

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.

OSHRC Docket No. 94-1374

DAYTON TIRE,
BRIDGESTONE/FIRESTONE,

Respondent,

UNITED STEEL WORKERS OF AMERICA,
LOCAL 998,

Authorized Employee
Representative.

DECISION AND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

In a September 10, 2010 Decision and Order, the Commission affirmed ninety-nine violations of the general industry lockout/tagout (“LOTO”) standard, 29 C.F.R. § 1910.147, alleged in a citation issued to Dayton Tire, Bridgestone/Firestone (“Dayton”) under the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. §§ 651-678. *Dayton Tire*, 23 BNA OSHC 1247, 2010 CCH OSHD ¶ 33,098 (No. 94-1374, 2010). The Commission characterized all of the affirmed violations as willful and assessed a total penalty of \$1,975,000. Dayton filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit, challenging, *inter alia*, the Commission’s willful characterization of these violations. The D.C. Circuit vacated this portion of the Commission’s order, holding that there was insufficient evidence to support a finding that any of Dayton’s ninety-nine violations were willful, and “remand[ed] for the Commission to reassess the nature of Dayton’s violations and recalculate the appropriate penalty.” *Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249, 1257 (D.C. Cir. 2012).

Under the OSH Act, a violation is characterized as serious if “there is a substantial probability that death or serious physical harm could result.” 29 U.S.C. § 666(k). Based on the record evidence described in our previous decision, we find that a “substantial probability” of “death or serious physical harm” could have resulted from the servicing and maintenance activities performed by Dayton employees on the machines and equipment at issue, and that compliance with the cited LOTO provisions would have minimized or eliminated these hazards. *Dayton Tire*, 23 BNA OSHC at 1252, 2010 CCH OSHD at p. 54,816. We therefore affirm all ninety-nine LOTO standard violations as serious. *See Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2141, 2004-09 CCH OSHD ¶ 32,922, p. 53,564 (No. 04-1475, 2007) (affirming LOTO violation as serious based on record evidence).

The penalties for these serious violations are considered in light of the OSH Act’s statutory factors, which require the Commission to give “due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.” 29 U.S.C. § 666(j). In our previous decision, we concluded that no reductions were warranted for business size or good faith, but that a reduction was warranted for history. *Dayton Tire*, 23 BNA OSHC at 1266-67, 2010 CCH OSHD at p. 54,829. We also concluded that the gravity of each violation was high. *Id.* at 1267, 2010 CCH OSHD at p. 54,829. On remand, our analysis of business size, history, and gravity remain the same. With respect to good faith, however, we have taken into account the D.C. Circuit’s findings regarding Dayton’s efforts to comply with the LOTO standard—particularly that Dayton’s safety manager “made *some* effort to ensure Dayton’s LOTO compliance,” but she “may not have displayed the kind of initiative [one] would expect when lives and limbs are at stake.” *Dayton Tire*, 671 F.3d at 1257.

Given the foregoing analysis, we assess the following penalty amounts, totaling \$197,500, for the affirmed items: Items 1 through 6 - \$2,500 each; Item 7 - \$1,500; Items 8a and 8b - \$1,000 (grouped); and Items 9 through 12, 14 through 17, 20 through 30, 32 through 48, 50 through 83, 86, 87, 89 through 98, 100 through 106, and 108 - \$2,000 each.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: May 23, 2012