91-2834E, 2007) (consolidated) ("Energization is 'unexpected' in the absence of some mechanism to provide adequate advance notice of machine activation." (citations omitted)).

We find that this potential was present during the unjamming activity the mechanic performed here. *See, e.g.*, Control of Hazardous Energy Sources (LOTO), 54 Fed. Reg. 36,644, 36,646-47 (Sept. 1, 1989) (final rule) (indicating that effort to unjam wood wedged in energized table-saw blade created potential for unexpected energization). There was stored kinetic energy in the elevator's jammed chain assembly due to the weight of the partially open gate. Although the mechanic testified that the chain was off the sprockets and jammed "tight as could be," and that he "expected" the chain would move once he "unwedged" it, the record does not show that he could predict when the jam would yield. In fact, the mechanic's own testimony shows that the release of energy surprised him: "I *reacted*, and I guess I grabbed [the chain] with my hand" to prevent the gate from slamming and breaking the counterweight link. (Emphasis added.) *See Gen'l Motors Corp.*, 22 BNA OSHC at 1023, 2004-09 CCH OSHD at p. 53,606; *compare Reich v. Gen'l Motors Corp.*, 89 F.3d 313, 315 (6th Cir. 1996) (affirming Commission's holding that LOTO standard did not apply to servicing activities performed on deactivated machines that were "designed and constructed so that [they could not] start up without giving a servicing employee notice of what [was] about to happen"), *aff'g* 17 BNA OSHC 1217, 1993-95 CCH OSHD ¶ 30,793 (No. 91-2973, 1995) (consolidated).

Moreover, we find that the release of stored energy posed a caught-in hazard to the mechanic. Even if he had not reflexively grabbed the chain, his work necessarily placed him in close proximity to it, and a body part or piece of clothing could have been inadvertently caught

in the chain, or between it and the sprocket, when the stored energy released.[3] *See* Control of Hazardous Energy Sources (LOTO), 54 Fed. Reg. at 36,647 (noting that performance of maintenance or servicing activities "expose the employee to the hazard of being pulled into the operating equipment when parts of the employee's body, clothing or the material or tools used for cleaning or servicing become entrapped or entangled in the machine or equipment mechanism"); *Burkes Mech., Inc*., 21 BNA OSHC 2136, 2139 n.4, 2004-09 CCH OSHD ¶ 32,922, pp. 53,561-62 n.4 (No. 04-0475, 2007) (finding laborers cleaning near 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" (citations omitted)). The Otis mechanic was, therefore, engaged in "service and/or maintenance" within the meaning of the LOTO standard's scope provision. 29 C.F.R. § 1910.147(a)(1)(i), (b).

In support of his contention that the LOTO standard applies here, the Secretary relies on 29 C.F.R. § 1910.147(a)(2)(ii), which generally excludes "[s]ervicing and/or maintenance which takes place during normal production operations" from coverage under the LOTO standard, but includes such work pursuant to paragraph (a)(2)(ii)(B) if, as relevant here, "[a]n employee is required to place any part of his or her body into an area on a machine or piece of equipment . . . where an associated danger zone exists during a machine operating cycle." 29 C.F.R. § 1910.147(a)(2)(ii), (ii)(B). Even if the work here was done during "normal production operations," we find that the LOTO standard applies because the record establishes that this criterion for coverage under the standard has been met.[4]

As we have already found, the Otis mechanic was on top of the elevator car—where an employee using the elevator would not ordinarily be positioned—performing an unjamming activity that placed parts of his body in a "danger zone," i.e., an area where a release of energy

[3] Otis asserts that the "movement of the gate," which is designed to be evenly counterweighted so that its weight would be greatly reduced, could not "inflict any serious physical harm or death," or even cause a bruise. But the mechanic testified that when he was servicing the elevator only one counterweight was holding the gate and, therefore, it would have slammed shut once the chain was unjammed. Based on this testimony, we reject Otis's assertion.

[4] We need not reach the issue of whether the Otis mechanic's work was done during "normal production operations," because the record establishes the LOTO standard's applicability in either case. If the work was not done during "normal production operations," the LOTO standard applies pursuant to § 1910.147(a)(2)(i). If the work was done during normal production operations, the LOTO standard applies because the record establishes that the requirements for applicability pursuant to § 1910.147(a)(2)(ii)(B) have been met.

stored in the gate assembly could result in a caught-in hazard.[5] *See* 29 C.F.R. § 1910.147(b) (defining "[s]ervicing and/or maintenance" as including "unjamming of machines or equipment . . . where the employee may be exposed to the *unexpected* . . . release of hazardous energy" (emphasis in original)); *Burkes Mech.*, 21 BNA OSHC at 2139 n.4, 2004-09 CCH OSHD at pp. 53,561-62 n.4. Moreover, the mechanic was in this danger zone "during a machine operating cycle," as the record shows that the elevator's gate was in a partially open position as the mechanic worked to unjam the chain, and then closed once he unjammed it. Under these circumstances, we conclude the LOTO standard covers Otis's unjamming activity.

Alleged Violation of § 1910.147(f)(2)(i)

In vacating the citation, the judge concluded that there was "no possibility" of Otis and Boston Store employees interacting or creating "misunderstandings," based on his findings that: (1) "[t]he only 'zone of danger' was on the elevator car top near the chain and sprocket" and "[t]he only employee who would ever be on the elevator car top . . . would be an Otis employee," and (2) there was no evidence that Boston Store employees were either "affected" or "authorized" employees under the LOTO standard.[6] On review, the Secretary argues that the standard presumes the potential for such interaction and/or misunderstandings whenever an outside employee is performing an activity covered by the LOTO standard.

We agree with the Secretary's reading of the standard. By its terms, § 1910.147(f)(2)(i) applies "*[w]henever* outside servicing personnel are to be engaged in activities covered by the scope and application of [the LOTO] standard . . . ." (Emphasis added.) As discussed above, the

[5] In fact, the caught-in hazard to which the Otis mechanic was subjected is the very type of hazard that the LOTO standard is intended to protect against when unjamming activities are performed during normal production operations. Control of Hazardous Energy Sources (LOTO), 54 Fed. Reg. at 36,646-47 (explaining that "operations such as cleaning *and unjamming machines or equipment* are covered by this standard when the employee is exposed to greater or different hazards than those encountered during normal production operations" (emphasis added)).

[6] The LOTO standard defines an "[a]uthorized employee" as "[a] person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment." 29 C.F.R. § 1910.147(b). The standard defines an "[a]ffected employee" as "[a]n employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under [LOTO], or whose job requires him/her to work in an area in which such servicing or maintenance is being performed." *Id.* "An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section." *Id.*

Otis mechanic was engaged in such covered activities. The cited provision, which is a specification standard,[7] presumes that in this situation a Boston Store employee may interfere with "the restrictions and prohibitions" of Otis's energy control program.[8] *See* Control of Hazardous Energy Sources (LOTO), 55 Fed. Reg. 38,677, 38,683 (Sept. 20, 1990) (final rule) (stating that § 1910.147(f)(2)(i) is "a way to prevent misunderstandings by either plant employees or outside service personnel regarding [in part] . . . the restrictions and prohibitions imposed upon each group of employees by the other employer's energy control program"); *Joseph J. Stolar Constr. Co.*, 9 BNA OSHC 2020, 2024 n.9, 1981 CCH OSHD ¶ 25,488, p. 31,783 n.9 (No. 78-2528, 1981) ("The Commission has held that, when a standard prescribes specific means of enhancing employee safety, [a] hazard is presumed to exist if the terms of the

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[7] On review, Otis claims that the cited provision is a performance standard because, in requiring employers to "inform" each other of their LOTO procedures, the standard fails to specify how that information is to be conveyed. Otis further contends that the word "inform"—which it defines as "impart[ing] information or knowledge"—is ambiguous because "many acts can impart information," making "what is necessary to comply with the [cited provision] . . . unclear." We find nothing unclear about the requirement that Otis "inform" Boston Store of its "lockout or tagout procedures." As Otis itself acknowledges, "inform" means to "impart [the] information." *See Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor,* 674 F.2d 1177, 1186 (7th Cir. 1982) (construing machine guarding requirement as "sufficiently specific . . . to reasonably apprise [the employer] in clear terms" of conduct required by standard). The provision is specific as to the circumstances under which the employers must convey the information and what information must be conveyed.

To the extent Otis is suggesting that the standard is impermissibly vague because it does not specify a particular *method* by which the information must be imparted, we find that the absence of such detail does not render the requirement invalid. And even if, as Otis suggests, the provision is performance-oriented in this respect, a reasonable person in the industry would understand that simply providing a copy of the procedures to Boston Store would have been sufficient, especially in light of the guidance provided in the Secretary's compliance directive, which indicates that the provision is met where the "on-site and outside contractors . . . exchange copies of their respective energy control procedures[.]" OSHA Instruction CPL 02-00-147, ch. 3, ¶ XIII (Feb. 11, 2008); *see Siemens Energy & Automation Inc.*, 20 BNA OSHC 2196, 2198, 2004-09 CCH OSHD ¶ 32,880, p. 53,229 (No. 00-1052, 2005) (stating that " 'general regulations are not constitutionally infirm on due process grounds so long as a reasonableness requirement is read into them' " (citation omitted)); *Western Waterproofing Co.*, 7 BNA OSHC 1625, 1629, 1979 CCH OSHD ¶ 23,785, pp. 28,862-63 (No. 1087, 1979) ("A standard is not invalid merely because an employer must exercise reasoning and judgment to decide how to apply the standard in a particular situation.").

[8] Moreover, as discussed below, the record establishes that Boston Store employees were present at the store and had access to the elevator gate while the Otis mechanic was servicing the elevator.

standard are violated."). And unlike other provisions in the LOTO standard that specifically reference "authorized" or "affected" employees, *see, e.g.*, 29 C.F.R. § 1910.147(c)(6), (c)(7), (d)(4), (d)(6), (e), no such reference is contained in the cited provision. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (citation omitted)).

Otis would have us find that § 1910.147(f)(2)(i) applies only to "situations like a factory floor with machines on which both the employees of the employer controlling the building and another, different contractor are expected to . . . service [equipment]." But such a reading contradicts the plain language of the provision, which (1) defines its scope in terms of the activities of only the outside servicing personnel, not the activities of the on-site employer, and (2) links its applicability to the full breadth of activities covered by the LOTO standard: "[w]henever *outside servicing personnel* are to be engaged in activities *covered by the scope and application of [the LOTO] standard* . . . ." 29 C.F.R. § 1910.147(f)(2)(i) (emphasis added). The scope and application section of the standard, § 1910.147(a), excludes only certain specific industries, equipment, and activities that have no relevance to the instant case. In short, the language in the standard that establishes the cited requirement's applicability precludes the interpretation urged by Otis. *See Arcadian Corp.*, 17 BNA OSHC 1345, 1347, 1995-97 CCH OSHD ¶ 30,856, p. 42,916 (No. 93-3270, 1995) (" 'In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.' " (citations omitted)), *aff'd*, 110 F.3d 1192 (5th Cir. 1997).

Otis also argues that the cited provision applies only where *both* the outside and on-site employers have LOTO procedures, and thus is inapplicable here because Boston Store lacked its own procedures. Specifically, Otis relies on the provision's use of the word "respective"—"the on-site employer and the outside employer shall inform each other of their *respective* lockout or tagout procedures," 29 C.F.R. § 1910.147(f)(2)(i) (emphasis added)—which Otis defines as "relating to two or more persons or things regarded individually; particular." According to Otis, this shows that the provision's requirement is contingent on both employers having their own LOTO procedures.

We disagree. The term "respective," even as defined by Otis, does not establish that the outside employer's duty under the provision is *conditioned* on the on-site employer also having procedures; it simply means that each employer has a duty to provide *its own* procedures to the other employer. This is also evident from the structure and context of the standard. Section 1910.147(f)(2)(ii), the provision that follows the one cited here, requires the on-site employer to "ensure that his/her employees understand and comply with the restrictions and prohibitions of the outside employer's energy control program." Even if Boston Store did not have its own procedures, it needed Otis to comply with paragraph (f)(2)(i) so that it could identify what information to provide to its own employees, and Otis needed Boston Store to comply with paragraph (f)(2)(ii) to help protect the Otis mechanic.[9] Not only would Otis's interpretation defeat the purpose of these provisions, it would lead to the absurd result that the protections afforded by paragraph (f)(2)(ii) to outside contractor employees would be rendered inapplicable where the on-site employer violates a requirement to have its own LOTO procedures. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid . . . unreasonable results whenever possible."); *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502, 1993-95 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993) ("It is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result."). Therefore, we conclude that the cited provision places a separate

[9] We disagree with Otis's assertion that the rule's preamble is inconsistent with the Secretary's interpretation. To the contrary, OSHA specifically discussed how the safety of contractor employees depends in part on the on-site employees understanding the outside contractor's procedures:

> [Section 1910.147(f)(2)(ii)] requires that each employer inform the other employer of the procedures used by his/her employees and that *each* employer's employees understand and comply with the restrictions and prohibitions *of the other* employer's energy control program. For example, if there are elements of the contractor's procedures which need to be explained to the facility employees, or if there are other steps needed to assure *the safety of the contractor's employees*, the facility employer must provide his/her employees with the information to provide the necessary protection.

Control of Hazardous Energy Sources (LOTO), 55 Fed. Reg. at 38,683 (emphasis added).

obligation on "each employer" to inform the other employer of its LOTO procedures that is not dependent on the existence of the other employer's procedures.[10]

Having determined that the Secretary's interpretation of § 1910.147(f)(2)(i) is supported by the provision's plain language, we conclude that Otis failed to comply with this provision because (1) Otis's work on the elevator was covered by the LOTO standard; (2) Boston Store and Otis were the on-site and outside employers, respectively; and (3) Otis admits that it did not inform Boston Store of its LOTO procedures.

Infeasibility

Before the judge and again on review, Otis raises the affirmative defense of infeasibility, claiming that (1) it cannot determine in advance of a particular job which of "a potentially 'endless' amount of different energy control procedures" will be applicable; (2) it may have difficulty finding personnel in a building to inform of its LOTO procedures; and (3) compliance with the provision could hinder its ability to respond to an emergency situation, "such as emergency call backs with trapped passengers." To prove infeasibility, Otis must show by a preponderance of the evidence that " '(1) literal compliance with the terms of the cited standard was infeasible *under the existing circumstances* and (2) an alternative protective measure was

[10] Otis argues that the cited provision "fails to give any notice whatsoever that an elevator maintenance company like Otis should provide a customer its procedure for wedging open an elevator gate" both as a general matter and, in particular, where only the outside employer has LOTO procedures. We find that Otis had fair notice of the requirement in both respects. As discussed above, the mechanic's work does not fall within any of the standard's scope exclusions, and the cited provision's language, along with the structure and context of the standard, make clear that the duty of the outside employer to provide its LOTO procedures to the on-site employer is independent of the on-site employer's corresponding duty. 29 C.F.R. § 1910.147(a); *see Ohio Cast Prods., Inc.*, 18 BNA OSHC 1912, 1915, 1999 CCH OSHD ¶ 31,926, p. 47,353 (No. 96-0774, 1999) ("[I]n view of our conclusion that [29 C.F.R. § 1910.1000(c)'s] formula operates to regulate silica exposure in only one manner, we find that its plain meaning would be 'ascertainably certain' to an employer who is aware that its operations generate silica dust exposure."), *aff'd*, 246 F.3d 791 (6th Cir. 2001). Even if, as Otis alleges, "industry understanding and practice"—as reflected in testimony from its employee and expert witnesses, and in an industry consensus standard (ANSI Z-244.1)—differs from the OSHA requirement, that does not render insufficient the notice provided by the clear terms of the provision. Moreover, OSHA expressly stated in an interpretation letter that it had "carefully considered the 1982 ANSI standard in developing the agency's LOTO standard, . . . [but] did not adopt the standard by reference, and in some respects the agency deliberately departed from the ANSI standard in order to provide a higher level of employee protection." Interpretation Letter from Director of OSHA Directorate of Enforcement Program, to Chairman of Z244 American Standards Committee (Nov. 10, 2004).

used or there was no feasible alternative measure.' " *Westvaco Corp.*, 16 BNA OSHC 1374, 1380, 1993-95 CCH OSHD ¶ 30,201, p. 41,570 (No. 90-1341, 1993) (emphasis added) (citation omitted).

None of Otis's claims are relevant to the circumstances that existed at Boston Store. First, based on the information the Otis mechanic received from Boston Store employees and his own initial observation, he knew before starting his work on the elevator that the gate was jammed. Determining what energy control procedure to utilize in that situation was straightforward because, in addition to shutting down the electrical components of the elevator, Otis's LOTO procedures merely required the mechanic to "block up [the gate] mechanically or with a Bi-Parting Door Tool to prevent unexpected gate movement." Second, the Otis mechanic talked to Boston Store personnel about the elevator before servicing it. He could have provided LOTO procedures to Boston Store at that point or asked them who to inform. Finally, there was no emergency when the Otis mechanic first arrived on site—the elevator gate was simply jammed. Otis, therefore, has not shown that it would have been " 'infeasible *under the existing circumstances*' " to inform Boston Store of the applicable LOTO procedures before the mechanic commenced his work. *Id.* (emphasis added) (citation omitted). Accordingly, we affirm the citation.

Characterization and penalty

On review, Otis challenges the Secretary's characterization of the violation as serious, claiming that the violation should be classified as *de minimis*. Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result" from the violation. A violation is *de minimis*, however, "when a deviation from the standard has no 'direct or immediate' relationship to employee safety." *Star Brite Constr. Co.*, 19 BNA OSHC 1687, 1691, 2001 CCH OSHD ¶ 32,511, p. 50,434 (No. 95-0343, 2001) (citation omitted); 29 U.S.C. § 658(a) (noting that *de minimis* violations are those "which have no direct or immediate relationship to safety or health"). *But see Caterpillar, Inc. v. Herman*, 131 F.3d 666, 668 (7th Cir. 1997) ("[W]e accept the Secretary's view that the Commission cannot label a violation *de minimis* and disregard it; that would transfer the Secretary's prosecutorial discretion to the Commission. If the Secretary issues a citation, the Commission must determine whether the violation occurred and set an appropriate penalty." (citation omitted)).

Absent information from Otis about its LOTO procedures, Boston Store was precluded from evaluating those procedures "and determin[ing] what information need[ed] to be provided to [Boston Store] employees." Control of Hazardous Energy Sources (LOTO), 55 Fed. Reg. at 38,683. Had LOTO procedures been implemented here, Boston Store's inability to provide its employees with proper instruction could have, in turn, made it more likely that a Boston Store employee would interfere with the use of those procedures, exposing the mechanic to serious injury from a release of stored energy. Indeed, a Boston Store employee could have removed a wedge or Otis's Bi-Parting Door Tool, or even pulled on the gate as the Otis mechanic unjammed the chain.[11] *See Flintco, Inc.*, 16 BNA OSHC 1404, 1405-06, 1993-95 CCH OSHD ¶ 30,227, p. 41,611 (No. 92-1396, 1993) (establishing that serious characterization requires Secretary to show " 'an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident' " (citation omitted), and holding that judge erroneously relied upon likelihood of accident occurring to characterize violation as non-serious). We therefore reject Otis's argument and affirm the violation as serious.

However, we find the Secretary's proposed penalty of $5,000 excessive under the circumstances here. The likelihood of an accident resulting from a Boston Store employee interfering with Otis's LOTO procedures (had they been implemented) was exceptionally low: an out-of-order sign had been placed by the elevator before the Otis mechanic arrived at the store; only a limited number of Boston Store employees were present at the time because the servicing activity was being performed before the store opened for business; and the record shows that Boston Store employees, as part of their jobs, were *not* responsible for servicing the freight elevator, at least when the Otis mechanic was assigned to perform the servicing activity. *Siemens Energy*, 20 BNA OSHC at 2201, 2004-09 CCH OSHD at p. 53,231 (noting that principal factor in penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury").

[11] The judge concluded that there was "insufficient evidence to show that store employees were in the area of the gate while [the Otis mechanic] serviced the elevator." However, the mechanic admitted at the hearing that he was uncertain whether all of the Boston Store employees were aware that he was fixing the elevator, though some of them knew of his presence based on his interactions with them. And he conceded that they could have come near the elevator gate while he was working on it.

Thus, upon consideration of all of the penalty factors, we find a penalty of $500 to be appropriate.

ORDER

We affirm Citation 1, Item 2 as serious and assess a penalty of $500.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: April 8, 2013