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. AJM PACKAGING CORPORATION, Respondent.	OSHRC Docket No. 16-1865

ON BRIEFS:

Brian A. Broecker, Attorney; Heather Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Brent I. Clark, Esq.; Adam R. Young, Esq.; Seyfarth Shaw LLP, Chicago, IL
For the Respondent

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

AJM Packaging Corporation manufactures paper plates and bowls at its facility in Vineland, New Jersey. In May 2016, an employee suffered an amputation injury while clearing a paper jam on one of the facility's machines. As a result of the incident, the Occupational Safety and Health Administration inspected the facility and issued AJM a one-item, four-instance repeat citation alleging a violation of a provision of the lockout/tagout (LOTO) standard, 29 C.F.R. § 1910.147(c)(4)(i).[1]

[1] The citation, which initially alleged a violation of 29 C.F.R. § 1910.147(d)(4)(i), was amended by the Secretary in his complaint. OSHA also issued AJM a one-item serious citation that is not at issue on review.

Following a hearing, Administrative Law Judge William S. Coleman vacated the citation in its entirety. Only Instance (d) of the alleged violation is at issue before the Commission. For the reasons discussed below, we affirm the judge and vacate Instance (d).

BACKGROUND

To produce the paper products manufactured at AJM's facility, the company uses machines referred to as "Peerless Cutting Machines" or "PCMs." In 2016, AJM operated about 33 PCMs at its facility, which were arranged in the central production area, the "floor," in two parallel rows. The output end of every machine faced toward a center aisle. Employees known as "adjusters" operate the PCMs and perform any necessary machine adjustments, such as clearing paper jams, to ensure that the paper products are formed correctly. Between eight and twelve adjusters typically work each shift,[2] and experienced adjusters normally operate three or four PCMs at a time. Adjusters operate the PCM using a control panel located on the "operator's side" of the machine.[3]

The production process begins with the PCM's mechanical paper feeder pulling a sheet of paper into the cutting, or "blanking," die of the machine. The cutting die then cuts five holes through the sheet of paper to produce five circle-shaped "blanks," which the PCM then forms into plates or bowls. After the cutting die creates the blanks, the paper remnant, or "scrap," drops a short distance onto the PCM's scrap chute. A burst of forced air from an air nozzle located at the end of the scrap chute on the operator's side expels the scrap from the chute. The scrap blows out of the PCM through an opening on the non-operator, or "discharge," side of the PCM, where it falls into a bin positioned below the opening.

The scrap chute on each PCM is a piece of solid steel sheet metal that weighs approximately 30 pounds; it is about five feet long and runs horizontally across the width of the PCM from the

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[2] The facility has three eight-hour shifts per day.

[3] The PCM can be shut down in three ways—by turning off the machine using the disconnect switch on the control panel and locking it out, by activating one of three emergency stop, or "e-stop," buttons, or by opening the rear access doors, which are interlocked. AJM has established written LOTO procedures, both general and machine-specific, for each of its machines. The company trains adjusters as "authorized employees" and issues them personal locks that they must always keep on their belt loops. *See* 29 C.F.R. § 1910.147(b) (defining "authorized 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").

operator's side to the discharge side. There are two bends in the scrap chute—one right-angle bend and one approximate 30-degree angle bend—that give the chute a shape that resembles the letter "J" when viewed from the operator's side. When the scrap chute is in its operating position, its "J" shape is canted clockwise about 45 degrees, so that the interior angles of the scrap chute form a cradle onto which the scrap paper falls.

The scrap chute is not powered by any device or mechanism. It is possible, however, to pivot the scrap chute upward by hand by reaching through a guarded opening on the operator's side of the machine or by reaching through an opening below the rear access doors. When in its canted operating position, the scrap chute's own weight keeps it from pivoting or moving upward during machine operations. If the scrap chute is pivoted to an upright position by hand, there is nothing on the PCM that allows for it to be secured in that position. It can remain balanced in place or fall by force of gravity to its canted operating position. AJM prohibited lifting the scrap chute to clear paper jams in February 2015, following an injury to one of its adjusters.[4]

On May 8, 2016, an adjuster discovered that blanks were jammed near the cutting die of a PCM he was operating. To unjam the machine, he engaged the e-stop button on the control panel to shut down the machine, walked to the back of the PCM, opened the interlocked rear access doors, and observed about 60 blanks jammed near the cutting die. He then reached up and tried to pull the blanks out with his hand, but they were too tightly jammed for him to do so. He returned to the operator's side of the machine, opened the scrap chute guard, and lifted the scrap chute to its upright position. The adjuster then returned to the opened rear access doors and from that position he again reached up into the machine to remove the jammed blanks. He succeeded in removing them, but as he was finishing, the scrap chute fell from its upright position and pinched his middle finger against the cutting die, resulting in the amputation of part of his finger.

DISCUSSION

The Secretary alleges a violation of § 1910.147(c)(4)(i), which provides: "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." With respect to Instance (d), the

[4] The 2015 incident occurred when an adjuster attempted to clear a paper jam located in the cutting die. Because he did not shut down the PCM, the cutting die continued to reciprocate. The adjuster inserted his arm into the machine through an opening below the rear access doors and pushed up on the scrap chute so that it pivoted upwards. This created space for his fingers to contact the reciprocating cutting die and resulted in an amputation injury.

amended citation describes the alleged violation as follows: "Lockout procedures were not utilized and lockout devices were not affixed by an authorized employee performing tasks such as, but not limited to, clearing jams on the Peerless Cutting Machine . . . ."[5]

To establish a violation, the Secretary must prove that the cited standard applies, there was a failure to comply with the standard, employees were exposed to the violative condition, and the employer knew or should have known of the violative condition with the exercise of reasonable diligence. *See Briones Utility Co.*, 26 BNA OSHC 1218, 1219 (No. 10-1372, 2016); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part,* 681 F.2d 69 (1st Cir. 1982). Of these elements, only applicability and constructive knowledge are at issue on review.[6]

I. Applicability

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) (emphasis in original).

In finding that the LOTO standard applied to the violative condition alleged in Instance (d), the judge agreed with the Secretary that hazardous gravitational energy accumulates when the PCM's scrap chute is raised to clear a paper jam, a servicing and maintenance activity, and therefore must be controlled by a physical restraint, such as a block, to prevent it from

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[5] Although the amended citation includes "tasks such as, but not limited to, clearing jams," the Secretary in both his post-hearing brief and his brief on review maintains that the violative condition at issue relates specifically to employees raising the scrap chute to clear paper jams. Likewise, the citation is limited to the circumstances that occurred "on or about May 8, 2016," which involved the employee raising the scrap chute to clear a paper jam.

[6] The judge found no evidence of actual knowledge. That finding is not at issue on review.

unexpectedly falling and injuring an employee.[7] As it did before the judge, AJM argues on review that the LOTO standard cannot apply to the raised scrap chute because it was not until the employee lifted the scrap chute during the servicing activity (i.e., clearing the paper jam) that any stored energy became an issue. Specifically, AJM asserts that the PCM was in a "zero mechanical state" at the time of the incident and that the scrap chute, held down by gravity, was at rest until lifted by the employee to clear the jam.[8] In other words, AJM claims the LOTO standard does not apply to energy unrelated to a machine's normal production function—that is, energy created by an ancillary machine component that is at rest and does not require an energy isolating device to keep it at rest.[9]

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[7] There is no dispute that clearing a paper jam is a servicing and/or maintenance activity covered by the LOTO standard. *See* 29 C.F.R. § 1910.147(b) (servicing and/or maintenance "activities include lubrication, cleaning or *unjamming* of machines or equipment and making adjustments or tool changes" (emphasis added)). Although AJM argues that lifting the scrap chute to clear a paper jam was not a service or maintenance task because it was " '*categorically*' prohibited, an illegitimate activity," the fact that the practice was prohibited is not relevant in the context of applicability. It is, however, a consideration for the knowledge element of the Secretary's case, as we discuss below.

[8] AJM's reliance on the fact that the PCM was rendered to a "zero mechanical state" before the employee began clearing the paper jam is misplaced given that OSHA explicitly rejected the concept of zero mechanical state in the LOTO standard preamble: "[E]very power source that can produce movement of a machine member must be locked out." Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,678 (Sept. 1, 1989) (Final Rule). OSHA further explained that it had reviewed the consensus standard that adopts the concept of zero mechanical state "and believes that adoption of this OSHA standard will better effectuate the purposes of the [Occupational Safety and Health] Act. The OSHA standard requires the adoption and utilization of a complete program for the control of hazardous energy, including energy sources not specifically addressed by the [consensus] standard." *Id.* In short, the LOTO standard is more expansive and, as explained below, also includes the requirement to control for gravitational energy not created by a machine's mechanical processes.

[9] AJM does not dispute, however, that gravitational energy in general is a type of energy covered by the LOTO standard. Indeed, the text of the standard, as supported by the preamble, plainly includes "gravitational energy" as a form of "other energy" covered by the standard. *See* 29 C.F.R. § 1910.147(b) (defining "energy source" as "[a]ny source of electrical, mechanical, hydraulic, pneumatic, chemical, thermal, or *other* energy" (emphasis added)); Lockout/Tagout, 54 Fed. Reg. at 36,666 (explaining that "energy" includes "potential energy due to pressure, gravity, or spring"); *see also Arcadian Corp.*, 17 BNA OSHC 1345, 1348 (No. 93-3270, 1995) (considering legislative history where plain meaning of statutory language is clear only to determine whether there is express legislative intent to the contrary), *aff'd*, 110 F.3d 1192 (5th Cir. 1997); *Otis Elevator Co.*, 24 BNA OSHC 1081, 1082-83 (No. 09-1278, 2013), *aff'd*, 762 F.3d 116 (D.C. Cir. 2014) (finding

Like the judge, we reject this argument. The temporal component suggested by AJM is simply not present in the text of the LOTO standard. As the judge noted, the definition of "servicing and/or maintenance" makes no reference to whether the unexpectedly released energy is present either before or after the employee begins a servicing or maintenance activity. 29 C.F.R. § 1910.147(b). This reading is supported by the plain text of various provisions of the LOTO standard, which state that the standard applies to all energy sources that could unexpectedly release energy and injure an employee at any point during a servicing and/or maintenance activity. 29 C.F.R. § 1910.147(a)(1)(i) (standard "covers servicing and maintenance of machines . . . in which the unexpected release of stored energy could cause injury to employees"); 29 C.F.R. § 1910.147(a)(2)(i) (standard "applies to the control of energy during servicing and/or maintenance of machines and equipment"); 29 C.F.R. § 1910.147(c)(4)(i) (procedures must be "utilized for the control of potentially hazardous energy *when employees are engaged in the activities covered by this section*" (emphasis added)).

Contrary to AJM's claim on review, this reading of the LOTO standard is consistent with its preamble. *See Arcadian Corp.*, 17 BNA OSHC 1345, 1348 (No. 93-3270, 1995) (considering legislative history where plain meaning of statutory language is clear only to determine whether there is express legislative intent to the contrary), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). It is true, as AJM points out, that the preamble explains in reference to 29 C.F.R. § 1910.147(d)(5) that "energy [that] may still be present in a system that has been isolated from the energy source [must] be controlled *before* an employee attempts to perform work." Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,677 (Sept. 1, 1989) (Final Rule) (emphasis added). But the provision itself states that "[i]f there is a possibility of reaccumulation of stored energy to a hazardous level, verification of isolation *shall be continued until the servicing or maintenance is completed*, or until the possibility of such accumulation no longer exists." *See* 29 C.F.R. § 1910.147(d)(5)(ii) (emphasis added). In addition, as OSHA explained in the preamble, "the [LOTO] standard is intended to control energy as it relates to the energy isolating device and the machine or equipment being serviced, and that the only stored or residual energy addressed by the standard is that which could reenergize that equipment *or be released while the servicing operation is being performed*." Lockout/Tagout, 54 Fed. Reg. at 36,678 (emphasis added).

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potentially hazardous stored kinetic energy in elevator's jammed chain assembly due to weight of partially opened freight elevator gate).

AJM fails to recognize that the stored gravitational energy in a raised scrap chute "could . . . be released while the servicing operation is being performed," regardless of when that energy was created. *Id.* Indeed, OSHA explained that employers must use a standardized energy control procedure while preparing for, conducting, *and completing* servicing of equipment because "simply shutting down the machine or equipment has not proven to prevent accidents when there is an unexpected energization or start up of the machine or equipment *or the release of stored energy*." Lockout/Tagout, 54 Fed. Reg. at 36,661 (emphasis added); *see id.* at 36,653 ("The procedure would outline the necessary steps to be taken to prepare for, conduct, and complete servicing of equipment . . . ."), 36,661 (describing the standardized procedure used to control hazardous energy). Finally, the preamble also states that the employer must "ensure that the control measures are used by employees *whenever* they might be exposed to injury from the unexpected energization or start up of machines or equipment *or the release of stored energy*." *Id.* at 36,670 (emphasis added). In short, the LOTO standard requires that an employer control energy *throughout* the servicing and/or maintenance activity, not only before the activity begins.

For these reasons, we affirm the judge's finding that the LOTO standard applies to the violative condition at issue in Instance (d).

II. Constructive Knowledge

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

1892, 1894 (No. 12-1045, 2016); *Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012).

The cited provision states that LOTO procedures are required "when employees are engaged in the activities covered by this section." In this case, the "covered" activity is raising the scrap chute "to remove an accumulation of blanks from the cutting dies." Thus, for purposes of the knowledge inquiry, the question on review is whether AJM should have known with the exercise of reasonable diligence that employees raised the PCM's scrap chute to clear paper jams. The judge found the record lacked sufficient evidence to establish that AJM should have known of this practice. For the reasons that follow, we agree with the judge that the Secretary failed to establish AJM had constructive knowledge.[10]

Adequacy of Work Rule and Training

In February 2015, AJM established and trained its adjusters on the following work rule:

> All adjusters: NEVER raise the scrap [chute] to clear a jam. This [chute] acts as a guard when clearing out jams from under the machine. Exposure to the scrap knife is extremely dangerous while the machine is running. To clear a jam, you must go under the machine and remove the jam with the sc[ra]p [chute] in place. NEVER try to reach in from the sides of the machine. This is a part of our safety S[tandard] O[perating] P[rocedures] and is <u>strictly enforced.</u>

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[10] The Secretary also argues that constructive knowledge can be based on what he claims is the Plant Manager's failure to exercise reasonable diligence. *See Otis Elevator Co.*, 21 BNA OSHC 2204, 2208 (No. 03-1344, 2007) (supervisor's knowledge imputable to employer). Under the circumstances of this case and given that this matter may be appealed to the Third Circuit, an analysis of constructive knowledge based on the Plant Manager's conduct depends on many of the same facts considered in our analysis of reasonable diligence that follows. *See Penn. Power & Light Co. v. OSHRC*, 737 F.2d 350, 357-58 (3d Cir. 1984) (supervisor's knowledge imputable to employer, but where supervisor participates in violative conduct, supervisor's knowledge only imputable where supervisor's participation was foreseeable); *Kokosing Constr. Co.*, 21 BNA OSHC 1629, 1632 (No. 04-1665, 2006), *aff'd*, 232 F. App'x 510 (6th Cir. 2007) (unpublished) (finding that supervisor could have known of the violative condition with the exercise of reasonable diligence); *see also* 29 U.S.C. § 660(a) (employers may seek review in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or in the District of Columbia Circuit); 29 U.S.C. §660(b) (Secretary may seek review in the circuit where the violation occurred or in the circuit in which the employer's principal office is located); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted) ("Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent."). Accordingly, the conclusions we reach in that analysis apply equally to any theory of constructive knowledge based on the actions of the Plant Manager.

The judge found that "even though the rule was not intended to protect adjusters from the gravitational energy present in the raised scrap chute," it was nonetheless adequate because "compliance with the rule would have the unintended ancillary effect of preventing the hazardous physical condition involved in instance [(d)] from materializing."

"The Commission has consistently held that an employer's work rules must simply 'reflect[] the requirements of the cited standard.' " *MasTec N. Am., Inc.*, No. 15-1574, at 9 (OSHRC 2021) (citations omitted); *see also Armstrong Utilities, Inc.*, No. 18-0034, at 10 (OSHRC 2021). As noted above, the obligation to "develop[], document[] and utilize[]" LOTO procedures only arises "when employees are engaged in the activities covered by th[e] [LOTO standard]." 29 C.F.R. § 1910.147(c)(4)(i). In this regard, AJM's work rule reflects the cited provision's requirements because it prohibits employees from engaging in the cited activity that triggers the requirement for LOTO procedures. Indeed, it would be illogical for AJM to establish a work rule that lays out LOTO procedures for raising the scrap chute when clearing a paper jam given that employees are prohibited from doing that in the first place. Thus, we find that AJM's work rule is adequate.

We also find the Secretary failed to prove AJM's efforts to implement and communicate this work rule were deficient. AJM's initial efforts to communicate and train employees on the rule were clear and direct. The rule was provided to adjusters on February 9, 2015, and 27 adjusters, including the adjuster injured in 2016, signed a form acknowledging that they had received training on the rule. Several supervisors, including the Assistant Plant Manager, testified that at the time the rule was implemented, adjusters were trained on the rule, understood the rule, and did not express any confusion about the rule. The Assistant Plant Manager testified that he went over the rule step by step with each adjuster, including the injured adjuster, while they were standing at their machines. Furthermore, the two former and three current employees who testified at the hearing and worked as adjusters for AJM in February 2015, including the injured adjuster, all stated that they were aware of and understood the rule.[11]

The Secretary argues that despite initially training adjusters on the work rule, AJM failed to provide subsequent formal or written training on the rule either during classroom or on-the-floor

[11] This group of five employees includes two former adjusters, one current adjuster, and two current foremen who worked as adjusters in February 2015. A total of five former adjusters testified at the hearing, but only two of them were employed by AJM in February 2015.

training. But the Secretary failed to prove that the rule was not conveyed informally during on-the-floor training provided to trainees by experienced adjusters who knew the rule. In fact, the Secretary did not ask any witnesses whether new adjusters were trained on the work rule or whether AJM's supervisors had informed or instructed adjuster-trainers to provide training on it. Rather, the Secretary asserts that any informal training that took place was inadequate because AJM "often" shortened the amount of time it spent informally training adjuster-trainees on the floor.[12] However, the amount of time that AJM spent training adjuster-trainees does not speak to whether during such training the work rule was adequately communicated to trainees. Moreover, the Secretary never explains what length of on-the-floor training would be reasonably necessary under the circumstances. Without this evidence, there is simply no basis to conclude that AJM's subsequent informal communication or training was inadequate.[13]

For all these reasons, we find the Secretary failed to establish that the company's communication of its work rule to employees was inadequate.

Adequacy of Supervision

It is undisputed that AJM's various production supervisors—including the Assistant Plant Manager, the Production Manager, Foremen, and Assistant Foremen—spend the majority of their time on the production floor, observing and monitoring employees, including adjusters, and ensuring compliance with safety rules. The Human Resources Manager also walks the floor each day, and the Plant Manager occasionally observes the production floor and can view the machines from his office. The Secretary claims that this monitoring cannot possibly be considered effective because the testimony of five former adjusters shows that adjusters frequently raised scrap chutes at the facility to clear paper jams, and a raised scrap chute would and should have been "readily detectible" to any supervisor observing the work. But as the judge acknowledged in his decision, there is a "clear divide" in the evidence on the basic premise underlying the Secretary's

[12] Three former adjusters testified that they received two, two and a half, and three weeks of training, respectively, while two current foremen who started as adjusters and one current adjuster all testified that they were trained for "a couple of months," "around 90 days," and six months, respectively.

[13] The Secretary also claims that AJM's informal training was inadequate because on-the-floor training included adjuster-trainees being shown practices that violated AJM's work rules, including the rule prohibiting raising the scrap chute. But only one adjuster hired after February 2015 testified in that regard, and his testimony concerned reaching into the scrap chute of an operating machine, not raising the chute to clear jams.

argument—the prevalence of lifting the scrap chute to clear a paper jam. Specifically, four of the five former adjusters called by the Secretary testified that they raised the scrap chute one to three times per day per machine to clear paper jams after the 2015 work rule was instituted, and that floor supervisors and other adjusters engaged in that practice as well.[14] At the same time, the eight current supervisors and one current adjuster called by AJM testified that they never lifted the scrap chute to clear a jam and had never seen adjusters raise the scrap chute to clear a jam.[15]

Faced with this contradictory testimony, the judge determined that all of these witnesses were equally credible, discrediting only part of the testimony of one former adjuster.[16] Specifically, the judge found that "the testimony of former and current employees regarding their practices after the rule was implemented was facially credible" and "[i]t is entirely believable that [all but one of the former adjusters who testified] lifted the scrap chute in the manner and frequency with which they testified."[17] He also found that testimony from the former adjusters "that they had observed floor supervisors [raise the scrap chute to clear jams] is no more credible than the testimony of two of the supervisors they identified who essentially controverted having violated the rule themselves." In short, the judge credited the former adjusters' testimony that they themselves lifted the scrap chute *regularly* to clear paper jams and had seen floor supervisors do so, and also credited the current employees' testimony (including that of floor supervisors) that

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[14] The fifth adjuster testified that he raised the scrap chute once a day to clean the rails but did not testify that he raised it to clear paper jams. One of the four adjusters who testified that he raised the scrap chute to clear jams also testified he raised the scrap chute to tighten screws. Given that the alleged violative condition relates only to raising the scrap chute to clear paper jams, any testimony related to raising the scrap chute for other reasons is not relevant.

[15] In its briefs on review, AJM characterizes its employee witnesses as seven supervisors and two adjusters. However, one of the employees AJM counts as a current adjuster is an assistant foreman (and was a foreman trainee at the time of the 2016 incident), though he had worked as an adjuster in the past and in the period between the incident and his testimony.

[16] The judge determined that the testimony of one former adjuster who said he lifted the scrap chute 10 to 15 times a day to clear paper jams over the three weeks he worked for AJM as an adjuster-trainee was the "possible exception" to his finding that the witnesses were equally credible. We likewise give no credit to the adjuster's testimony regarding the frequency with which he raised the scrap chute.

[17] In making this finding, the judge considered the testimony of the former adjusters who said they raised the scrap chute for reasons other than clearing paper jams. As noted, none of that testimony is relevant to the violative condition alleged here. We therefore do not consider it in our analysis here.

they themselves *never* lifted the scrap chute to clear paper jams and had *never* seen anyone do so. This means he was unable to resolve the conflicting testimony regarding the prevalence of this practice. Accordingly, the judge concluded the Secretary failed to proffer sufficient evidence to establish by a preponderance of the evidence that AJM failed to adequately supervise its adjusters regarding compliance with the rule.

We find no basis for disturbing the judge's determination that the former adjusters and the current employees were equally believable, and therefore, we also credit their respective testimony except where it directly conflicts. *See, e.g., Metro Steel Constr. Co.*, 18 BNA OSHC 1705, 1706 (No 96-1459, 1999) (Commission ordinarily defers to judge's credibility findings when based on demeanor of witnesses or other factors peculiarly observable by judge). Thus, we credit the former employees' testimony that it was their own practice to regularly lift the scrap chute to clear paper jams, the current adjuster's testimony that he never lifted the scrap chute to clear jams, and all of the current employees' testimony that they had never seen anyone lift the scrap chute to clear jams. And absent evidence in the record that would allow us to assess the credibility of either set of these employees with respect to whether floor supervisors and *other* employees violated the work rule, our inquiry here is limited to whether—in light of the four former adjusters' credible testimony that *they* had previously lifted the scrap chute to clear paper jams—AJM's supervisors should have been aware that there were four employees violating the work rule.

On that issue, we find that the record is again lacking. First, testimony from the former adjusters shows that their scrap chute lifts were relatively infrequent and of short duration. One former adjuster testified that he only "rarely" raised the scrap chute to clear paper jams. Another adjuster simply said he lifted the scrap chute "whenever [he] needed to clear [a paper jam]" with no explanation of how often that occurred. A third adjuster testified he lifted the scrap chute to clear paper jams, but while the judge agreed that this adjuster did perform this action to some degree, his testimony as to how often he did so has been discredited. And the adjuster injured in 2016 testified he would raise the scrap chute "like four times . . . per shift." In short, four adjusters—three on one shift and one on a different shift—were raising scrap chutes to clear paper jams, with the record showing that three were doing so only occasionally over the course of an eight-hour shift.

With respect to the duration of their lifts, none of the former adjusters explained precisely how long clearing a paper jam would take. Three of them simply said the scrap chute remained

upright long enough to pull out any paper. Only the injured adjuster testified that the scrap chute was normally up for one minute when he raised it to clear a jam. During the 2016 incident, however, when he had to go back and forth between the operator's side of the machine and the rear doors to clear the jam, the scrap chute was raised for four to five minutes. Given this testimony and that of the adjusters who said their goal was to get their machines running again as quickly as possible, we find that any lifts to clear a jam were usually of short duration.

Second, it is not clear that a raised scrap chute would, as the Secretary claims, have been readily apparent to any supervisor walking the production floor.[18] The Plant Manager claimed that anyone observing the adjusters would be able to see whenever a scrap chute was raised because the end of it sticks out of the machine on the discharge side, and when the scrap chute is raised, the whole chute is at "an upright position instead of a 45[-]degree angle." However, the record makes clear that for the PCM to remain operational, the scrap chute cannot be raised while the machine is operating. As a result, supervisors would have to look for the raised scrap chute whenever they saw that a PCM had stopped operating, as indicated by a blinking red light on the top of the machine. Indeed, supervisors testified that they were required to check whenever they saw that a machine was no longer operating. But the Production Manager, who spends the majority of his time on the production floor, testified that the light was visible only from five feet away, so supervisors could not always tell when a light was lit while walking down the center aisle during their rounds, particularly if they were some distance away from the inoperative machine. In short, a supervisor may not have been in the vicinity for the brief period of time a machine's red light was on or the scrap chute was raised.

Under these circumstances, we find the record evidence falls short of establishing that the AJM supervisors monitoring the production floor should have observed the few and relatively fleeting occasions when the scrap chute was raised in violation of the company's work rule. Accordingly, we find the Secretary failed to establish that AJM's continuous safety monitoring by multiple supervisors was inadequate. *See, e.g., N.Y. State Elec. & Gas Corp.*, 19 BNA OSHC 1227, 1231 (No. 91-2897, 2000) (finding safety program adequate where, in addition to

[18] As noted above, testimony from some of the former adjusters that they raised the scrap chute for reasons other than clearing a paper jam is not relevant to the alleged violative condition here. But even if considered, we find that the evidence would still be insufficient to establish that the adjusters were raising the scrap chutes for a duration or frequency such that AJM supervisors should have detected it.

supervisory surprise audits, foreman inspected each site for safety compliance twice a day and spent thirty to forty minutes at each visit); *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2070 (No. 96-1719, 2000) (finding safety program adequate where either company's co-owner or safety director inspected between 75 percent and 95 percent of the company's work sites each day to monitor employee compliance with safety rules).

Anticipating Hazards

In terms of adequately anticipating hazards to which its employees may be exposed, the judge found that AJM's supervisors uniformly and credibly believed that adjusters had no need to raise the scrap chute to clear paper jams. He also determined, and we agree, that the evidence presented by the Secretary was insufficient to establish that there was a widespread practice of lifting the scrap chute to clear paper jams among adjusters. On review, the Secretary argues that testimony from the adjusters shows they apparently found it helpful to raise the scrap chute when clearing a paper jam. But that has no bearing on whether *AJM* should have anticipated hazards related to that practice. And, as the judge found, AJM's supervisors all testified there was no reason to raise the scrap chute and that doing so would not make the work go faster. Thus, we agree with the judge that AJM had no reason to anticipate that adjusters would violate its work rule and thus be exposed to the violative condition.

In addition, the record does not support the Secretary's claim that prior injuries suffered by adjusters at the facility should have alerted the company that adjusters were exposed to a hazard related to raising the scrap chute. The evidence shows that all but one of those previous injuries occurred while adjusters were performing work activities that did not involve raising the scrap chute.[19] And the one prior incident that did involve raising the scrap chute to clear a paper jam is what led AJM to establish its work rule prohibiting the practice.[20] Accordingly, we find the

[19] The prior incidents were described as follows in the record: laceration when cutting die dropped; laceration while improperly inserting hand in cylinder to clear scrap paper from cutting die; cut/fracture to pinky while clearing scrap from operator side of a running machine; and amputation from cutting die while clearing paper jam.

[20] As described above, that incident differed from the incident at issue here in that the adjuster did not shut down the PCM or raise the scrap chute to balance it in the upward position. Instead of the scrap chute falling on his fingers, his fingers contacted the reciprocating cutting die as he was pushing the scrap chute upward from the rear of the machine.

Secretary failed to show that AJM did not adequately anticipate hazards associated with raising the scrap chute while clearing paper jams.

Enforcement of Work Rules

Last, we agree with the judge that the Secretary failed to establish that AJM's disciplinary program was ineffective or inadequate. AJM has a general progressive disciplinary policy for violations of "safety regulations or common safety practices," and the record contains 88 documented disciplinary actions for violations of that policy. The company also has a separate progressive disciplinary policy for violations of its LOTO program.[21] We find that AJM's extensive documentation of disciplinary actions supports the judge's conclusion that the Secretary failed to prove AJM inadequately enforced its safety program. *See S.J. Louis*, 25 BNA OSHC at 1900 (record of numerous safety-related disciplinary actions shows implementation of progressive disciplinary policy even though no recent disciplinary actions for violation at issue); *Thomas Indus.*, 23 BNA OSHC at 2088-89 (discipline adequate where employer had disciplined employees for violations of its safety program and disciplinary reports show that employees involved in fall protection violation at issue had never been disciplined for personally violating fall protection rules).

We are also not persuaded by the Secretary's claim that AJM's reliance on undocumented verbal discipline means the company failed to enforce its work rules adequately. The Commission has held that verbal discipline coupled with documented written discipline can constitute effective enforcement. *Compare S.J. Louis*, 25 BNA OSHC at 1900 (finding effective enforcement where record shows company provided corrective informal training and disciplinary actions when it discovered safety work rule violations), and *Aquatek Sys. Inc.*, 21 BNA OSHC 1400, 1402 (No. 03-1351, 2006 (finding that verbal reprimand demonstrates employer enforced safety rules), *with Stark Excavating Inc.*, 24 BNA OSHC 2218, 2221 (No. 09-0004, 2014) (consolidated) (evidence of *only* verbal discipline undermined progressive disciplinary policy where the policy expressly required written warnings). And, as the judge found, the record shows that the Plant Manager instructed supervisors to "use their own latitude" to issue verbal warnings or written discipline, if

[21] Although, as the Secretary points out, none of the disciplinary records submitted into evidence were issued pursuant to the LOTO program disciplinary policy, it appears that employees who violated the LOTO program were issued discipline under the company's general disciplinary policy, as was the case for the injured adjuster.

necessary, and AJM's supervisors testified that they commonly relied on verbal warnings and counseling to address observed safety violations.

Finally, contrary to the Secretary's argument, AJM's decision to delay disciplining the injured adjuster does not support a finding of ineffective enforcement. *See Precast Servs, Inc.*., 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995) ("Commission precedent does not rule out consideration of post-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline."), *aff'd*, 106 F.3d 401 (6th Cir. 1997). It is undisputed that the company waited twelve days to discipline the employee and that it normally issues discipline within a day of an infraction. The Secretary attempts to compare this to the eight-month disciplinary delay that occurred in *Cooper/T. Smith Corp. d/b/a Blakeley Boatworks Inc.*, No. 16-1533, at 7 (OSHRC 2020), which the Commission found weighed in favor of ineffective enforcement. But considering the record evidence of enforcement here, we find that one instance of discipline delayed for days, not months, is insufficient to establish that AJM's overall enforcement efforts were ineffective. *See Thomas Indus.*, 23 BNA OSHC at 2088-89 (where employer had established that it had disciplined employees for safety violations in the past, employer's decision to forgo discipline in one instance did not establish ineffective enforcement). Accordingly, we find the Secretary failed to prove that AJM's disciplinary program was inadequate.

Conclusion

For all these reasons, we find that the Secretary failed to show that AJM should have known of the conditions constituting the alleged violation. Accordingly, we vacate Instance (d) of Repeat Citation 2, Item 1.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: April 1, 2022

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

SECRETARY OF LABOR, Complainant, v. AJM PACKAGING CORPORATION, Respondent.	OSHRC Docket No. 16-1865

DECISION AND ORDER

APPEARANCES:

For the Complainant:

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For the Respondent:

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BEFORE: William S. Coleman
Administrative Law Judge

I. INTRODUCTION

The Respondent, AJM Packaging Corporation (AJM), manufactures paper plates and bowls at a facility in Vineland, New Jersey. AJM makes the paper products with large machines

called "Peerless Cutting Machines" (PCMs).[1] (Ex. C-44; Ex. R-18 at 13). AJM operates about thirty-three PCMs at its Vineland facility. (T. 734, 1725).

Upon receiving a report that an amputation injury had occurred at the Vineland facility on May 8, 2016, the area office of Occupational Safety and Health Administration (OSHA) located in Marlton, New Jersey, assigned a compliance safety and health officer (CO) to conduct an inspection and investigation. The investigation resulted in OSHA issuing to AJM a one-item repeat citation and a one-item serious citation on September 30, 2016.

The one-item repeat citation (as the Secretary amended in his complaint pursuant to Commission Rule 34(a)(3)) alleges that AJM violated the "control of hazardous energy (lockout/tagout)" (LOTO) standard, 29 C.F.R. § 1910.147, specifically subparagraph (c)(4)(i) thereof, which provides: "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." AJM is alleged to have violated that provision in four discrete instances (designated instances "a", "b", "c" and "d") in the following identical manner for each instance: "Lockout procedures were not utilized and lockout devices were not affixed by an authorized employee performing tasks such as, but not limited to, clearing jams on the Peerless Cutting Machine." Instances "a", "b" and "c" were alleged to have occurred on or about August 25, 2016, with each instance pertaining to a different PCM. Instance "d" relates to the amputation injury that had precipitated the investigation and was alleged to have occurred "on or about" May 9, 2016. [2]

[1] The name "Peerless Cutting Machine" is derived from the name of the manufacturer, Peerless Machine & Tool Corporation. The citation identifies the machines using this name, although it is not apparent from the record that either AJM or Peerless ever used this nomenclature.

[2] In actuality, the amputation injury occurred on May 8, not May 9. AJM argues that the allegation that the violation occurred "on or about" May 9 fails to meet the requirement set forth in section 9(a) of the Occupational Safety and Health Act that a citation "describe with particularity

The one-item serious citation (as was twice amended, first in the Secretary's complaint and again during the course of the hearing) alleges that AJM violated the "hand protection" standard codified at 29 C.F.R. § 1910.138(a), which provides in relevant part as follows: "Employers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from … thermal burns; and harmful temperature extremes." The amended citation alleges that AJM violated this standard on or about August 17, 2016 in the following manner: "[AJM] did not provide or ensure use of hand protection to employees who were exposed to harmful temperatures from the paper products exiting the Peerless Cutting Machines." (Complaint dated 2/13/2017, ¶ VIII, amended at T. 370-71).

AJM timely contested the citations and proposed penalties, bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (Act). 29 U.S.C. § 659(c). The matter was assigned to the undersigned administrative law judge, who conducted

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the nature of the violation." 29 U.S.C. § 658(a). (Resp't Br. 49-50). That argument is rejected. The purpose of the particularity requirement of section 9(a) is to provide to an employer "fair notice of the nature of the alleged violation." *Meadows Indus., Inc.*, 7 BNA OSHC 1709, 1710-11 (No. 76-1463, 1979). A citation can meet this requirement without going into "minute detail." *Id.* Although section 9(a) does not explicitly require that a citation allege the *time* that an alleged violation occurred, Commission Rule 34(a)(2)(ii) does require that the Secretary's complaint in Commission proceedings state "with particularity" the "time, location, place and circumstances" of each alleged violation. 29 C.F.R. § 2200.34(a)(2)(ii).

The allegation in both the original citation and the subsequent complaint that the violation described in instance "d" occurred "on or about May 9" is sufficiently particular to meet the requirements of both section 9(a) and Commission Rule 34(a)(2)(ii). AJM received fair notice of the nature of the alleged violation and understood instance "d" to pertain to the amputation injury that had occurred on May 8. (*See e.g.*, T. 44-50). AJM does not argue (and has not demonstrated) that its defense on the merits was prejudiced by the way the citation (or the subsequent complaint) averred the time of the alleged violation. *See Gold Kist, Inc.*, 7 BNA OSHC 1855, 1862 (No. 76–2049, 1979) (rejecting argument that citation be dismissed for lack of particularity where the employer's ability to defend on the merits was not prejudiced).

an evidentiary hearing in Philadelphia, Pennsylvania, on the following dates: October 17 to 19, 2017; January 30 to February 2, 2018; and March 6 and 8, 2018. Post-hearing briefing was completed on June 18, 2018.

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

- Did the Secretary prove by a preponderance of the evidence that on August 25, 2016 employees Beals, Mendieta, or Thompson bypassed the scrap chute guard of an operating PCM to reach into the scrap chute to remove scrap paper? (Citation 2, item 1, instances "a", "b" & "c"; § 1910.147(c)(4)(i))

  Decision: No. The Secretary did not prove that any of those employees violated the terms of the cited LOTO standard in the manner averred by instances "a", "b" or "c".

- Did the Secretary prove by a preponderance of the evidence that AJM should have known of the physical condition that violated the LOTO standard that occurred on May 8, 2016 (the physical condition being a raised scrap chute that could unexpectedly fall and cause injury to an employee clearing a paper jam)? (Citation 2, item 1, instance "d"; § 1910.147(c)(4)(i))

  Decision: No. The Secretary did not prove AJM had failed to exercise reasonable diligence to prevent or discover the physical condition that constituted a LOTO violation, and thus failed to establish the "employer knowledge" element of the alleged violation.

- Did the Secretary prove by a preponderance of the evidence that the residual heat present in the stacks of paper plates and bowls that exit the PCMs was likely to expose employees' hands to thermal burns or harmful temperatures? (Citation 1, item 1; § 1910.138(a)).

  Decision: No. The Secretary did not prove that employees were likely to be exposed to a significant risk of thermal injury and thus did not establish that the hand protection standard applies.

The Secretary having failed to meet his burden to prove the alleged violations, both citations must be vacated.

II. FINDINGS OF FACT

Except where the following findings indicate that the evidence was insufficient to establish a certain fact or indicates the absence of evidence bearing on a matter of fact, the following facts were established by at least a preponderance of the evidence:

1. AJM Packaging Corporation (AJM) is a Michigan corporation and maintains its headquarters in that state. AJM manufactures and distributes paper products, including paper plates and bowls. (Answer ¶ 2; T. 716-17, 2441). AJM operates eight manufacturing facilities across the United States including facilities in Georgia, Michigan, California, and New Jersey. (T. 716, 732-33). AJM distributes its products to major U.S. retailers. (T. 2732). AJM employs approximately 2,100 employees across the company. (T. 733). AJM is engaged in a business that affects interstate commerce. (Answer dated 3/6/2017, ¶¶ II & III).

2. In 2009, AJM opened a facility in Vineland, New Jersey, to produce paper plates and bowls. (T. 573, 2441). The Vineland facility (Facility) operates 24 hours a day, with three eight-hour shifts. (T. 733). In 2016, about 250 employees worked at the Facility, about 100 of whom staffed the first shift. (T. 732-33, 1433, 1866).

3. AJM makes the paper plates and bowls at the Facility with machines that were manufactured by a company named Peerless Machine & Tool Corporation ("Peerless"). (T. 448, 747, 1157-64; Exs. C-6; Ex. R-15 at 5-7). The machines are identified in this Decision using the acronym "PCM." (*See* footnote 1, *supra*). Peerless designed the PCMs that AJM owned and operated at the Facility sometime before 1968, though the record does not indicate the year or years that Peerless manufactured any of the PCMs used at the Facility. (T. 1157, 1162).

4. In 2016, AJM operated about 33 PCMs at the Facility, all of which were located on the Facility's central production area, or "floor," with each PCM identified by a number (numbers 1 through 33). (T. 734-35, 2457). The PCMs were arrayed on the floor in two rows in the manner depicted in a schematic of the Facility at Exhibit C-2. This two-row configuration created a central aisle between the rows, with the output end of every machine facing inward toward the aisle. (T. 734, 737; Ex. C-2). All the PCMs were substantially similar in design and functionality.

(T. 73, 172-73, 304, 1200).

Employee Roles

5. Employees called "adjusters" operate the PCMs. (T. 57-58, 764). (The activity of adjusters is the subject of the LOTO citation.) Adjusters are responsible for observing the overall function of the PCMs, ensuring that the paper plates and bowls are formed correctly, and performing adjustments on the PCMs to ensure proper functioning. (T. 70-71, 170, 181-82, 303, 764-65, 2732-33). Servicing tasks that adjusters perform include adjusting the rails, changing the air levels, replacing springs, and clearing paper jams that are simple enough not to require the intervention of AJM's maintenance mechanics. (T. 73-74, 182-83, 305-06, 653-54, 1434-35, 1947-48, 2021-22, 2340-41). Between eight and twelve adjusters typically work each shift. (T. 1435, 2104, 2234-35). Experienced adjusters normally operate three or four PCMs at a time. (T. 171-72, 641, 2017-18, 2392-93, 2459, 2733).

6. Employees called "packers" are responsible for removing finished plates and bowls from a runout table placed at the end of each PCM and then packing the product into plastic bags. (T. 764, 2000-01). (The activity of the packers is the subject of the hand protection citation.) Packers also check the quality of the finished plates and bowls and make sure the stacks of product have the correct quantity. (T. 2001-02). About half of the employees present for any given shift are packers. (T. 1935-36).

7. Employees called "balers" collect and bale scrap paper that is generated by the PCMs. (T. 2174-75).

Manufacturing Process

8. The operation of the PCMs begins with the adjuster mounting a cylindrical roll of paper, about four feet wide, on a stand located at the rear of the PCM. (T. 60-61, 747-48, 1731-32, 1585-86, 2012; Ex. C-6; Ex. C-51; Ex. R-18 at 8). The adjuster feeds the roll of paper upward

towards a mechanical paper feeder that is located at the top rear of the PCM. (T. 58-60, 605, 748-49, 1731-32, 2349-50; Ex. C-6).

9. The PCM has a control panel located on what is known as the "operator's side" of the machine. (T. 2042-44; Ex. C-16). After feeding the roll into the paper feeder, the adjuster goes to the PCM's control panel and manipulates the controls to feed the paper downward through the feeder and into the PCM, where during production the paper passes into the cutting die (also referred to as the "blanking die" and the "cutting head."). (T. 86-87, 749, 751, 601-02, 2736). The cutting die is a large orange-colored component that reciprocates in an up-and-down motion and is set to complete about 45 cutting cycles per minute. (T. 62-63, 187, 1140-41, 2503; *see* video clips at Exs. C-25 & C-26). In each cutting cycle the cutting die cuts five holes through the sheet of paper to produce five flat circle-shaped "blanks" (which moments later the PCM will form into plates or bowls). (T. 749-50, 1173, 2025; 2031; 2582).

10. After the cutting die creates the flat circular blanks, the remnant of the paper (known as "scrap" or "skeletons") drops a short distance onto the PCM's "scrap chute." (The scrap chute is a piece of sheet metal situated adjacent to the cutting die and extends horizontally across the width of the machine; the scrap chute is described in greater detail *infra* ¶¶ 17–21) After the scrap paper drops into the scrap chute, a burst of forced air from an air nozzle located at the end of the scrap chute on the PCM's operator's side expels the skeleton from the scrap chute. The skeleton exits the PCM through an opening on the non-operator side (or discharge side) of the PCM, where it falls into a bin positioned below the opening. (T. 752, 1023-24, 2029, 2031, 2542; *see* video clips at Exs. C-23, C-25 & C-26). The skeletons are expelled in-time with the movement of the cutting dies, so that a skeleton exits the PCM at a rate of about 45 times per minute. (*See* video clips at Exs. C-23 & C-25).

11. At the same time that the scrap paper drops into the scrap chute, the flat circular blanks drop by force of gravity underneath the scrap chute onto internal inclined metal rails. (T. 2027-28; video clip at Ex. C-26). Each blank falls onto its own rail, which functions like a slide to guide the blanks to the heated forming dies. (T. 177, 2027-28; *see* video clip at Ex. C-25). The movement of the blanks down the rails is halted by a mechanical component called the "blank stop." (T. 2027-28). The blank stop catches the blanks and then releases them in time with the cutting die to control the flow of blanks into the forming dies. (T. 1172-74, 1915). Once released by the blank stop, the blanks continue to slide down the rails to the heated forming dies. (T. 63-69, 2027-28).

12. The forming dies use pressure and heat to form the flat circular blanks into the desired three-dimensional plate or bowl shape. (T 1266-67). Five sets of forming dies are positioned across the machine. (T. 66-67). Each set of forming dies consists of a top die and a bottom die. (1266-68). The forming dies open as the blanks approach from the rails and then compress together around the blanks as the blanks pass through. (T. 187-88, 1267-70). The forming dies typically operate between 250- and 350-degrees Fahrenheit but may operate as high as 425 degrees Fahrenheit in cold or humid weather. (T. 1268-71).

13. After the forming dies open, the newly formed plate or bowl drops onto a horizontal conveyor that transports the product to a "stacker" for each of the five lanes, where the stacked plates are shaken or agitated so that they nest into a neat stack. (T. 1267, 2199; Ex. C-19). The plates or bowls accumulate in the stacker until the programmed quantity for a complete stack is reached. The programmed quantity of plates or bowls in a complete stack varies depending on customer orders, but common sizes include an 8-stack, a 25-stack, a 50-stack, and a 100-stack. (T. 1267, 2296-98). When a complete stack has accumulated in the stacker, the PCM automatically

discharges the stack onto another conveyor that deposits the stacks onto a wood run-out table situated at the front of each PCM. (T. 1267-68, 2196-98). The plate or bowl on the bottom of each stack would have been the first plate in that stack to have left the heated forming die, and the plate or bowl on the top of the stack would have been the last item in that stack to have left the forming die. (T. 2198-2201).

14. Once a stack reaches the run-out table, a packer picks them up with their hands and then steps a short distance to a machine called a "bagger" that the packer uses to package the stack in a plastic bag. (T. 547, 1267-68, 2200-05; Ex. C-19).

15. The PCMs can process single-ply and multi-ply paper. When single-ply paper is processed, each lane produces about 45 plates per minute, and a stack of eight plates would accumulate about every 10 seconds. When four-ply paper is processed, each cutting cycle results in the production of four plates per lane per cutting cycle (for a rate of about 180 plates per lane per minute, so that a stack of 100 plates would accumulate in about 35 seconds). (T. 2197-99, 2298-2300).

16. The run-out table is sufficiently wide to permit at least two stacks of plates or bowls to accumulate on the table while the PCMs continue to discharge stacks of product onto the table. (Ex. C-19; Ex. R-18 at 5, 14, 15, 26, 27; Ex. C-23). A stack that is nearest the location where the packers handle them would have been discharged from the stacker for a longer period than the stack that followed it. (T. 2019-20; Ex. R-18 at 26 & 32). There is no evidence regarding the duration that the finished stacks may remain on the run-out table before the packer must handle the stack to prevent the stacks of product from overflowing the run-out table.

PCM Components and Features

The Scrap Chute

17. The scrap chute on the PCMs is a piece solid steel sheet metal, weighing approximately 30 pounds, that is about five feet long and runs horizontally across the width of the PCM from the operator's side to the discharge side. (T. 592, 2542). There are two bends in the sheet metal—one right-angle bend, and one approximate 30-degree angle bend. These two bends give the scrap chute a shape that resembles the letter "J" when it is viewed from the operator's side. When the scrap chute is in its operating position, its "J" shape is canted clockwise about 45 degrees, so that the interior angles of the scrap chute form a cradle onto which the scrap paper falls. (T. 590-92; Ex. C-12).

18. Sometime before the Facility opened in 2009, AJM modified the way the scrap chutes were mounted and secured in the PCMs. (T. 1335). As Peerless originally designed and manufactured the PCMs, the scrap chute was fixed in place in the canted operating position described above and could be moved only by first removing mounting hardware, which would require several minutes to do. (T. 1167-70, 1178). AJM modified the way the scrap chute was mounted so that it could be pivoted counterclockwise from its tilted operating position about 45 degrees (so that its "J" shape was oriented upright) without having to remove the mounting bracket. (T. 591, 1096; compare Ex. C-12 [scrap chute depicted in canted operating position] & Ex. C-5A [scrap chute depicted in upright raised position]). With this modification, it became easier for workers to reach into the scrap chute area through the opening that was protected by the scrap chute guard (the scrap chute guard is described in detail *infra* ¶¶ 25–27) because the mounting bracket did not present a physical obstacle to doing so. (T. 1342-46).

19. After a scrap chute is pivoted up to an upright position, it could remain balanced in place, but if jostled it could fall by force of gravity and return to its canted operating position. (T. 211-12, 222, 592, 361-62, 616; Ex. C-5).

20. The scrap chute is not powered by any device or mechanism, and it does not move during machine operations from its canted operating position. (T. 538, 2541-43). When the scrap chute is in its operating position, its weight keeps it from pivoting or moving upward by itself during operations. (T. 538-39).

21. At the time of OSHA's 2016 inspection, an employee could pivot the scrap chute upward while positioned in two different locations: (a) from the side of the scrap chute, by reaching through the opening protected by the scrap chute guard located on the operator's side (the scrap chute guard is described *infra* ¶¶ 25–27); and (b) from below the scrap chute, by pushing up on the scrap chute from the rear of the PCM while positioned near the PCM's rear access doors (the rear access doors are described *infra* ¶¶ 33–34). (T. 591, 615-1, 656, 1096, 1346-47).

22. After AJM modified the way the scrap chutes were mounted, AJM did not provide adjusters with any means to block a raised scrap chute to prevent it from falling to its canted operating position. (T. 361, 591, 1096). Only the counterbalance of the scrap chute's weight kept it in an upright position. (T. 361, 591, 1096).

Machine Guards

23. AJM did not acquire the PCMs in use at the Facility when they were newly manufactured, but rather acquired previously owned PCMs from sources other than the manufacturer. (T. 1372). In addition to modifying the manner in which Peerless had designed the scrap chutes to be mounted as described above, AJM further modified the PCMs by designing and installing some components that are unique to the PCMs that AJM owned and operated. (T. 1162).

24. The PCMs as originally manufactured had an exterior framework that extended about two feet out from the operator's side and that had guards or barriers that were designed with "interlocks" so that the PCM would shut down when opened. (T. 1185, 1215-27). AJM removed that exterior framework and designed and installed two door-like guards that did not have an interlock feature (one for the scrap chute and the other for the forming die), so that the PCMs could run even if the guards were open. (T. 623-33, 1325-26, 1364; Ex. C-4).

25. AJM designed and installed a guard for the scrap chute that was a rectangular hinged metal door (hereinafter referred to as "scrap chute guard") on the exterior frame on the operator's side of the PCM. (T. 587-88; Ex. C-4A, door marked with the number "2"). The scrap chute guard appears to be about 12 inches high by about 15 inches wide and is canted at the same angle as the scrap chute in its operating position. (Ex. C-12). The scrap chute guard's hinge was on the higher (right) side of the guard and a handle was on the lower (left) side, so that if the guard were opened it would fall shut by force of gravity unless it was held open or propped open. (T. 82, 2463-64, 2572).

26. The face panel of the scrap chute guard was made of metal grating, so that when the guard was closed the interior scrap chute area of the PCM (and any scrap paper in that area) was visible through the grating. (T. 587-88; photo at Ex. C-5; video clip at Ex. C-25). The scrap chute guard could be opened by turning its handle to unlatch it and then pulling outward and upward on the handle to open it. (T. 2049). This action of opening the scrap chute guard could be swiftly completed. (T. 1902, 1968-70, 2306-07). AJM designed the scrap chute guard to allow employees easier and quicker access to the scrap chute. (T. 1326).

27. The scrap chute guard that AJM designed and installed had no "interlock" feature, so a PCM would operate regardless whether the scrap chute guard was closed or open.

28. A second metal door-like guard that AJM designed and installed was known as the "forming die guard." The forming die guard is located below and to the left of the scrap chute guard and was similar in size to the scrap chute guard. (T. 1580; Ex. C-4A, door marked with the number "1"). The forming die guard was not hinged, but it could be removed from the PCM by first twisting a handle to unlatch it and then pulling on two handles to remove it. Like the scrap chute guard, the forming die guard also did not have an interlock feature, so the PCM would continue to run if the guard were removed when the machine was operating. (T. 587-88, 1842, 1912-13).

29. Peerless had manufactured the PCMs with safety interlock features to prevent operators from being exposed to the moving parts inside the scrap chute and forming die areas of operating machines. (T. 1186-87). After Peerless learned that AJM was operating PCMs from which this interlock feature had been removed or bypassed, Peerless informed AJM in 2001 and again in 2008 that it believed this modification was unsafe because it enabled the machine to continue operating when the scrap chute guard or the forming die guard (both of which were designed and installed by AJM, not Peerless) were open. (T. 1203-12, 1360-66; Exs. C-44, C-49, C-5A). Peerless' stated concerns did not cause AJM to modify the scrap chute guard or the forming die guard to include a safety interlock feature.

Cutting Die Guards

30. After OSHA commenced the investigation, AJM began installing "cutting die guards" (also referred to as "finger guards" and "blanking die guards") inside the scrap chute area of all the PCMs at the Facility in a measure to protect employees hands and arms from contacting the cutting die when accessing the scrap chute area through the opening that is guarded by the scrap chute guard. (Ex. C-11, T. 308-09, 311-13, 589-90, 691, 820-22, 1091-92, 1275, 2130, 2511, 2530; Ex. R-18 at 29). By August 25, 2016 (the date of three alleged instances of the LOTO

citation), a cutting die guard had been installed on four PCMs (nos. 7, 9, 13 and 14). (T. 691, 1011-12, 2530, 2511). PCM #13 was being operated by Brandon Mendieta during the CO's walkaround on that day. (PCM #13 is identified in connection with instance "b" of the LOTO citation.) Even for PCMs in which cutting die guards had been installed, AJM required employees to continue to abide by the work rule that the scrap chute guard remain in place when the PCMs were in operation. (T. 1967, 2431-33, 2512-15).

31. The evidence is insufficient to establish that an employee would be exposed to hazardous energy when opening the scrap chute guard and inserting a hand or arm into the scrap chute of an operating PCM on which a cutting die guard had been installed. (T. 163, 1012-13, 1914, 1968, 1880-81, 2012, 2130).

32. In PCMs in which cutting die guards had *not* been installed, the scrap chute area of the PCMs was hazardous. (T. 2305-06, 2431-33). The cutting die is located near the edge of the scrap chute, and an arm or hand inserted into the scrap chute area could make contact with the cutting die and would necessarily come within a least few inches of the cutting die. (T. 188-190, 313-14, 318-19, 1144, 2129; Exs. C-12 & C-26). If a hand or finger contacted the cutting die while the cutting die is reciprocating, a serious laceration or amputation injury would be likely. (T. 87, 1143-44). Contact with the cutting die can cause a laceration even when the cutting die is not reciprocating. (T. 590).

Interlocked Rear Access Doors

33. At the rear of each PCM are two adjacent doors ("rear access doors") that open and close like French doors, with the right door hinged on its right side and the left door hinged on its left side. Each door is about three feet high and two feet wide. The surface of the PCM on which the doors are mounted is on a plane that is declined at about a 45 degree angle, and so when the doors are unlatched they fall open downward toward the floor by force of gravity (although

pneumatic cylinders slow the pace at which the doors fall open). (T. 603-06, 1145, 2066, 2274, 2485; Exs. C-22, R-18 at 23). The face panels of the rear access doors are metal grating, and so when the doors are closed the machinery behind them is visible through the grating. (Ex. R-18 at 23).

34. The rear access doors are not visible from the PCM's control panel. (Ex. C-22). To get to the rear access doors from the control panel, adjusters must walk to the rear of the PCM. (T. 606, 1909-10).

35. The rear access doors provide access to the underside of the cutting die, the scrap chute, and other internal machine components. (T. 625-26, 1909-12, 2352-53, 2487-88, 2582-83). It is routine for adjusters to open the rear access doors to clear paper jams, and typically this must be done for each PCM about four to six times per shift. (T. 2488).

36. The rear access doors have a safety interlock, whose circuitry involves a micro-switch that is spring loaded and that must be depressed to activate power to the PCM. (T. 2487). A PCM will not run when a rear access door is open, because the non-depressed micro-switch breaks the circuit to the machine. (T. 2719). The micro-switch is designed so that if it fails, it must fail in the open (off) position, opening the circuit and cutting power to the system. (T. 1876-77, 2487, 2787-88). AJM trains its employees that the rear access doors have this interlock feature and that they are not required to utilize LOTO procedures when accessing the PCMs through the rear access doors. (T. 1912, 1977-78, 2274, 2321-22, 2328, 2353-55).

37. AJM allows employees to open the rear access doors and access the PCMs through the open doors without using LOTO procedures because AJM determined that the PCMs could not operate when the doors were open. (T. 1910, 2414-17). There was no scientific, technical, or other specialized evidence that AJM was incorrect when it concluded that after a rear access door

is opened that a PCM is not capable of unexpectedly energizing or starting up, or releasing any stored hazardous energy, even if the control circuitry for the interlocked rear access door was to fail. (E.g., T. 2274, 2719, 2788).

Emergency Stops (E-stops)

38. The PCMs are equipped with three emergency stop buttons, known as "e-stop" buttons. (T. 621-22). One e-stop button is located on the control panel on the operator's side, another is located near the run-off table, and another is located on the PCM's discharge side. (T. 354-55, 583, 622, 1228, 1993, 2350; *see* R-18 at 3, 7, 24). When an e-stop is activated, it breaks the circuit to all power to the PCM and the machine shuts down. (T. 583-84, 621-22).

39. The e-stops are on the same electrical circuit as the interlocked rear access doors and have the same electrical effect on the machine in terms of cutting the circuit when they are activated. (T. 620-22, 1227-28, 2487). When an e-stop breaks or stops functioning, it does so in the "off" position, rendering it impossible to restart the machine. (T. 1876-77, 2481-82).

40. The e-stop on the control panel is situated such that it is within arm's reach of a normal sized adult who is accessing the scrap chute through the scrap chute guard. (T. 618-20, 2350-51, 2255; *see* R-18 at 3).

41. When an e-stop button is depressed to engage the e-stop, the button itself illuminates with a red-colored light. (T. 1993, 2254). Engaging an e-stop also causes another red-colored light located on the top of the PCM to illuminate, signifying that the PCM is not running. (T. 2269, 2579). To restart a PCM after an e-stop has been engaged, the e-stop must be disengaged by turning and pulling on the e-stop button, and then the adjuster must execute a prescribed startup procedure. The startup procedure includes an administrative procedure that entails the adjuster surveying the entire machine, returning to the control panel, hollering the word "clear," and then

waiting a few beats before restarting the PCM from the control panel. (T. 2267, 2482-83, 2267-68; Ex. R-19). The PCMs make an audible beeping noise upon restarting. (T. 160).

42. No scientific, technical or other specialized evidence was presented that would establish that after an e-stop on a PCM has been engaged, that the PCM is capable of unexpectedly energizing, starting up, or releasing any stored hazardous energy, even in the circumstance in which the e-stop were to fail.

Lockout/Tagout

43. AJM has a general energy control program at the Facility, called the Control of Hazardous Energy Lockout/Tagout Policy, that generally governs LOTO at the Facility. (T. 432; Ex. C-3). AJM trains adjusters as "authorized" employees (as that term is defined in 29 C.F.R. § 1910.147(b)) and issues adjusters personal locks that they must keep on their belt loops. (T. 2789).

44. AJM has developed written machine-specific LOTO procedures for each of its machines, including the PCMs. (T. 413-14, 2474-75; Ex. R-15). These machine-specific procedures are tagged on each machine. (T. 2474-76). AJM conducts monthly unannounced random inspections requiring selected authorized employees to demonstrate proficiency in executing a machine's LOTO procedure. (T. 1481-86, 2160, 2417-18; Ex. R-5).

Clearing Paper Jams

LOTO Method and E-Stop Method

45. Paper may become jammed in a variety of locations in PCMs, including the feeder, the cutting die, the scrap chute, the rails, and the forming dies. (T. 74, 87-90, 306, 2037-38, 2042-44, 2488-89). The adjusters are generally responsible for clearing paper jams. (T. 73-74, 87-90, 183, 194, 305).

46. AJM uses the term "paper jam" to describe scrap paper improperly accumulating in

the scrap chute, even in those circumstances when the PCMs continue to operate and produce finished products despite the accumulation. (T. 2253, 2290, 2292, 2314).

47. It is a common occurrence for scrap paper to fail to be discharged from the scrap chute and sometimes accumulate there over multiple cycles of the cutting die. (T. 87-90, 183-85, 196, 225-26, 306, 2037-39, 2491-92, 2534-35). This can happen in a variety of ways. Scrap sometimes accumulates because the air nozzle malfunctions and fails to blow it out. (T. 87-90, 183-84, 306, 2037-38). Dull blades on the cutting die can result in scrap paper accumulating in the scrap chute. (T. 306). Sometimes the scrap paper gets snagged on the air nozzle or on the frame. (T. 196, 225-26). Sometimes the exit portal on the discharge side becomes blocked, causing scrap paper to back up in the scrap chute. (T. 185).

48. The PCMs shut down automatically when sensors that are located between the forming die and the stacker detect that newly formed plates are not exiting the forming die. (T. 2041, 2101). The accumulation of scrap paper in the scrap chute sometimes triggers these sensors and causes the PCM to shut down automatically. (T. 2041). But it is also possible for scrap paper to accumulate in the scrap chute and for finished plates and bowls to continue to exit the forming die. In that situation, a PCM would not shut down automatically but would continue to run until an employee manipulated the controls or engaged an e-stop. (T. 2041).

49. Regardless whether a PCM shuts down automatically when scrap paper fails to be discharged from the scrap chute, an adjuster is required to remove the scrap paper from the scrap chute. This is typically done by the adjuster reaching into the scrap chute to remove the scrap paper by hand, and not by using a tool or instrument. (T. 330, 2488-89).

50. In clearing scrap paper from the scrap chute, AJM allows employees to access the scrap chute through the scrap chute guard on the operator's side of a PCM by shutting down the

PCM in one of two ways. One way is for the employee to implement the PCM's LOTO procedures. The other way is for the employee to stop the PCM by engaging the e-stop button located on the control panel, opening the scrap chute guard and then reaching into the scrap chute to grasp and remove the scrap paper manually (all the while remaining within arm's reach of the e-stop), and then re-starting the machine using a prescribed protocol. (T. 228-29, 353-54, 588, 2253-55, 2419-20, 2278, 2816-17, 2632). [NOTE: For ease of reference, these two methods for clearing paper jams by accessing the scrap chute through the open scrap chute guard are henceforth referred to respectively as the LOTO Method and the E-Stop Method.]

51. If in the course of clearing a paper jam using the E-Stop Method it becomes necessary for the adjuster to move away from within arm's reach of the e-stop, the employee must abandon use of the E-Stop Method and continue only after executing the PCM's LOTO procedure. (T. 240).

52. There is no evidence that any of the three adjusters who were operating the PCMs identified in instances "a", "b" or "c" of the LOTO citation were utilizing the E-Stop Method at the time that the violative conditions were alleged to have occurred on August 25, 2016.

53. There was no scientific, technical, or other specialized evidence that employees who serviced or maintained the PCMs by utilizing the E-Stop Method would be exposed to the unexpected energization or startup of the PCM or the release of hazardous energy.

Bypassing Scrap Chute Guard to Clear Paper Jams

54. Some adjusters developed a practice of sometimes *not* using either the LOTO Method or the E-Stop Method to clear scrap paper from the scrap chute. Instead, some adjusters sometimes bypassed the scrap chute guard of operating PCMs and reached inside the scrap chute area to manually grab and remove the scrap paper as the PCM continued to run. (T. 87-89, 92-93, 194, 199-201, 316-19, 660-62, 1127). Some adjusters learned this technique from other adjusters early

in their employment. (T. 92-93, 201-03, 319-21, 334, 662-63, 670-72). Use of this technique violated AJM's work rule that all guards be closed while a PCM is running.

Work Rules for Adjuster Servicing Activities

55. On February 6, 2015, an adjuster sustained an amputation injury at the Facility while attempting to clear a paper jam located in the cutting die. (T. 467-69, 601-02; Ex. C-37 at 47). In his effort to clear the paper jam, the employee stopped paper feeding to the cutting die, but he did not shut down the PCM so the cutting die continued to reciprocate in its cutting action. (T. 634-35). With the PCM cycling in this way, the employee moved to the rear of the PCM near the interlocked rear access doors, and without opening the rear access doors (and thus not activating the interlock feature of those doors) he inserted his arm into the machine through an opening that is near the rear access doors. (T. 631-32). With the cutting die continuing to reciprocate, the employee pushed up on the scrap chute so that it pivoted upwards. The lifting of the scrap chute created space for his fingers to contact the reciprocating cutting die and resulted in him sustaining the amputation injury. The amputation injury was not caused by the scrap chute falling down from its raised position, but rather was the result of the scrap chute's raised position creating a space through which the employee could insert his hand and expose his hand to the reciprocating cutting die. (T. 629-36).

56. The activity related to the amputation injury on February 6, 2015 resulted in OSHA issuing a citation to AJM in July 2015 that alleged two violations of two different provisions of the LOTO standard, specifically §§ 1910.147(c)(4)(i) and 1910.147(d)(4)(i). (Exs. C-27, C-28). Those alleged violations became a final order of the Commission on August 11, 2015, by operation of an informal settlement agreement resolving the citation. (T. 852-53, 855-60; Ex. C-30).

57. A few days after the amputation injury on February 6, 2015, AJM instituted a rule that prohibited adjusters from raising the scrap chute to clear a paper jam. (T. 1051-52, 2422-23;

Ex. R-14 at 3-5). AJM trained adjusters on the new rule and documented that training by having the adjusters sign a training document that provided as follows:

> The following employees have received training on; [sic] not to raise the scrap shoot [sic][3] to clear a jam.
>
> All adjusters: NEVER raise the scrap shoot [sic] to clear a jam. This shoot [sic] acts as a guard when clearing out jams from under the machine. Exposure to the scrap knife is extremely dangerous while the machine is running. To clear a jam, you must go under the machine and remove the jam with the scarp [sic] shoot [sic] in place. NEVER try to reach in from the sides of the machine. This is part of our safety SOP and is strictly enforced. (Lock out Tag out)

In the training document, the ending parenthetical phrase "(Lock out Tag out)" was handwritten, while the remainder was in bold typeface. (Ex. R-14 at 3-5). The term "scrap knife" in the document is a reference to the cutting die.

May 8, 2016 Injury to W.F.

58. An employee with the initials W.F. was one of the 27 adjusters whom AJM trained in February 2015 on the new rule not to raise the scrap chute to clear paper jams. (Ex R-14 at 4). On May 8, 2016, about 15 months after the new rule was implemented, W.F. sustained a partial amputation of his middle finger as he was attempting to clear a paper jam located in the cutting die of PCM #16.

59. W.F. sustained the injury when the PCM was shut down because he had activated an e-stop and he had also opened the interlocked rear access doors. W.F. had raised the scrap chute in trying to clear the paper jam, and he had finished clearing it when the scrap chute fell

[3] The use of the word "shoot" for its homonym "chute" is understandable in that scrap paper literally shoots out of the scrap chute's discharge portal at the rate of about 45 times per minute. (*See* video clip at Ex. C-23).

from its raised position and pinched his middle finger against the stationary cutting die. (T. 469-71, 602-03, 2734-35, 2792; Ex. C-37 at 60).

60. W.F.'s actions immediately preceding his amputation injury were as follows. W.F. discovered that blanks were jammed near the cutting die. (T. 2735-37). Despite the jam, the PCM had continued to cycle, so W.F. shut down the PCM by engaging the e-stop button on the control panel. (T. 2737-38; Ex. C-16). W.F. then walked to the back of the PCM, opened the rear access doors, and saw about 60 blanks jammed near the cutting die. (T. 2738-41; Ex. C-22). He reached up and tried to pull the blanks out with his hand, but they were too tightly jammed for him to do so. (T. 2741-44). W.F. believed that his effort to remove the jammed blanks was being impeded by the scrap chute. He returned to the operator's side of the machine, opened the hinged scrap chute guard to access the scrap chute, and then pivoted the scrap chute up to its raised position. He then attempted to remove the jammed blanks by reaching his arm through the open scrap chute guard, but without success. (T. 602-03, 2741-45). W.F. then returned to the opened rear access doors and from that position he again reached up into the machine to remove the jammed blanks. (T. 2745-46). He succeeded in removing the jammed blanks from that position, and as he was finishing the scrap chute fell from its upright position and pinched his middle finger against the then stationary cutting die, resulting in the amputation of part of the finger. (T. 510-11, 603, 2746). The scrap chute had been in its raised position for about four to five minutes before it fell. (T. 2747). W.F. was taken to the hospital for treatment. He returned to work about four or five days later. (T. 530, 2112, 2761).

61. On May 25, 2016, about twelve days after W.F. returned to work, AJM imposed formal discipline on W.F. (a written warning) for having violated the work rule that prohibited raising the scrap chute. (T. 530-31, 2114-18, 2761; Ex. R-9 at 4).

62. None of the PCMs were outfitted with any means to secure the scrap chute in place once it had been raised to its upright position. AJM has never trained or instructed adjusters to attempt to secure the scrap chute in place after raising it to its upright position and has never provided adjusters with any means to do so. (T. 535, 591, 1096, 2744).

63. W.F. learned to lift the scrap chute during his initial on-the-floor training in 2012, and it was his common practice to lift the scrap chute when clearing paper jams. (T. 2731-32, 2746-47). AJM did not prohibit that practice until after the amputation injury that had occurred in February 2015. Before he was injured, W.F. lifted the scrap chute to clear paper jams approximately four times per shift, and he typically left the scrap chute in the raised position for at least one minute each time. (T. 2748). W.F. continued to do this even after he had been instructed in February 2015 on the new rule not to lift the scrap chute to clear paper jams.[4]

64. WF's attempt to clear the paper jam on May 8, 2016 during which he was injured constituted a service or maintenance activity and was not itself part of normal production operations.

65. AJM did not have actual knowledge before the amputation injury that W.F. had raised the scrap chute while attempting to clear the paper jam on PCM #16.

66. The evidence is insufficient to establish that AJM failed to exercise reasonable diligence to prevent or discover that W.F. had raised the scrap chute of a PCM to an upright position while clearing a paper jam on May 8, 2016 (thereby creating gravitational energy that could unexpectedly release and cause him injury).

[4] Sometime after W.F.'s amputation injury, AJM again modified the scrap chute by securing it in its canted operating position with pins that would have to be removed in order to raise the scrap chute. (T. 594).

2016 OSHA Inspection

67. On May 26, 2016, the CO conducted an on-site inspection at the Facility and inspected PCM #16, which was the PCM involved in the amputation injury that had precipitated the inspection. (T. 961-64).

68. On August 25, 2016, the CO returned to the Facility to investigate a complaint pertaining to cutting die guards having been installed on some PCMs but not on others. (T. 792). The CO conducted a walkaround inspection of the production floor, during which the plant manager (Roger Finckbone) and the human resource manager (Robert Cutler) accompanied him.

69. The CO testified that during the walkaround he first observed adjuster Brandon Mendieta sticking his hand into an operating PCM (PCM #13) to remove scrap paper from the scrap chute area. (T. 830).

70. The CO testified that he then observed another adjuster (James Beals) doing "the exact same function" as the CO had just seen Mendieta do. (T. 831).

71. The CO testified that he then turned his attention back to Mendieta and saw him removing scrap a second time from the same operating PCM (#13) by inserting his forearm into the scrap chute, and that Mendieta then "walked away from the machine, leaving the scrap chute door wide open." (T. 832).

72. The CO testified that in between the two times he observed Mendieta reach into PCM #13, he observed James Beals place his hand inside the scrap chute and remove scrap paper of another operating PCM (PCM #27), in a movement that took one to three seconds. (T. 819, 823-24). The CO did not make any comment or remark to either Finckbone or Cutler that he had seen Beals reach inside an operating PCM. (T. 1068, 1590, 2519).

73. Neither Finckbone nor Cutler observed Beals reach in the PCM in the manner that the CO testified he had witnessed. Finckbone saw Beals do something else—he observed Beals

open the scrap chute guard of PCM #27 while the machine was operating and peer into the scrap chute area. Finckbone further observed Beals rapidly close the scrap chute guard after Beals realized that Finckbone was observing him violate the work rule that all guards be closed during machine operations. (T. 1589, 2516-18, 2516-17, 1589). Finckbone instructed his staff to issue a written warning to Beals for this violation of a work rule, but no such warning was issued. (T. 2529-30).

74. The CO testified that he then saw adjuster Andrew Thompson open the scrap chute guard of PCM #30, reach his hand into the scrap chute area up to mid-forearm, remove the excess scrap paper, and close the scrap chute guard, in movements that took only one to three seconds. (T. 839). The CO did not tell either Finckbone or Cutler what he believed he had seen Thompson do. (T. 1068). The CO observed Cutler approach Thompson and speak to him, although the CO could not hear what was being said between them. (T. 840). When Cutler returned to the CO's side, he remarked to the CO that Thompson would be "retrained," and there was no further discussion between the two about Thompson's activities. (T. 840, 1065-66).

75. When the CO saw Cutler speaking privately to Thompson in the course of the CO's walkaround, Cutler was reprimanding Thompson for having left the forming die guard off the PCM. (T. 1588).

76. During the CO's investigation, the plant manager (Finckbone), the human resources manager (Cutler), and one of the floor supervisors (Lena Mays), each told the CO that employees were required to employ LOTO procedures whenever clearing a paper jam, and that there were no exceptions to this policy. (T. 779-81, 2853). In their communications with the CO over the course of the inspection and investigation, none of AJM's managers or floor supervisors volunteered the information that adjusters had the option to utilize the E-Stop Method when clearing scrap paper

from the scrap chute area, or ever mentioned to the CO the existence of the E-Stop Method. (T. 2851, 2853).

Training

77. New employees who are hired to become adjusters initially receive classroom training on a variety of subjects, and then they are assigned to work alongside an experienced adjuster whose task is to teach the new employee how to do the various tasks necessary to operate the PCMs. This aspect of new adjuster training is known as "on-the-floor" training, and the new employees being trained are known as "adjuster-trainees." The duration of an adjuster-trainee's on-the-floor training varies from three to six months. (T. 1740-42, 1925-26, 2014-15). The on-the-floor training is deemed completed once the adjuster-trainee demonstrates to the trainer proficiency in 93 tasks that are detailed on a five-page "New Adjuster Checklist." (Ex. R-35 at 5-10; Ex. R-41 at 59-65; T. 2083-90). There are at least three or four experienced adjusters who are designated to provide on-the-floor training to adjuster-trainees, although the record does not indicate the precise number. (T. 2430-31). There is no evidence addressing what training or instructions the experienced adjusters receive, if any, regarding the content and manner of conducting on-the-floor training of the adjuster-trainees.

Supervision on the Production Floor

78. AJM's production managers spend the majority of their time on the production floor, observing and monitoring the activities of the 8 to 12 adjusters who are on the floor during any given shift, as well as monitoring the activities of the packers and other workers on the production floor. (T. 1432-33, 1435, 1592, 1861-62, 1881-82, 1929, 1931-32, 1934, 2188-89, 2335-37, 2455-57, 2565-66).

Discipline

79. AJM has a formal written disciplinary policy that includes a rule (Rule 6) that addresses safe work practices, and which provides as follows:

> Non-compliance with safety regulations or common safety practices or *failing to immediately* reporting [sic] injures [sic] to supervisor is strictly prohibited. Conduct such as, but not limited to, running on the premises, horseplay, throwing objects, pushing or shoving, failure to wear safety apparel, *or* performing an unsafe act *will not be tolerated.*
>
> 1st Violation – Written Warning
> 2nd Violation – 3 Day suspension
> 3rd Violation – Discharge

(Ex. R-22, at 3).

80. AJM's supervisors and managers have discretion not to apply the progressive disciplinary protocol specified in Rule 6, but rather are permitted to render informal oral discipline and corrective action to an offending employee in lieu of initiating the formal discipline prescribed by the disciplinary policy. (T. 527-28, 1473-75, 2166, 2180-81, 2292, 2453-54, 2534).

81. AJM's written LOTO policy specifies a progressive discipline protocol for violations of that policy that is marginally more lenient than the progressive discipline protocol set forth in Rule 6. The progressive discipline protocol set forth in the LOTO policy provides for imposing an oral warning for a first violation, a written warning for a second violation, and termination for a third violation. (Ex. C-3 at 10). There is no evidence that AJM had ever disciplined an employee for a violation of the LOTO policy.

82. From time to time, AJM imposed progressive discipline at the Facility for safety violations according to the progressive discipline protocol set forth in Rule 6. The 104 documented instances of discipline for Rule 6 violations reflected in the record occurred in the years 2013 to

2017.[5] Ninety-seven of those 104 disciplinary events were for first offenses. (Ex. R-6; Ex R-23; Ex. R. 26 at 2–3, 9–10, 12-13; Ex. R-27 at 18). Eighteen of those 104 documented disciplinary events occurred after the citation was issued on September 30, 2016, and seventeen of those eighteen were for first offenses. (*Id.*) For the eight documented second violations of Rule 6, the prescribed three-day suspension was waived for three them. (Ex. R-6 at 1 and 81; Ex. R-26 at 9). AJM did not present documentation of any employee at the Facility having been cited for a third violation of Rule 6, for which termination is the prescribed sanction. The only evidence of an employee being terminated for a violation of safety rules was a single instance of an employee having been under the influence of alcohol when he sustained an amputation injury while trying to clear a paper jam from an operating PCM. (T. 2543-44; Ex. R-23 at 2).

[5] The documentation of disciplinary action reflected in Exhibits R-6, R-23, R-26, and R-27 has not been represented to reflect all documented discipline for violations of Rule 6 taken at the Facility in the years 2013 to 2017. The record does not contain information on the total number of documented instances of discipline for Rule 6 violations over that period.

There are 94 documented instances of discipline for Rule 6 violations in Exhibit R-6. There are six additional instances of documented discipline for Rule 6 violations in Exhibit R-23 at pages 4–7, 10–13, and 54. There are three additional instances of Rule 6 violations documented in Exhibit R-26 at pages 2, 3, 9, 10, 12 & 13. There is one additional Rule 6 violation reflected in Exhibit R-27 at page 18.

The disciplinary events reflected in Exhibit R-23 at pages 14–53 and 62–92 are duplicates of discipline reflected in Ex. R-6.

The discipline reflected at pages 55–61 of Exhibit R-23 involves a violation of Rule 7 pertaining to threatening conduct and is a duplicate of the documentation reflected in Exhibit R-26 at pages 21-29. That discipline does not involve a Rule 6 "safe work practices" violation.

The documentation regarding employee injuries reflected in Exhibit R-23 at pages 1–3 and 9 does not indicate any discipline having been taken with respect to those four employee work injuries. However, as to the amputation injury reflected by the incident report dated 2/24/2014 at page 2 of Exhibit 23, there was testimonial evidence that the injured employee was fired after AJM received test results indicating that he had been impaired by alcohol when he sustained the injury. (T. 2543-44). However, no documentation of disciplinary action taken against that employee was identified or offered in evidence.

Glove Policy

83. After the finished paper plates and bowls exit the forming die of a PCM, they travel a short distance by conveyors to a part of the PCM called the "stacker." When a sufficient stack of the plates or bowls amass in the stacker (typically between 8 and 100 items in a stack) the stack proceeds on another conveyor to the wooden runout table. (T. 2196-99). The employees called "packers" then pick up the stacks with their hands. (T. 483-84). The stacks arrive on the runout table still retaining heat that had been transferred to them from the brief time each plate or bowl was compressed in the heated forming die. (T. 2006). The amount of time a blank spends in the heated forming die is necessarily some fraction of 1.33 seconds.

84. Packers work eight-hour shifts picking up stacks of plates and bowls as they exit the PCMs and then bagging them. (T. 553, 483-84). The packers pick up thousands of stacks over the course of each shift. (T. 483-84, 553-55).

85. AJM requires that packers handling the stacks do so with either clean bare hands or while wearing clean gloves. (T. 486-87). For sanitation purposes, AJM requires that packers who have an open wound or a bandage on their hand, or who are wearing fingernail polish, wear cotton gloves that AJM provides. (T. 486, 515-17).

86. AJM does not supply protective gloves to packers or other employees to protect the employees from the heightened temperature of the stacks of paper products. But some packers who are not required to wear gloves for hygiene reasons choose to wear gloves that they supply themselves, some to protect from paper cuts and friction from twisting plastic bags, and some to insulate their hands from the temperature of the plates. (T. 1937, 2004, 558; 804-08, 814). Approximately 75-80% of packers on the third shift choose not to wear gloves. (T. 1937).

87. The forming dies of the PCMs operate at temperatures of between 250 and 350 °F, but in colder weather the upper die may operate up to 375 °F and the lower die may operate up to

425 °F. (T. 1268). No evidence was presented of any measured temperatures of the finished stacks of paper plates or bowls. (T. 233-34, 867).

88. There is no evidence of any packer or any other employee having ever been burned or blistered from the temperature of the plates exiting the PCMs. There is no evidence of any member of management receiving a complaint or report of any thermal injury to hands caused by handling the stacks of paper plates and bowls.

III. DISCUSSION

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees had access to the violative conditions; and (4) the cited employer had actual or constructive knowledge of those conditions. *Donahue Indus. Inc.,* 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003).

As discussed below, the Secretary failed to meet his burden to establish either the LOTO or the hand protection citation, so both citations must be vacated.

A. Control of Hazardous Energy (LOTO) Citation – § 1910.147(c)(4)(i)

The Secretary alleges AJM violated subparagraph (c)(4)(i) of the LOTO standard (§ 1910.147), which provides as follows: "(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."

The amended LOTO citation alleges that AJM violated § 1910.147(c)(4)(i) in four discrete instances (designated as instances "a", "b", "c" and "d"). Instances "a", "b" and "c" were all alleged to have occurred on or about August 25, 2016, and to have involved respectively PCMs #27 (operated by James Beals), #13 (operated by Brendan Mendieta) and #30 (operated Andrew

Thompson). Instance "d" was alleged to have occurred on or about May 9, 2016 in connection with the amputation injury involving PCM #16 (operated by W.F.).[6]

For each of the four instances of the alleged LOTO violation, the Secretary's complaint sets forth identical descriptions of the manners in which AJM is alleged to have violated the standard. Each of the four instances avers that "[l]ockout procedures were not *utilized* and lockout devices were not affixed by an authorized employee performing tasks such as, but not limited to, clearing jams on the Peerless Cutting Machine." (Emphasis added). Each of the four alleged instances was tried on this theory as pleaded—the alleged failure to utilize LOTO procedures.[7]

With respect to instances "a", "b" and "c", the Secretary's theory of the case, as defined by the complaint and then developed by the evidence presented in his case in chief, was that on August 25, 2016, three different adjusters operating three different PCMs bypassed the scrap chute guard and inserted their arm or hand into the scrap chute of an operating PCM to remove scrap paper from the scrap chute area.

1. The LOTO Standard Applies to Instances "a" and "c"

The LOTO standard applies to the conduct alleged to have occurred with respect to instances "a" and "c".

The LOTO standard's "scope" provision states that the "standard covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the

[6] As to the amputation injury having occurred on May 8, not on May 9, see footnote 2, *supra*.

[7] The averment in each instance that "lockout devices were not affixed" is a remnant of the allegations of the original LOTO citation item (subsequently amended by the Secretary's complaint), which had alleged four instances of a violation of § 1910.147(d)(4)(i), which provides: "Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees." (Complaint, 2/13/2017). AJM does not dispute that lockout devices had not been affixed in connection with any of the alleged instances.

machines or equipment, or release of stored energy could cause injury to employees." § 1910.147(a)(1)(i).

An adjuster's act of manually clearing scrap paper from the scrap chute area of a running PCM (as the Secretary alleges occurred in instances "a" and "c") constitutes a servicing activity within the meaning of the term "servicing and/or maintenance" as defined in § 1910.147(b).[8] *See Sec'y of Labor v. Action Elec. Co.*, 868 F.3d 1324, 1335 (11th Cir. 2017) (noting that the issue of the applicability of the LOTO standard does not necessarily turn on the "workplace activities" identified in the standard's definition of "servicing and/or maintenance," but rather that the standard's "clear thrust … is broadly to ensure safety where an employee performs legitimate workplace activities directed at the relevant machine" where the employee may be exposed to hazardous energy while engaged in such activities); *Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 123 (D.C. Cir. 2014) (determining the text of the LOTO standard contemplates its application to "unjamming" work, and also "comports with the standard's preventative purpose").

Whether an energy source presents the potential for hazardous energy involves a two-pronged test: (1) whether unexpected energization, start up or release of stored energy could occur, and (2) if it can occur, whether it could cause injury to employees. *Otis Elevator*, 762 F.3d at 121; *see also* § 1910.147(c)(1) (requiring employers to establish a LOTO program "where the

[8] The LOTO standard defines the term "servicing and/or maintenance" in § 1910.147(b) as follows:

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

unexpected energizing, start up or release of stored energy could occur and cause injury"); Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, 36666 (Sept. 1, 1989) (to be codified at 29 C.F.R. pt. 1910) ("If an energy source does not have the capability of causing injury to employees, it is not 'hazardous energy' within the scope of this standard.").

As set forth in ¶ 32 of the Findings of Fact, the clearing of scrap paper from the scrap chute of a running PCM that lacked a cutting die guard involves placing a hand or arm within inches of the PCM's reciprocating cutting die and would expose an employee to the hazardous energy present in the reciprocating cutting die. This is the service activity that is alleged to have occurred with respect to instances "a" and "c". PCMs #27 and #30, (the machines identified respectively in instances "a" and "c") had not yet been outfitted with cutting die guards on the day of those alleged violations (August 25, 2016), and thus the cited LOTO standard applies to the activity alleged for those two instances. *See Burkes Mechanical, Inc.*, 21 BNA OSHC 2136, 2139-40 (No. 04-475, 2005) (rejecting argument that the LOTO standard was not applicable on the asserted ground that "employees were aware the conveyor was running while they cleaned underneath it.").

2. The LOTO Standard Was Not Proven to Apply to Instance "b"

Instance "b" pertains to PCM #13 and the alleged conduct of adjuster Brandon Mendieta on August 25, 2016 of twice reaching into the PCM's scrap chute to remove scrap paper when the machine was running. PCM #13 was one of four PCMs at the Facility on August 25, 2016 on which a cutting die guard had been installed. (Findings of Fact ¶ 30). As found in ¶ 31 of the Findings of Fact, the evidence was insufficient to establish that any employee who inserted an arm or hand into the scrap chute of an operating PCM that was outfitted with a cutting die guard could contact the cutting die. Even though AJM maintained a work rule forbidding employees from opening guards while PCMs were running (including PCMs in which a cutting die guard had been installed), the evidence was insufficient to establish that it was possible for employees to sustain

an injury from the reciprocating cutting die when bypassing the scrap chute guard and inserting a hand or arm into the scrap chute of an operating PCM on which a cutting die guard had been installed. *See Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2066 (No. 78-1443, 1984) (consolidated) ("An employer's safety recommendations do not establish that such precautions were necessary in order to comply with a standard"), *aff'd*, 764 F.2d 32 (1st Cir. 1985). An essential element in determining whether the LOTO standard applies to any given workplace activity is that an employee could be injured while engaging in that activity. *Otis Elevator Co.*, 762 F.3d at 121. That essential element is absent with respect to the service activity alleged in instance "b" involving PCM #13 on August 25, 2016. [9]

3. The LOTO Standard Applies to Instance "d"

The Secretary's theory as to instance "d" is that hazardous gravitational energy is present in a raised scrap chute that must be controlled during service or maintenance activities by a physical restraint such as a block to prevent it from unexpectedly falling and injuring an employee. (Sec'y Br. at 27-28).

AJM argues that the LOTO standard is inapplicable to instance "d", contending that the standard does not apply to gravitational energy that is "manually created by an employee after rendering the machine to a zero mechanical state." (Resp't Br. 52). This argument is rejected.

[9] While the evidence was insufficient to establish that any zone of danger existed in the scrap chute area that is accessed through the opening that is accessed through scrap chute guard of operating PCMs outfitted with cutting die guards, the evidence was similarly not conclusive with respect to whether the cutting die guard was adequate to protect employees from injury under those circumstances. The issue of whether the cutting die guard meets the minimum requirements of the machine guarding standard at subpart O of 29 C.F.R. pt. 1910 was not a matter put in issue by the pleadings, was not actually tried by the parties, and is not adjudicated herein. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) ("Trial by consent [under FRCP 15(b)] may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue.")

AJM points to commentary in the LOTO standard's preamble as support for its argument, but that commentary evinces the Secretary's rationale for *not* incorporating the concept of "zero mechanical state" into the LOTO standard. 54 Fed. Reg. at 36678.

More importantly, the text of the LOTO standard does not permit the interpretation that AJM urges. The LOTO standard "applies to the control of energy during the servicing and/or maintenance of machines and equipment." § 1910.147(a)(2)(i). The defined term "service and/or maintenance" does not embody the temporal component that AJM now urges, but provides simply that the term means "[w]orkplace activities … where the employee may be exposed to the unexpected … release of hazardous energy" without reference to whether such "hazardous energy" was present either before or after servicing or maintenance activities commenced. § 1910.147(b) (quoted in full *supra* footnote 8). There are likely myriad scenarios involving the service or maintenance of complex machinery during which hazardous energy materializes while the workplace activity is progress. To allow such a workplace activity to proceed without requiring that the hazardous energy be controlled to protect employees from injury would be at odds with the LOTO standard's stated purpose "to prevent unexpected energization, start-up or release of stored energy in order to prevent injury to employees." § 1910.147(a)(3)(i); *see also Action Elec.*, 868 F.3d at 1335 (noting that the LOTO standard's "clear thrust … is broadly to ensure safety where an employee performs legitimate workplace activities directed at the relevant machine" where the employee may be exposed to hazardous energy while engaged in such activities). The cited LOTO standard applies to instance "d".

4. Collateral Issue as to Application of LOTO Standard – The "E-Stop Method" For Clearing Scrap from Scrap Chute

AJM's work rules required that all guards on the PCMs be closed while the PCMs were running. (Findings of Fact ¶ 30). Compliance with that rule would preclude an adjuster opening

the scrap chute guard for any purpose while a PCM is running, to include bypassing the scrap chute guard to manually clear scrap paper from the scrap chute.

AJM permitted adjusters to open the scrap chute guard and reach inside the scrap chute area of PCMs to clear scrap paper manually when the machines were *not* running by using either the LOTO Method or the E-Stop Method. (*See* Findings of Fact ¶ 50). The LOTO Method involves utilizing LOTO procedures. The E-Stop Method entails an adjuster activating the e-stop button located on the PCM's control panel and then, while remaining within arm's reach of the e-stop button, opening the scrap chute guard and manually clearing scrap paper from the scrap chute area.

The Secretary argues that utilization of the E-Stop Method is itself violative of the LOTO standard, while AJM argues that the LOTO standard does not apply when adjusters employ the E-Stop Method. (Sec'y Br. 33-34; Resp't Br. 74-79; Resp't Reply Br. at 30-34). The E-Stop Method is not directly implicated in adjudicating whether AJM violated the LOTO standard in any of the four instances alleged in the amended complaint, because there is no evidence that any of those instances involved employees utilizing the E-Stop Method.[10] It is therefore unnecessary to adjudicate whether utilization of the E-Stop Method violates the cited LOTO standard as the Secretary contends. However, considering the substantial effort put into litigating this issue, the merits of the question are addressed herein for the benefit of both the parties and any reviewing tribunal that may be asked to consider the question. Because the Secretary failed to establish that

[10] As to instances "a", "b" and "c", the Secretary does not argue, and none of the evidence suggests, that the CO observed any of the adjusters involved utilizing the E-Stop Method to remove scrap paper from the scrap chute. And as to instance "d" (relating to the amputation injury on May 8, 2016), even though the employee had activated the e-stop button located on the PCM's control panel before he raised the scrap chute to its upright position, he did not engage the e-stop as part of an attempt to clear scrap paper from the scrap chute (as adjusters do when utilizing the E-Stop Method). (See Findings of Fact ¶ 60).

using the E-Stop Method would expose employees to potential injury from the unexpected energization of the cutting die (*see* Findings of Fact ¶¶ 39, 42, 53), the Secretary has not established that the LOTO standard applies when employees utilize the E-Stop Method, as is discussed next in greater detail.[11]

The LOTO standard's "scope" provision, § 1910.147(a)(1)(i), provides that the 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." Thus, the LOTO standard "applies only where the Secretary shows that unexpected energizing, start up or release of stored energy could occur and cause injury." *Gen. Motors Corp., Delco Chassis Div. (GM-Delco)*, 17 BNA OSHC 1217, 1218 (No. 91- 2973, 1995) (consolidated), *aff'd*, 89 F.3d 313 (6th Cir. 1996).

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[11]The Secretary argues that the E-Stop Method "did not exist prior to the citation being issued," but rather that AJM concocted it afterwards. (Sec'y Br. 31-33). This argument is rejected. The record is replete with testimony from witnesses called by both parties that in the years before OSHA commenced the underlying investigation, the E-Stop Method was widely known, understood, and commonly utilized to clear scrap paper from the scrap chute. (*See* Findings of Fact ¶ 50).

The circumstantial evidence that the Secretary contends establishes that AJM concocted the E-Stop Method after the citation was issued was not preponderant. (Sec'y Br. 31-33). One item of circumstantial evidence is that during the investigation AJM management told the CO that employees were required to utilize LOTO procedures to clear scrap paper from the scrap chute area, and that they never mentioned the E-Stop Method to him. (Findings of Fact ¶ 76). Further, in an unverified interrogatory response made early in the litigation, AJM stated that the use of LOTO procedures was mandatory when clearing scrap paper from the scrap chute. (Ex. C-29 at 8). Both of these circumstances support at least a reasonable suspicion that AJM fabricated the E-Stop Method post-citation. However, that reasonable suspicion was refuted decisively by the abundant and uncontroverted testimony from witnesses called by both parties that the E-Stop Method was well known and frequently utilized well before the commencement of the investigation. The circumstantial evidence cited by the Secretary suggests at the least that AJM was less than fully forthcoming with both (1) the CO before the citation was issued, and (2) with its attorneys in the preparation of the unverified interrogatory response. But that evidence does not establish that AJM concocted the E-Stop Method after the citation was issued.

The E-Stop Method does not itself constitute a protocol that would meet to the LOTO standard's substantive requirements, and AJM does not argue that it does.[12] (T. 585). The Secretary argues that only LOTO procedures may be used to clear scrap paper from the scrap chute, and consequently AJM's use of the E-Stop Method to do so violates the cited LOTO standard.

The Secretary failed to establish that the LOTO standard applied to the use of the E-Stop Method because the evidence was insufficient to support the conclusion that the unexpected energization or startup or release of stored energy could occur and cause injury while clearing scrap paper by using the E-Stop Method. (*See* Findings of Fact ¶¶ 39, 42, 53).

The Commission has rejected the Secretary's implicit position that the LOTO standard "presumes that there always is a hazard of unexpected energization, etc., on every industrial machine and piece of equipment during servicing and maintenance." *GM-Delco*, 17 BNA OSHC at 1220. Rather, the Commission has determined that the "terms of the standard clearly place the burden on the Secretary to *show* that there is such a hazard as to the cited machines and equipment." *Id.* (emphasis in original). The Commission has decided that control circuit type devices in machines may operate in such a manner that eliminates the potential of injury from hazardous energy during certain servicing or maintenance activities, so that the LOTO standard does not apply in those circumstances. *See GM-Delco*, 17 BNA OSHC at 1220 (determining

[12] Use of the E-Stop Method does not involve locking out or tagging out anything on a PCM, but even if it did, it could not constitute a compliant LOTO procedure. The locking or tagging out of an "energy isolating device" is an essential component of a compliant LOTO procedure. The LOTO standard's definition of "energy isolating device" expressly excludes "control circuit type devices," providing that "[p]ush buttons, selector switches and other control circuit type devices are not energy isolating devices." § 1910.147(b). The e-stops on the PCMs are "control circuit type" devices (see Findings of Fact, ¶¶ 38–39), and thus utilizing a procedure that relied on locking or tagging out the machine's e-stops would not constitute a procedure that met the LOTO standard's minimum requirements.

LOTO standard not applicable where employer relied on control circuit type devices, including electronically interlocked gates and e-stop buttons, to eliminate the potential for injury from hazardous energy); *see also Alro Steel Corp.*, 25 BNA OSHC 1839, 1854 (No. 13-2115, 2015) (ALJ) (rejecting the argument that "relying on control circuitry allows the machine to remain energized and, therefore, subject to unexpected energization through accident or mechanical failure," and determining LOTO standard was not applicable because control circuitry prevented unexpected energization or start up or release of stored energy during a particular servicing activity).

The Secretary points to testimony that from time to time employees improperly utilized the E-Stop Method by failing to stay within arm's reach of the e-stop after having opened the scrap chute guard. (Sec'y Br. 33; e.g., T. 116-19, 331-32, 359-60). Such an improper utilization of the E-Stop Method could constitute a violation of the LOTO standard, because in such instances an employee could be exposed to hazardous energy and resultant injury while performing service or maintenance. However, the testimony regarding such instances of the mis-utilization of the E-Stop Method lacked specificity as to the time of occurrence or the precise context of such occurrences. That non-specific evidence is insufficient to establish the violations alleged by instances "a", "b" or "c" involved the improper use of the E-Stop Method.

The Secretary also points to anecdotal evidence of instances of e-stops malfunctioning. (Sec'y Br. 33-34). As set forth in the Findings of Fact (¶¶ 39, 42, 53), the preponderant evidence is that any failure in the e-stop circuit could result only in the machine shutting off and remaining off. (E.g., T. 1949, 2055-56, 2414, 2470, 2481-82). The plant manager, Roger Finckbone, who has been involved in the maintenance and servicing of the PCMs since 1997 (T. 2448), testified that the e-stops on the PCMs fail in the "off" position and that components of the machine cannot

move if an e-stop fails. This testimony was more authoritative that the vague anecdotal testimony of two former employees that engaging an e-stop (or activating the safety interlock upon opening the rear access doors) did not always cause the PCMs to shut down immediately and completely. (T. 218-19, 229-30, 333-34). *Cf. Conagra Flour Milling Co.*, 16 BNA OSHC 1137, 1141 (No. 88-1250, 1993) ("Generally speaking, where employees testify from their own knowledge and experience on matters that pertain to their specific work activities, their testimony should be given greater weight than that of witnesses who do not have first-hand experience with the operation in question").

AJM's written LOTO procedures do not contain any description of the E-Stop Method. (See Ex. C-3; R-15 at 5-7, 13). The Secretary argues that the absence of any such description in AJM's written LOTO procedures violates the provisions of the LOTO standard that prescribe the content of written LOTO procedures. (Sec'y Br. 32). *See* §§ 1910.147(c)(4)(ii)(A)—(D); *Angelica Textile Servs., Inc.*, 27 BNA OSHC 1246, 1250 n. 6 (No. 08-1774, 2018) (observing that the "LOTO standard mandates that procedures be documented" except in certain narrow circumstances), *vacated on other grounds*, 803 F. App'x 542 (2d Cir. 2020) (unpublished). It is not necessary to adjudicate whether AJM's written LOTO procedures were deficient because the Secretary's complaint does not allege any deficiencies in the way AJM documented its LOTO procedures. Moreover, the parties did not consent to trying the unpleaded issue of the adequacy of AJM's written LOTO procedures. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) ("Trial by consent [under Fed. R. Civ. P. 15(b)] may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue.") This decision and order does not adjudicate whether the LOTO standard required that AJM's written LOTO procedures describe either (1) the E-Stop Method, or (2) the conditions in which

employees were authorized to utilize the E-Stop Method to clear scrap paper from the scrap chute. *Cf. S. Hens, Inc.*, No. 17-0029, 2018 WL 2017592 at *6 (O.S.H.R.C.A.L.J., Mar. 20, 2018) (concluding that the LOTO standard's provisions that prescribe the content of written LOTO procedures "is concerned with the 'how' of the lockout procedures, not the 'when'"), *aff'd* 930 F.3d 667, 676 (5th Cir. 2019).

AJM argues that the E-Stop Method constitutes an alternative measure to LOTO procedures so that it meets the "minor servicing exception" to the application of the LOTO standard. *See* NOTE to § 1910.147(a)(2)(ii) (containing "minor servicing" exception to subparagraph (a)(2)(ii)). This argument is rejected. AJM did not plead the minor servicing exception as a matter in avoidance to the allegations of the complaint. *Westvaco Corp.*, 16 BNA OSHC 1374, 1377-78 (No. 90-1341, 1993) (noting that employer bears burden of proving that the LOTO standard's minor servicing exception applies); Fed. R. Civ. P. 8(c)(1) (providing that "any avoidance or affirmative defense" must be affirmatively stated in responsive pleading). Also, the parties did not squarely recognize that they were trying that unpleaded issue. *McWilliams Forge Co., Inc.*, 11 BNA OSHC at 2129-30 (trial of unpleaded issues by consent).

5. Collateral Issue as to Application of LOTO Standard – Effectiveness of the Scrap Chute Door as a Machine Guard

The Secretary asserts, in connection with various arguments, that the hinged scrap chute guard located near the PCM's control panel was not an effective machine guard because adjusters could bypass it quickly and with ease to clear scrap paper from the scrap chute of an operating PCM. The Secretary's argument is based in part on the evidence that (1) the manufacturer of the PCMs (Peerless) designed and manufactured the PCMs with a barrier or guard for the scrap chute with an interlock circuit that caused a running PCM to shut down when opened, (2) the PCMs at the Facility had been modified in a manner that had eliminated or bypassed this interlock feature,

so that opening the scrap chute guard did not cause the PCMs to shut down, (3) AJM designed, fabricated, and installed the scrap chute guards on the PCMs at the Facility (T. 1324), (4) Peerless informed AJM that for safety reasons it disapproved of the absence of interlock functionality on the guards, and (5) after Peerless expressed those concerns, AJM did not re-configure the guards to re-establish safety interlock functionality.[13]

The Secretary is substantially justified in his criticism of the efficacy of the hinged scrap chute guard in preventing employees from placing body parts in the dangerous scrap chute area of operating PCMs. The absence of an interlock feature on the AJM-designed scrap chute guard would have reasonably supported an allegation that the scrap chute guard violated the machine guarding standard found at 29 C.F.R. § 1910.212(a)(1) because employees could easily bypass the guard and access the dangerous scrap chute area of an operating PCM. *See HBD/Thermoid, Inc.*, 26 BNA OSHC 2068, 2080 (No. 16-1070, 2017) (ALJ) (deciding that a hinged guard that was easily bypassed by employees was inadequate and failed to meet the machine guarding requirements of § 1910.212(a)(1)), citing *Pass & Seymour, Inc.*, 7 BNA OSHC 1961, 1964 n. 5 (No. 76-4520, 1979) (stating "such a guarding method is only acceptable if installed in such a way that it cannot be easily circumvented by employees"); *see also Akron Brick and Block Co*., 3 BNA OSHC 1876, 1878 (No. 4859, 1976) (stating that "the method of machine guarding should not be

[13] AJM was not the original owner of the PCMs at the Facility but rather acquired them from entities other than Peerless. (T. 1371-73). The record does not reflect whether AJM or some prior owner had modified the PCMs used at the Facility to bypass or eliminate the original interlock feature. However, the evidence did establish that AJM fabricated and installed the non-interlocked hinged scrap chute guard on each PCM, and that AJM could have configured the scrap chute guards with a safety interlock feature. (T. 1324-26, 1364, 1371-73).

After the citation was issued, AJM modified the scrap chute guard by causing it to be secured in its closed position by some type of fastener such as a bolt or screw. (T. 589). After that modification, it became necessary for employees to use a hand tool to remove the bolt or screw to open the scrap chute guard. (T. 2309).

predominantly dependent upon human behavior," and that workers take to the job "any tendency to neglect any specified course of conduct").

But the Secretary did not cite AJM for violating the machine guarding standard (subpt. O of 29 C.F.R. pt. 1910). Notwithstanding that the LOTO standard was "designed to seamlessly dovetail with the machine guarding protections that apply during normal production operations under" subpart O, *Dayton Tire*, 23 BNA OSHC 1247, 1253 (No. 94-1374, 2010), *aff'd in pertinent part,* 671 F.3d 1249 (D.C. Cir. 2012), the matter of whether the hinged scrap chute guard met the requirements of the machine guarding standard simply was not a matter put in issue by the pleadings, nor did the parties squarely recognize that they were trying that unpleaded issue. *McWilliams Forge Co., Inc.*, 11 BNA OSHC at 2129-30 (trial of unpleaded issues by consent).

6. Proof of Non-compliance for Instances "a", "b" and "c" -- Did Adjusters Bypass the Scrap Chute Guard to Clear Scrap When the PCMs Were Running?

The CO's approximately 30-minute walkaround on the floor on August 25, 2016 spawned the LOTO violations that were ultimately alleged in instances "a", "b" and "c".[14] The CO testified that during the walkaround he observed three adjusters on three different PCMs bypassing the scrap chute guard of operating PCMs to reach into the running machine and manually remove scrap paper. These employees were later identified to be James Beals on PCM #27 (instance "a"), Brandon Mendieta on PCM #13 (instance "b"), and Andrew Thompson on PCM #30 (instance "c").

The CO's testimony, if accepted at face value, would prove the violative conduct alleged in connection with each these three instances. AJM presented considerable countervailing

[14] Even though the Secretary failed to establish that the cited LOTO standard applied to instance "b" (involving PCM #13 and adjuster Brandon Mendieta), the issue of whether the Secretary proved non-compliance with the cited standard as to instance "b" is adjudicated herein as well and is intended to provide an additional ground for vacating instance "b".

evidence challenging the credibility and reliability of both the CO's testimony and the evidence that is corroborative of the CO's testimony. The undersigned, as the finder of fact, must scrutinize the whole of the evidence in determining whether the evidence that would prove the violative conduct was preponderant. For that reason, the following discussion goes into considerable detail in describing evidence bearing on whether the Secretary carried his burden to establish that there was noncompliance with the cited standard in the manners the Secretary alleged and sought to prove for instances "a", "b" and "c". *See Lake County Sewer Co.*, 22 BNA OSHC 1522, 1524 (No. 07-1786, 2009) (requiring Commission judge to "address all conflicting testimony, as well as any other record evidence relevant" to a material issue); *Agra Erectors, Inc.*, 19 BNA OSHC 1063, 1066 (No. 98-0866, 2000) (directing Commission judge to "give reasons for crediting the testimony of one witness over that of another that are accompanied by summaries of pertinent testimony and reasons for crediting the testimony").

The Secretary's theory of these three violations relates to a common servicing activity—removing scrap paper that has become lodged in the scrap chute. The Secretary argues that it was common practice among adjusters at the Facility to use neither the LOTO Method nor the E-Stop Method for removing scrap paper from the scrap chute area, but rather to insert their hand or arm in the scrap chute of running PCMs to clear scrap paper manually. This is what the CO testified he saw three employees do on three different PCMs during his approximate 30-minute walkaround on August 25, 2016.

AJM argues that the activity that the CO described the three employees doing was prohibited and that employees complied with, and AJM effectively enforced, the work rule that all guards be closed when the PCM is operating. AJM contends the evidence that the three identified employees had reached into operating PCMs in the manner that the CO described was not

sufficiently reliable or credible to prove by a preponderance that any of those employees engaged in the activity alleged.

a. Proof of Non-Compliance -- Instance "a"
(PCM #27 Operated by James Beals)

The Secretary failed to meet his burden to establish that AJM violated § 1910.147(c)(4)(i) in the manner alleged in instance "a" of the LOTO citation.

i. Testimony of CO and James Beals

Instance "a" pertains to PCM #27 that James Beals was operating on August 25, 2016. The CO testified that during his 30-minute walkaround on the production floor, he observed Beals engage in the following sequence of movements that occurred over a period of "one to three seconds." (T. 817-19). The CO testified that PCM #27 was in operation when he observed Beals open the scrap chute guard, reach into the scrap chute area up to his mid-forearm, remove scrap paper from the scrap chute area with his hand, and then close the guard. (T. 817-19). It is undisputed that the CO did *not* comment or remark to either Finckbone or Cutler about what he believed he had seen Beals do. (T. 825 & 1068 (CO testimony), T. 1590 (Cutler testimony), T. 2019 (Finckbone testimony)). Rather, after the walkaround the CO requested to speak privately with Beals, and AJM arranged for the CO to do so. The CO's testimony about what Beals told him in that private interview is murky. The CO did not expressly state that Beals had said to the CO privately that he had reached into the operating machine earlier *that day* in the manner that the CO testified that he had seen, although the CO unambiguously testified that Beals said that he sometimes reached into operating PCMs to clear scrap paper. (T. 829-30).

Beals testified that he generally did not use the E-Stop Method to clear paper from the scrap chute area unless "the paper jam was to the point where it was actually overflowing out of the scrap chute itself." (T. 198). He testified that instead of using the E-Stop Method, he usually

opened the scrap chute guard while the PCM was in operation to clear out scrap paper that had gotten caught up in the scrap chute. (T. 194-199). Beals testified that he did this between two and twenty times a day for each PCM that he would be responsible for operating at any given time. The frequency with which the need arose to do this was affected by such factors as the ambient humidity and the moisture content of the paper stock. (T. 194-199). Beals testified that when removing scrap paper from the scrap chute in this manner, he would sometimes insert only his hand into the scrap chute area, while at other times he would reach in up to his elbow, and that the length of time to complete that process was "a couple of seconds," which was all the time needed to "[j]ust open the door, grab it, and keep it moving." (T. 199).

Beals testified that he learned to clear scrap paper from the scrap chute of operating PCMs in this manner from his trainers and from observing other adjusters. (T. 201). He testified that the practice "just came with the job" (T. 202) and was "just the way we worked" (T.200). He testified that he had once observed his floor supervisor (Don Gaddy) do this on a PCM that Beals was operating after Gaddy had come to assist him. (T. 202).

Beals also described times when scrap paper would become snagged on the adjustable air nozzle situated just inside the scrap chute door (which is the source of the bursts of air that expel the scrap paper from the scrap chute). (T. 196-99; *see also* T. 84-85; Ex. C-12, photo depicting the green-colored air hose near the center of the photo).

Beals acknowledged that AJM had a work rule that guards had to be in place when the PCMs were in operation, and he acknowledged further that over his tenure at AJM from April 2015 to November 2016 he had been disciplined for violating that rule. The record reflects Beals being formally disciplined for violating that rule on three separate occasions, the last such time being about eleven months before his employment was terminated in November 2016 (for a non-

safety related infraction). (T. 169, 258-260, 267, 274; Ex. R-26 at 21-29). Ex. R-26 at 2-3 [8/28/2015], 9-10 [10/15/2015], 12-13 [1/7/2016], 21-29 [termination 11/29/2016]). None of those disciplinary events involved Beals clearing scrap paper from the scrap chute of an operating machine. Beals testified that he had never been disciplined for bypassing the scrap chute guard and reaching into an operating machine in the manner that he described having done routinely during his work as an adjuster. (T. 294).

Mr. Beals was not asked, and he did not testify about, whether he had bypassed the scrap chute guard to remove scrap paper during the CO's walkaround on August 25, 2016 in the manner that the CO testified he had observed Beals doing.

ii. Testimony of Former AJM Employees Consistent with Beals' Testimony

Three other former AJM employees called by the Secretary were corroborative of Beals' testimony that the practice of clearing scrap paper from the scrap chute of operating PCMs was a common practice of many adjusters. Those former employees were Dallas Benjamin, David Griner, and an employee with initials D.F.

(A). Dallas Benjamin

Dallas Benjamin's testimony was corroborative of Beals' testimony with respect to the practice among adjusters to bypass the scrap chute guard when the PCMs were operating.

Benjamin was employed by AJM for only about three weeks. He started in August 2016 as an "adjuster-trainee" and was terminated soon thereafter for poor attendance. (T. 72, 130-31, 134, 169). Benjamin testified he had been assigned two PCMs to operate (T. 137), even though his training records indicate he remained an "adjuster-trainee" throughout his brief tenure and that he did not complete new adjuster training. (Ex. R-33). Like Beals, Benjamin described circumstances when scrap paper became snagged or "caught" in the scrap chute. (T. 87-88). Benjamin testified that he would sometimes open the scrap chute guard and clear the scrap paper

manually while the machine was running by reaching in the scrap chute up to his forearm in a movement that took only "two seconds." (T. 88-92, 96). Benjamin testified further that he would manually adjust the air nozzle that is accessible through the scrap chute guard about ten times daily for each machine he was assigned to operate, and that most of the time the PCMs were running when he made this adjustment. (T. 94-96). He testified further that he cleared scrap paper from the scrap chute of a single PCM between 30- and 60-times day, and about half those times the machine would be running. For the other half of those times, he would activate an e-stop when a paper jam in the scrap chute "got out of hand," or the PCM would stop automatically (apparently when the sensor between the forming die and the stacker detected that finished product was not exiting the forming die). (T. 89-92). Benjamin testified that the process of reaching into the scrap chute of an operating machine to clear scrap paper took a "few seconds," in contrast to using the E-Stop Method, which took "about a few minutes." (T. 121-22). Benjamin did not know whether a supervisor had ever observed him putting his hand or arm into an operating PCM. (T. 152).

Benjamin testified that his trainer, whose name he did not recall, showed him how to clear scrap paper from the scrap chute and adjust the air nozzle when the machine was operating. (T. 75, 92-93, 96). He testified that he observed other adjusters clearing scrap paper and adjusting the air nozzle of operating PCMs every day that he had worked at AJM. (T. 93, 96-98).

(B). David Griner

David Griner's testimony was corroborative of Beals' account of the circumstances in which adjusters bypassed the scrap chute guard of an operating PCM to remove scrap paper and to adjust the air nozzle.

Griner was employed at AJM as an adjuster from September 2014 to January 2017.[15] (T. 302-04; Ex. R-27 at 1; Ex. R-31). Griner described scrap paper accumulating in the PCM's scrap chute when the air nozzle was "not blowing correctly" and when the cutting die failed to make a complete cut of the paper stock. (T. 306-07). He testified that it was "not that often" that he would use the E-Stop Method to clear scrap paper from the scrap chute. (T. 316).

Griner testified that a "couple of times a day" he would clear scrap paper from the scrap chute while the machine was running if the scrap paper "was right there where I could get to it." (T. 314). He testified that he did this by manipulating the controls to stop paper from feeding into the cutting die area, but allowing the cutting die to continue to reciprocate and bypassing the scrap chute guard to manually clear the scrap paper from the scrap chute. (T. 314-19). He testified that he learned to do this by observing the plant manager (Roger Finckbone), the assistant plant manager (Marc Saylor), and his floor supervisor do the same thing, although Griner did not speak to whether he had been expressly trained to do this. (T. 319-20, 334). When asked whether he had ever been told not to reach into an operating machine, he responded "Not really," with no further explication. (T. 334).

Griner testified further that when he adjusted the air nozzle he would usually do so while the PCM was running because that way he was able to determine the manner in which the air was flowing as he adjusted the nozzle, which was not possible when the PCM was shut off, though he did not speak to whether he had been trained to do this. (T. 325-27). Adjusting the air nozzle with the machine running took only "a couple of seconds," while shutting the machine down to

[15] Griner testified that he quit AJM upon walking out of a meeting in which managers were giving him a "work improvement notice" for having left PCMs unattended. (T. 340-43). AJM's view of the circumstances of Griner's departure was that AJM terminated his employment after he walked out of that meeting. (T. 1656; Ex. R-27 at 1).

complete the same task would take about five minutes. (T. 326-27). Griner testified that he had observed a floor supervisor (Egorov) and other adjusters adjust the air nozzle when the PCMs were running. (T. 327).

(C). Adjuster "D.F."

The testimony of an employee with the initials D.F. corroborated Beals' account of the circumstances in which some adjusters cleared scrap paper from scrap chutes and adjusted air nozzles of operating PCMs.[16]

D.F. was employed as an adjuster at the Facility from March 2015 to September 2016, when he chose not to return to work after having taken a medical leave of absence. (T. 640-42, 689, 1676-77; Ex. R-39). D.F. testified that throughout his employment he inserted his hand into the scrap chute area of operating PCMs to clear scrap paper and to adjust the air nozzle, and that he did this as many as 20 to 30 times a day in a series of movements that were completed in "[j]ust seconds, like one or two seconds." (T. 662-63, 667, 672). He testified his trainer (an experienced adjuster who had the same initials -- D.F.) "showed me that way," but also cautioned him that "you wasn't supposed to" clear the paper that way "but, you know, that's the way you got to get this machine running," and so "[t]hat's how we do it." (T. 693, 695). D.F. testified he had observed other adjusters clear scrap paper from the scrap chutes of operating PCMs every day (T. 663, 670-71, 695-96), and that he had observed floor supervisors (Egorov and Mays) do this as well. (T. 671-72). He testified that he would be "a bit concerned" about the proximity of his hand to the reciprocating cutting die when doing this, but that he did not believe he was putting himself at risk when doing so, explaining that "I'll be cautious," and "I know … how to move." (T. 694).

[16] D.F. is the nephew of the employee who suffered the amputation injury on May 8, 2016, (and who for privacy considerations is identified in this Decision by initials "W.F."). (T. 640).

iii. Competing Testimony of Current AJM Employees

AJM presented testimony of current AJM employees who testified to substantial effect that (1) AJM's work rule was that all PCM guards had to remain in place when the machines were operating, (2) they had not observed employees clear scrap paper by bypassing the scrap chute guard of operating PCMs in violation of that rule, and (3) it was not a common or an accepted practice for employees to do so.

The plant manager, Roger Finckbone, who accompanied the CO throughout the CO's walkaround on August 25, 2016 (T. 2510-11), testified that during the walkaround he did not see Beals reach into a running PCM in the manner that the CO described. (T. 2516-19). However, Finckbone recalled that he had observed Beals holding open the scrap chute guard to PCM #27 and peering into the scrap chute area while the machine was operating. (T. 2516-17). Finckbone recalled further that when Beals realized that Finckbone was observing him do this, Beals immediately closed the scrap chute guard. (T. 2516-19). Finckbone testified that he instructed someone to discipline Beals with a written warning for operating the PCM with a guard open, but that he later learned that his instructions had not been carried out. (T. 2529-30). Finckbone testified further that he had never seen an employee access the scrap chute through the scrap chute guard of an operating PCM machine at the Facility, though he recollected having seen that happen "long ago," probably at another AJM plant where he had worked before the Facility opened in 2009. (T. 2438-39, 2494-96). He testified that employees were permitted to access the scrap chute through the scrap chute guard by utilizing either the LOTO Method or the E-Stop Method, and that it is generally necessary to remove scrap paper from the scrap chute about "five or six times a day depending on the diligence of the adjuster." (T. 2469, 2489).

The Facility's human resources manager, Robert Cutler, who along with Finckbone accompanied the CO during his 30-minute walkaround on August 25, 2016, similarly testified that

he did not observe Beals reach into a PCM during the walkaround (or at any other time for that matter). Cutler testified that employees are "trained to leave the guards in place and if the guards are in place" employees cannot stick their hands in the scrap chute near the reciprocating cutting die. (T. 450-51).

The assistant plant manager since 2012, Marc Saylor, testified that he had never seen an adjuster reach into an operating PCM, and that employees were permitted to reach into PCMs only by utilizing either the E-Stop Method, LOTO procedures, or by engaging the interlock feature by opening the rear access doors. (T. 1870-73, 1881, 1885).

An employee who was an assistant foreman from 2011 to 2017, Dmitry Egorov, testified to the same effect as Mr. Saylor. (T. 1946-1948, 1960, 1977). He did not recall having ever seen an adjuster reach into the scrap chute area of an operating machine in the manner that Beals described. (T. 1960-61).

Another employee who had been a floor supervisor at the Facility since it opened in 2009, Lena Mays, testified that there were no exceptions to the rule that the scrap chute guard had to be closed at all times while a PCM was running. (T. 2173, 2252-53). She testified further that in her years as a floor supervisor she had never see an employee reach into the scrap chute of a running machine. (T. 2252-53). She testified that employees were permitted to remove scrap paper by accessing the scrap chute guard by employing either the LOTO Method or the E-Stop Method. (T. 2233-34, 2253-57). She testified further that employees were permitted to clear scrap paper from the rear of the PCMs by opening the interlocked rear access doors (and not having to utilize LOTO procedures when doing so). (T. 2321).

Another employee who had been a floor supervisor at the Facility since 2009, Bill Samosky, testified that employees were permitted to access the scrap chute through the scrap chute

guard only by utilizing either the LOTO Method or the E-Stop Method. (T. 2349-52). Employees were also permitted to open the interlocked rear access doors without using LOTO procedures, because the interlocks for the doors function like an e-stop. (2352-53). Samosky testified that he had never seen an employee reach into an operational machine, and that if he had seen such an act, he would have intervened and disciplined the employee. (T. 2361).

Another employee who was a floor supervisor at the time he testified, Don Gaddy, testified that employees are permitted to access the scrap chute through the scrap chute guard to clear scrap paper by utilizing either the LOTO Method or the E-Stop Method, and that he had never seen an employee attempt to clear scrap paper by accessing the scrap chute through the scrap chute guard of a running PCM. (T. 2572-76, 2587).

Another employee who was an assistant foreman at the time he testified, Brandon Mendieta (who had been working as an adjuster on August 25, 2016 when the CO made his walkaround), testified that adjusters are permitted to clear scrap paper from the scrap chute only by utilizing either the LOTO Method or the E-Stop Method, and that generally adjusters had to do this one or two times a day. (T. 2046-52, 2056-58).

iv. CO's Private Interviews of AJM Employees

The CO's account of his private conversation with Beals on August 25, 2016 is described above. His accounts of his private conversations with Mendieta and Thompson that same day are discussed in connection with the discussion ahead on instances "b" and "c". In addition to the interviews of those three adjusters, the CO privately interviewed Lena Mays three weeks later, on September 14, 2016. (T. 1117). Mays has been employed at the Facility as a floor supervisor since the plant opened in 2009. (T. 2171, 2176). The CO testified that he asked Mays about adjusters reaching into operating machines to clear scrap paper, and that Mays responded by saying that she had "observed employees stick their hand inside the machine to try to remove scrap" as

recently as the week before, and in that particular instance she had orally reprimanded that employee for having done so. (T. 1130). The CO testified further that Mays told him she thought employees reached into operating machines because they get "used to the machine" and "feel like they are faster than the machine." (T. 1130-31). Mays testified at the hearing and expressly denied having ever seen employees reach into an operating machines (T. 2253, 2321), but she was never questioned to confirm or deny having said to the CO privately what the CO described in his testimony.

The CO's description of precisely what the three adjusters and Ms. Mays told him in private interviews is of uncertain reliability. Of the employees who testified at the hearing and who were also interviewed privately by the CO with respect to instances "a", "b" and "c" (Beals, Mendieta, Mays), only Mendieta was questioned at the hearing about whether he had said to the CO what the CO described in his testimony. As described below, Mendieta's testimony suggests that the CO had misunderstood him. Neither Beals nor Mays were provided the opportunity either to confirm or deny the CO's account of his private interviews, or to provide any context for what they had said to the CO privately.

In those private interviews, the CO questioned employees about complex activities on complex machinery. Such circumstances sometimes heighten the possibility of miscommunication. Another significant factor that bears on whether the CO understood what the employees were attempting to say to him, is that AJM managers caused the CO to reasonably, but erroneously, understand that AJM required adjusters to utilize LOTO procedures to clear paper jams from the scrap chute. But in truth, adjusters were not limited to using LOTO procedures. Rather, they were permitted also to utilize the E-Stop Method. While it may be that AJM management did not intentionally mislead the CO, the CO's reasonable belief that AJM required

adjusters to use LOTO procedures to remove scrap paper from the scrap chute may have resulted in the CO misunderstanding or misinterpreting what employees were attempting to communicate to him in the private interviews.

In addition, the investigative file that the CO compiled contains a number of substantial errors that AJM highlights in its closing briefs in its challenge to the reliability of the CO's testimony. (Resp't Br. 60-65). While perfection in an investigative file and in a CO's recollection of past events is not required, some of the errors highlighted raise legitimate concerns regarding the CO's attention to certain detail in the conduct of the investigation and the accuracy of some of his recollections.

v. Violative Condition for Instance "a" Not Proven

A preponderance of the evidence establishes that Beals, and at least some other adjusters, had a personal practice of clearing scrap paper from the scrap chute of an operating PCM in the manner that is alleged in instance "a". (Findings of Fact ¶ 54). But the evidence is insufficient to establish by a preponderance that the CO actually observed Beals do this during his walkaround on August 25, 2016, or that Beals told the CO that he had done so during in the CO's private interview with Beals later that day. Finckbone's testimony that during the walkaround he observed Beals violating the AJM policy of operating the PCM with a guard open, but did not observe him reach in the machine, is somewhat controverting of the CO's testimony, and raises the inference that the CO misperceived what he thought he had seen Beals doing. It is notable also that the CO made no comment to Finckbone or Cutler that he had observed Beals reaching into the PCM in the manner that the CO testified. (T. 1068, 1590, 2519).

While there is substantial evidence that Beals engaged in the violative conduct during the CO's walkaround on August 25, 2016 as alleged in instance "a", on the whole of the record the evidence is closely balanced and not preponderant. *See Stanley Roofing Co., Inc.*, 21 BNA OSHC

1462, 1464 (No. 03-0997, 2006) (concluding that Secretary did not meet her burden of proof on a matter where the evidence was "essentially in equipoise"); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (observing that the "burden of persuasion" answers "which party loses if the evidence is closely balanced"). The violative condition alleged in connection with instance "a" is not proven.

b. *Proof of Non-Compliance -- Instance "b"*
(PCM #13 Operated by Brendan Mendieta)

Brandon Mendieta testified that he did not reach into an operating machine on August 25, 2016, directly controverting the CO's testimony that he had observed Mendieta do so twice. But Mendieta admitted that on that day he had removed the forming die guard (which is adjacent to the scrap chute guard) on a PCM that was not running (because he had engaged an e-stop), and that he had left the PCM unattended with the forming die guard off, in violation of a work rule. (T. 2124-28; Ex. C-4A). Mendieta testified that the plant manager (Finckbone) observed this and called him over to correct him about leaving the guard off the non-operating machine, and that he then replaced the guard. (T. 2124-28). Finckbone corroborated Mendieta's account, testifying that he had observed that Mendieta had left a guard off PCM #13 in violation of a work rule, even though the PCM was not operating at the time. (T. 2512-15).

The CO testified that, after he saw Mendieta reach into the PCM the second time, he "made a little reference" to Finckbone and Cutler" about "what [Mendieta] did," and that one of them then approached Mendieta and spoke with him privately. (T. 833-34). In contrast, Finckbone and Cutler both testified that the CO did not make any mention to them during the walkaround that he had seen Mendieta reach into the scrap chute of an operating PCM. (T. 1578, 2513). Both Finckbone and Cutler testified that during the walkaround, they did not observe Mendieta reach into the scrap chute area of PCM # 13 in the manner that the CO testified he had seen. (T. 1578, 2513).

The CO testified that when he interviewed Mendieta on August 25, 2016 after having seen him reach into an operating PCM twice, that "Mendieta informed me that he knew it wasn't something he was supposed to do as far as walking away from the machine if the scrap door was open," and "also … from what I recall, he … stated to me that he knew he wasn't supposed to stick his hand in that -- in the scrap chute area, but he had to remove the excess scrap paper." (T. 835). Mendieta did not expressly deny saying to the CO that he had reached into an operating machine that day, but he seemed to suggest in his testimony that he had simply told the CO that his infraction had been to leave a guard off a non-operating PCM. (T. 2127-28).

It is impossible to square the CO's testimony that he saw Mendieta reach into the PCM while it was operating, with the testimony of Finckbone and Mendieta that the PCM was not even operating at the time. The respective demeanors of these witnesses while testifying provide no basis for crediting one over the other. The evidence respecting the conduct of Mendieta that forms the basis of proving non-compliance for instance "b" is closely balanced and is in equipoise. *See Stanley Roofing Co., Inc.*, 21 BNA OSHC at 1464; *Schaffer v. Weast*, 546 U.S. at 56. The evidence is insufficient to meet the Secretary's burden to prove by a preponderance of the evidence the violative conduct alleged for instance "b".

c. *Proof of Non-Compliance -- Instance "c"*
(PCM #30 Operated by Andrew Thompson)

Andrew Thompson was operating PCM #30 on August 25, 2016, when he was still an "adjuster-trainee." (T. 2520; Ex. R-41 at 59-65). Finckbone testified that during the CO's walkaround that day, he did not observe Thompson reaching into the scrap chute area of an operating PCM. (T. 2520). The CO did not make any remark to Finckbone that he had observed Thompson reaching into the machine in the manner that the CO testified. (T. 2520).

Cutler testified that during the walkaround with the CO on August 25, 2016, he observed Thompson handling a roll of paper on the non-operator side of PCM #30, about 25 or 30 feet away from the scrap chute guard. Cutler testified he noticed that Thompson had left the forming die guard off the machine in violation of a work rule, so he left the CO's side and approached Thompson to correct Thompson on the spot for leaving the guard off the machine. Cutler testified that he did not see Thompson reach into the open scrap chute guard of PCM #30. Cutler testified further that the CO did not make any mention to him that the CO had seen Thompson reach into the scrap chute area of a running PCM to remove scrap paper, as the CO testified he had seen Thompson do. (T. 1583-89, 1727-28).

Thompson remained employed by AJM throughout the nearly five months that it took to complete the hearing (T. 2286), but neither party identified him as a person that the party might call to testify in their respective cases in chief, and neither party did. (*See* Joint Prehearing Statement, filed 10/3/2017). There is nothing in the record suggesting that Thompson was not available to testify. The record is silent regarding the parties' respective reasons for not attempting to call as a witness an individual whom the Secretary had identified as the employee who had engaged in the alleged violative conduct described in instance "c".

The CO testified about what he recalled Thompson telling him when the CO interviewed him privately on August 25, 2016. The CO testified that after his walkaround (during which he testified that he had seen Thompson bypass the scrap chute guard of an operating PCM to remove scrap paper), Thompson told him during a private interview that he had reached into the scrap chute of an operating machine to remove paper, and that "[h]e knew he wasn't supposed to…, but he was only trying to remove excess scrap paper from the machine." (T. 839-41). According to the CO, Thompson said that he had done so because "he had three other machines he was handling,

and it was overwhelming, so he was trying to be as fast as possible." (T. 1127). After having his recollection refreshed with the notes that he took during his interview with Thompson, the CO testified that Thompson told him that scrap chutes get jammed with scrap paper "several times a day" and that Thompson said that he reaches into an operating PCM to clear the paper from the scrap chutes about 40% of those times, which amounts to "several times a day." (T. 842-43).

CO's testimony about what he saw Thompson do and what Thompson said to him privately simply cannot be squared or reconciled with the testimony of Finckbone and Cutler that Thompson was not even in the vicinity of the scrap chute guard at the time. There is as much reason to doubt the reliability of the CO's testimony as there is reason to doubt the credibility of the AJM witnesses on this issue. It is possible that if Thompson had been presented to testify, that the balance of the evidence would have tipped one way or the other. But the evidence of record as to the conduct alleged for instance "c" is closely balanced and is in equipoise as well. *Stanley Roofing Co., Inc.*, 21 BNA OSHC at 1464; *Schaffer v. Weast*, 546 U.S. at 56. The Secretary has not met his burden of proof to establish the alleged violative conduct as to instance "c".

d. *Proof of Non-Compliance & Employee Access -- Instance "d"*
(PCM #16 Operated by W.F.)

As discussed above, the Secretary established that the cited LOTO standard applied to instance "d" which pertains to W.F.'s attempt to clear a paper jam located in the cutting die after he had raised the scrap chute to its upright position. For AJM to have complied with the cited standard would have involved AJM developing and directing the utilization of LOTO procedures that would protect employees from the release of gravitational energy in the raised scrap chute during service or maintenance activities. *Cf.* 54 Fed. Reg. at 36647 (explaining that one of "the most effective method[s] to prevent employee injury caused by the unanticipated movement of a component of a machine" is to "utilize a restraining device to prevent movement," such as "by

blocking material or components"); § 1910.147(b) (defining the term "energy isolating device" to include "a block; and any similar device used to block or isolate energy"). AJM had no such LOTO procedures, and W.F. did not neutralize the gravitational energy in the raised scrap chute that amputated his finger, and thus AJM was not in compliance with the cited standard as to instance "d". W.F. was exposed to the hazardous energy of the raised scrap chute when he reached inside the PCM from the PCM's operator's side through the open scrap chute guard, and also while he reached inside the machine from the rear of the machine through the opened rear access doors. The amputation injury itself establishes the "employee access" element of the Secretary's burden of proof. *S&G Packaging Co.,* 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (employee's injury resulting from the violative condition established employee access element).[17]

Only the "employer knowledge" element remains for the Secretary to meet his burden of proof as to instance "d".

7. Employer Knowledge – Instance "d"
(PCM #16 Operated by W.F.)

To establish the employer "knowledge" element of his burden of proof, "the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, 2155 (No. 08-1656, 2016). "The knowledge element is directed to the physical conditions that

[17] The Secretary argues also that AJM violated the LOTO standard by not requiring that W.F. utilize LOTO procedures after accessing the interior of the PCM through the interlocked rear access doors, on the ground that the interlocked rear access doors involve the use of control circuitry. (Sec'y Br. at 34-35). For essentially the same reasons described in connection with the discussion of the E-Stop Method, *supra*, the Secretary has not established that employees accessing the interior of the machine through the interlocked rear access doors are exposed to hazardous energy. The Secretary has thus not established that the LOTO standard applies when employees access the interior of the PCM through the opened rear access doors (except for when an employee also raises the scrap chute from its operating position). (See Findings of Fact ¶¶ 36–37).

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").

The physical condition that violated the LOTO standard as to instance "d" was the hazardous gravitational energy present in the raised scrap chute that caused injury to W.F. as he was clearing jammed paper on PCM #16 on May 8, 2016. For the Secretary to establish the alleged violation, Secretary must establish that AJM knew or, with the exercise of reasonable diligence, should have known of that violative physical condition. *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC at 2155; *Danis Shook Joint Venture XXV*, 19 BNA OSHC at 1501.

Only the Secretary has addressed the employer knowledge element of instance "d" in post-hearing briefing, arguing that the evidence established that AJM had both actual and constructive knowledge of the violative condition. (Sec'y Br. 36-44). AJM, although making no direct contrary argument, addresses the constructive knowledge issue obliquely in its argument in support of its affirmative defense of unforeseeable employee misconduct (UEM). (Resp't Br. 54-56; Resp't Reply Br. 21-25). *Cf. Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (noting that the Commission has considered the "same factors in evaluating both an employer's constructive knowledge and the merits of an employer's unpreventable conduct affirmative defense"), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished); *S. Hens, Inc.*, 930 F.3d at 678 (noting that "the UEM inquiry often overlaps considerably with the main violation inquiry").

Notwithstanding the absence of a direct countervailing argument from AJM on the issue of whether AJM had knowledge of the violative physical condition alleged in instance "d", that element of the Secretary's burden of proof remains a material issue that must be addressed and adjudicated on its merits. *See* Commission Rule 90(a), 29 C.F.R. § 2200.90(a) (providing that a Commission judge's decision must "include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record"); 5 U.S.C. § 557(c)(3)(a); Fed. R. Civ. P. 52(a)(1). It is apparent from the entirety of AJM's argument that it vigorously contests, albeit indirectly in the context of its UEM argument, the Secretary's assertion that AJM had constructive knowledge of the violative physical condition.[18]

[18] Even though the Secretary has failed to carry his burden to prove that AJM had constructive knowledge of the violative physical condition, it is not a certainty that AJM would have established even a *prima facie* UEM defense, which is often simply a mirror image of what the Secretary must prove to establish constructive knowledge.

The first element of the UEM defense requires the employer to show that it had "established work rules designed to prevent the violative conditions from occurring." *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). The work rule on which AJM pins its UEM defense is the rule prohibiting adjusters from raising the scrap chute to clear paper jams. (Ex. R-14 at 3-5, quoted in Findings of Fact ¶ 57). AJM implemented this work rule in the aftermath of an amputation injury that had occurred when an adjuster had raised the scrap chute while the PCM was running (and thus while the cutting die was reciprocating) and was injured by contact with the reciprocating cutting die. That employee was not injured from the hazardous gravitational injury that was present in the raised scrap chute. (*See* Findings of Fact ¶ 55). There is no evidence that the purpose of the rule was to prevent exposure to hazardous gravitational energy present in a raised scrap chute.

AJM does not assert that W.F.'s failure to utilize LOTO procedures to neutralize the gravitational energy in the raised scrap chute was a result of W.F.'s misconduct, and it could not reasonably make such an assertion because AJM had no such LOTO procedures. So it is at least questionable whether AJM's UEM defense to instance "d" was viable, because the work rule AJM relies upon to establish the defense was not designed or intended "to prevent the violative condition" from occurring (the "violative condition" being the gravitational energy present in a raised scrap chute that could cause injury to an employee). *Calpine Corp.*, 27 BNA OSHC 1014, 1020 (No. 07-0645, 2018), *aff'd*, 774 F. App'x 879, 882 (5th Cir. 2019) (unpublished) (concluding that employer failed to establish first prong of UEM defense because the work rule involved was

a. *Actual Knowledge of the Violative Physical Condition Involved in Instance "d"*

AJM believed, albeit erroneously, that the LOTO standard was inapplicable to the gravitational energy present in a raised scrap chute, and consequently it had not developed LOTO procedures to protect employees from being injured by that hazardous energy. If AJM were to have had actual knowledge that W.F. had raised the scrap chute while clearing a paper jam, AJM would necessarily have had actual knowledge that he was not utilizing any prescribed LOTO procedure to neutralize the hazardous gravitational energy present in the raised scrap chute. But there is no evidence that AJM had actual knowledge that W.F. had raised the scrap chute while attempting to clear the paper jam, and thus AJM had no actual knowledge that the violative physical condition had materialized. (E.g., T. 524-25).

The Secretary argues that AJM's "*modus operandi* set forth in the trial record supports a finding that AJM had actual knowledge of workplace conditions," but none of the Secretary's arguments that purport to show actual knowledge of the violative condition involved in instance "d" support such a finding. (Sec'y Br. 37-40, 44). Rather, those arguments bear instead on whether AJM should be charged with having constructive knowledge of the violative physical condition. *See* Sec'y Br. 40, n. 9 (wherein the Secretary states that his arguments in support of "actual knowledge of the violative conditions also support a finding of constructive knowledge"). The

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"not equivalent to the cited standard"), citing *Daniel Int'l Corp.*, 9 BNA OSHC 2027, 2031 (No. 76-181, 1981), and *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1075 (No. 09-1072, 2013) (rejecting UEM defense where employer's work rule did not meet cited standard's requirements); *S. Hens, Inc.*, 930 F.3d at 678 (determining a work rule to "keep hands off moving machinery" did not suffice to support UEM defense to a LOTO violation because the work rule did not "specifically match" the LOTO violation at issue); *Valdak Corp. v. OSHRC*, 73 F.3d 1466, 1469 (8th Cir. 1996) (noting that to establish UEM defense employer must prove "that it had a work rule in place which implemented the standard").

Secretary's arguments made under the rubric of having proved actual knowledge will be addressed next in resolution of the issue of constructive knowledge.

b. *Constructive Knowledge of the Violative Physical Condition Involved in Instance "d"*

Where an employer lacks actual knowledge of a violative condition, the Secretary may prove that the employer had constructive knowledge by showing that the employer failed to exercise reasonable diligence to prevent or discover the violative condition. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940 (No. 97-1676, 1999). "In assessing reasonable diligence, the Commission considers several factors, including an employer's obligations to implement adequate work rules and training programs, adequately supervise employees, anticipate hazards, and take measures to prevent violations from occurring." *S.J. Louis Constr.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). The regular enforcement of disciplinary procedures also bears on whether an employer has exercised reasonable diligence. *See Thomas Indus. Coatings*, 23 BNA OSHC 2082, 2088-89 (No. 06-1552, 2012).

Determining whether an employer had constructive knowledge of a violative condition involves "a fact-specific, practical inquiry, looking to company practice, the details of specific incidents, knowledge of supervisors imputable to the company, and commonsense inferences about what a company and its supervisors should know and do." *S. Hens, Inc.*, 930 F.3d at 676. Whether an employer has exercised reasonable diligence is a question of fact that will "vary with the facts of each case." *Martin v. OSHRC (Milliken & Co.)*, 947 F.2d 1483, 1485 (11th Cir. 1991).

The dispositive inquiry here is whether the Secretary proved that AJM failed to exercise reasonable diligence to prevent or discover the violative physical condition on May 8, 2016 of W.F. lifting the scrap chute while clearing a paper jam located in the cutting die. This is an extremely close question on this record, and there is substantial evidence that would support a finding either way. On balance, the evidence that AJM failed to exercise reasonable diligence in

preventing or discovering the violative physical condition was not preponderant, as described below.

i. Adequacy of Work Rules and Training Programs

AJM implemented a categorical work rule in February 2015 prohibiting adjusters from raising the scrap chute to clear paper jams.[19] The adjusters who were employed when the rule was implemented, twenty-seven altogether, were trained on this work rule in one-on-one meetings with a trainer, and each of the twenty-seven adjusters signed a training document reflecting having received the training. (T. 1888-91, 2603-06; Ex. R-14 at 3-5). (The training document that the adjusters signed is set forth verbatim in the Findings of Fact ¶ 57.)

No adjuster who was trained on the rule expressed or demonstrated confusion about the rule's import. (T. 2606, 2362-64). W.F., the employee who sustained the amputation injury when he violated the rule about fifteen months after it had been implemented, acknowledged in his testimony that he had been trained on the rule and that he understood it. (T. 2776-79).

AJM's work rule and the training on it were clear and direct, and if all adjusters followed the rule the violative physical condition (raising the scrap chute without neutralizing its resulting gravitational energy) would never materialize when adjusters cleared paper jams.

After the rule was implemented in February 2015, there is no evidence that AJM took any measures to ensure that newly hired employees were indoctrinated on the rule, either formally or

[19] The rule was directed only to adjusters. There is evidence that the rule did not apply to AJM's approximately 10 to 15 maintenance mechanics. (T. 1435, 2423-24, 2477-78, 2498). But no evidence was presented of any circumstances in which maintenance mechanics could be injured during their maintenance activities by the gravitational energy that is present in a raised scrap chute. AJM's compliance with the LOTO standard with respect to the service and maintenance activities of its maintenance mechanics is not a matter in issue.

informally. (Ex. R-13 at 5; Ex. R-17; *see* D. Benjamin and A. Thompson training records from 2016 at R-29, R-33, R-34, R-41).

No training documentation in evidence that post-dates the rule's implementation contains any reference or allusion to the rule, including the training documentation for subsequently hired adjuster-trainees. (*See* Exs. R-29, R-30, R-32, R-33, R-34; T. 1429-31, 1598-1612). According to the Facility's human resources manager, Robert Cutler, the "on-the-floor" training component for adjuster-trainees takes three to six months to complete, and includes training on clearing paper jams, although Cutler was not familiar with the precise content of the "on-the-floor" training in clearing paper jams. (T. 1740-42, 1744-46, 1925-26).

A floor supervisor, Dmitry Egorov, recalled the February 2015 training on the rule prohibiting the lifting of scrap chutes (T. 1963-65), and he mused that he "probably" had been trained "a couple of times" on the rule, although he could not "remember the last time." (T. 1985-86). Egorov personally had never delivered formal training on the rule. (T. 1986). Egorov was not questioned about whether he had ever informally communicated the rule to adjusters or adjuster-trainees during his day-to-day to supervisory activities.

Another floor supervisor, Lena Mays, testified that she was not involved in the training provided to adjusters on the rule in February 2015, but she was aware of it from discussions with her manager. (T. 2313-14, 2329-30). She testified further that she was not involved in providing "on-the-floor" training to adjuster-trainees. (T. 2310-11; Ex. R-30).

Another floor supervisor employed at the Facility since 2009, Bill Samosky, recalled the 2015 implementation of the rule prohibiting adjusters from lifting the scrap chute to clear paper jams, and recalled no adjusters being confused or questioning the rule. (T. 2362-64). He was not

questioned about whether he was aware of any reinforcement training on the rule or whether he had any knowledge about adjuster-trainees being trained on the rule.

Another floor supervisor, Don Gaddy, who had been one of the trainers who had delivered training on the rule to the adjusters in February 2015, testified that he was not aware of any subsequent reinforcement training having been provided on the rule. (T. 2699-2700). Like Lena Mays, Gaddy was likewise not involved in providing on-the-floor training to adjuster-trainees. (T. 2701-02). Gaddy was not asked whether he had knowledge of any subsequently hired adjuster-trainees being informed of or being trained on the rule in their on-the-floor training.

Jorge Gonzales has been an adjuster since 2014. He has been involved in providing on-the-floor training to about 25 adjuster-trainees. (T. 2402, 2419). Gonzales was not questioned about whether he ever informed or instructed an adjuster-trainee about the rule prohibiting adjusters from raising the scrap chute to clear paper jams, although he did testify about having trained adjuster-trainees in LOTO procedures and in utilizing the E-Stop Method to clear paper jams. (T. 2419-20, 2428). He recalled the February 2015 training that implemented the rule, but he could not recall whether there had been any reinforcement training on the rule. (T. 2424).

D.F. is the nephew of W.F., and he started working as an adjuster in March 2015, about a month after AJM implemented and trained on the rule. (T. 640; Ex. R-39). D.F. testified that he typically raised the scrap chute once a day in the course of cleaning the PCM's rails, and that he learned to do this "[f]rom experience and … my trainer … showed me little tricks or whatever to do." (T. 656-58; *see* video clip at Ex. C-25, depicting blanks sliding down rails). D.F. described his trainer showing him how to clear scrap paper from the scrap chute of an operating PCM by reaching in through the opened scrap chute guard but telling him at the same time the practice violated AJM policy. D.F. testified: "He didn't teach me that way but he showed me the way,

you know, he told me you wasn't supposed to but, you know, that's the way you got to get this machine running. That's how we do it." (T. 695). D.F. did not directly say the adjuster who was training him showed him how to lift the scrap chute to clean the rails, though his testimony certainly is susceptible of that inference. (T. 658). D.F. was not asked whether his trainer or anyone informed him of the rule prohibiting the lifting of the scrap chute to clear paper jams, or whether he had any awareness of that work rule. D.F. was not asked whether he had ever raised the scrap chute to clear a paper jam.

The work rule prohibiting adjusters from raising the scrap chute to clear paper jams was adequate. It was clear and direct, even though by its terms it did not prohibit adjusters from raising the scrap chute for work activities other than clearing paper jams, such as cleaning the rails as D.F. described he did on a daily basis. The original training on the rule in February 2015 was also adequate, with no adjusters expressing confusion about the rule or voicing concerns that the compliance with the rule would hinder them in doing their jobs. (T. 2499, 2609).

The record reflects no formal training on the rule after its implementation and the initial training on it. There is no evidence that AJM formally incorporated the rule into its new adjuster training. The on-the-floor training that adjuster-trainees received as they shadowed experienced adjusters over a period of three to six months entailed training on 93 tasks specified on a checklist, but none of those 93 tasks referenced the rule prohibiting the lifting of the scrap chute to clear a paper jam. (Ex. R-41 at 59-65). Whether the experienced adjusters who were assigned to provide on-the-floor training to adjuster-trainees informed an adjuster-trainee of the rule would seem to have been wholly dependent upon whether the adjuster/trainer happened to think about it and to decide to communicate it to the adjuster-trainee. The evidence established that the on-the-floor training for adjuster-trainees sometimes included experienced adjusters showing adjuster-trainees

means and methods that violated AJM work rules. (E.g., T. 695). This aspect of on-the floor training that was provided to at least some adjuster-trainees unavoidably communicated to those new employees that the breach of some safety rules was commonplace at the Facility, even if such violations were not expressly endorsed by supervisory personnel.

ii. Adequacy of Supervision

There is a clear divide in the testimony respecting the prevalence of the practice of lifting the scrap chute to clear paper jams. The former AJM adjusters presented by the Secretary indicated that even after AJM implemented the rule prohibiting adjusters from raising the scrap chute to clear paper jams, adjusters continued to do it and that supervisory personnel knew this and were even complicit in it. The testimony of current AJM employees and supervisors indicated the opposite.

James Beals started working at AJM about two months after AJM had implemented the rule that adjusters not lift the scrap chute when clearing a paper jam (T. 169; Ex. R-32), but he was not asked whether he had been informed of or knew about the rule prohibiting raising the scrap chute to clear paper jams. He testified that while he had raised the scrap chute to clear a paper jam, he had done so only "rarely." (T. 214). However, Beals testified that two or three times a week he would raise the scrap chute from its underside (apparently after having opened the interlocked rear access doors) in order to reach screws in the PCM's rails that needed to be tightened from time to time. (T. 213-14, 221-22). He testified that sometimes he would use a hand tool to block the scrap chute to prevent it from falling, and other times he would have someone else hold the scrap chute up to prevent it from falling. (T. 211-12, 222).

David Griner worked as an adjuster from June 2014 to January 2017. In February 2015 he was trained in and understood AJM's work rule prohibiting adjusters from lifting the scrap chute to clear paper jams. (T. 302-04, 350-52; Ex. R-14 at 3; Ex. R-27 at 1; Ex. R-31). Griner testified

that after this training, supervisors became strict on enforcing the rule for about two months, but then he began to see other adjusters, as well as floor supervisors (Egorov and Gaddy), reverting to the practice of lifting the scrap chute to clear paper jams. (T. 360-61). He testified that after seeing others revert to lifting the scrap chute, he started doing it too, and that sometimes the scrap chute would fall from its raised position. (T. 361-62). He was not asked how frequently he engaged in the practice or how frequently he observed others engage in the practice.

Dallas Benjamin was employed as an adjuster-trainee for about three weeks in August and September 2016. He testified that (1) during his short tenure he raised the scrap chute "maybe 10 to 15 times a day" to clear paper jams by accessing the scrap chute through the scrap chute guard on the operator's side of the PCM, (2) he had been taught to do this during his training, (3) he had witnessed other adjusters do the same thing every day, and (4) he had never been instructed to refrain from lifting the scrap chute. (T. 100-01, 153-55).

As previously noted, D.F., who worked as an adjuster from March 2015 to September 2016, testified that he typically raised the scrap chute once a day to clean the PCM's rails, but he was not asked whether he ever had occasion to raise the scrap chute to clear a paper jam. (T. 656-58).

W.F. was employed as an adjuster at the Facility from August 2013 through April 2017, when he voluntarily resigned and took other employment. (T. 2730-32; Exs. R-36 at 1; Ex. R-38 at 1-2). W.F. testified that in 2012 when he was an adjuster-trainee, he was taught to raise the scrap chute to clear paper jams, that this practice was "normal" at that time, and that he had raised the scrap chute to clear jams up until the time he sustained the amputation injury on May 8, 2016. (T. 2746-48). He testified further that he continued to raise the scrap chute to clear paper jams even *after* he suffered the amputation injury. (T. 2748). He testified that he typically lifted the scrap chute about once daily for each PCM he was operating. (T. 2748, 2733). He testified that

after being trained in February 2015 on the rule not to raise the scrap chute to clear paper jams, that he continued to do so, explaining the rule "wasn't really being enforced like that." (T. 2817). He testified further that around the time of his injury in May 2016 he observed other adjusters lifting the scrap chute on a daily basis, and he had even observed his floor supervisors (Efrain Machuca[20] and Salvador Cruz) engage in the practice. (T. 2748-50, 2817-23, 2777). W.F. testified that he was able to clear paper jams faster by raising the scrap chute. (T. 2761).

In contrast, current AJM supervisors testified uniformly that in their surveying of the production floor that they had never seen adjusters raise the scrap chute to clear a paper jam after the rule prohibiting that practice was implemented.

The plant manager, Roger Finckbone, testified that he has never seen the scrap chute in the raised position on the production floor and he could conceive of no circumstances in which it would be necessary for an adjuster to raise the scrap chute in order to do their job. (T. 2498-2502). So far as he was aware, no adjusters had indicated that following the rule would hinder them in performing their job. (T. 2499).

Robert Cutler, the human resources manager at the Facility whose responsibilities included coordinating safety training, investigating accidents, and imposing employee discipline (T. 1425, 1428-30; Ex. R-1), testified he had never seen employees raise or lift the scrap chute, and that if he had, or if that activity had been reported and confirmed, the offending employee would have been disciplined. (T. 1668-73).

Marc Saylor, the assistant plant manager since 2012, testified that he spent four to six hours each day walking the production floor and that prior to implementation of the rule prohibiting

[20] Transcript page 2749 and 2817 reflects the phonetic spelling of W.F.'s identifying Machuca. A correct spelling of the Machuca's name appears at T. 2104.

lifting the scrap chute, he had not been aware that the scrap chute it was capable of being lifted. (T. 1861, 1887-88). He could not conceive of any reason for an adjuster to raise the scrap chute to do their job. (T. 1888).

Brandon Mendieta, who was W.F.'s immediate floor supervisor when he suffered the amputation injury in May 2016, testified that he had never seen W.F. or other adjusters raise the scrap chute. (T. 2109, 2122). (At the time of the CO's walkaround on August 25, 2016, Mendieta was no longer working as a floor supervisor (T. 2122).) Mendieta testified further that it was not necessary for adjusters to raise the scrap chute to do their job (T. 2095), and that before the rule was implemented in February 2015 he was unaware that the scrap chute was capable of being raised. (T. 2098).

Another floor supervisor, Lena Mays, who has worked at the Facility since it opened in 2009, testified that she had not known the scrap chute could be raised until the rule prohibiting adjusters from raising it to clear paper jams was implemented, and that after the rule was implemented she had not witnessed any adjuster raise the scrap chute. (T. 2279-81). She testified she knew of no reason an adjuster would need to raise the scrap chute to do their job, and that no adjuster had indicated to her that it was necessary to raise the scrap chute to perform their job. (T. 2280-81).

Another floor supervisor employed at the Facility since 2009, Bill Samosky, testified that he is on the floor 95% of the time checking employees' work practices. (T. 2334-39). He had been aware that the scrap chute could be raised before the rule prohibiting adjusters from doing so to clear paper jams was implemented. He testified that he believed adjusters would not need to raise it to do their jobs, and that he did not believe raising it made it easier to clear paper jams. (T. 2361-62, 2383-84).

A floor supervisor and a former adjuster, Dmitry Egorov, testified that he could not conceive of a reason for an adjuster to raise the scrap chute to do their jobs. (T. 1963).

One of the two non-supervisory employees called by AJM, Jorge Gonzales, has worked as an adjuster since 2014 and testified that he has never raised the scrap chute. (T. 2422). He testified further that he did not believe it was necessary for adjusters to do so to operate and adjust the PCMs. (T. 2422).

Before W.F. was disciplined in May 2016 for having raised the scrap chute while clearing a paper jam, no other employee had been disciplined for violating this rule. According to AJM managers and supervisors, no such violations had been identified and reported in the approximate fifteen months since the rule had been implemented. (T. 1621, 2610).

The testimony of the former AJM employees about the continued lifting of the scrap chute after the implementation of the rule prohibiting adjusters from raising it to clear paper jams was somewhat scattered with respect to the frequency and reasons adjusters had for lifting it. James Beals testified he had lifted the scrap chute to clear paper jams but had done so only rarely. D.F. testified he raised the scrap chute about one time a day, but only to clean the rails. David Griner testified that he continued to lift the scrap chute after seeing other adjusters and even floor supervisors do so, but he did not testify to how frequently he did so. W.F. testified that on average he raised the scrap chute to clear a jam about one time a day on each of the PCM's he was responsible for, and that he continued this practice even *after* he was seriously injured and then disciplined after having violated the rule. Dallas Benjamin, who worked for only three weeks and did not complete new adjuster training, testified that he lifted the scrap chute 10 to 15 times a day to clear paper jams. AJM argues that the testimony of the former employees should be discredited

for a variety of reasons, including that each had reasons to be disaffected and harbor biases against AJM.

The testimony of current AJM supervisors and employees was generally consistent that none had observed instances of adjusters violating the rule and none could conceive of a reason that an adjuster would need to do so to do their jobs.

The Secretary argues that because AJM modified the mounting mechanism for the scrap chute in a manner that allowed employees to raise the scrap chute with relative speed and ease, it should be inferred that "AJM wanted employees to raise the scrap chute." (Sec'y Br. 39). It is certainly reasonable to infer that this was AJM's objective when it modified the PCMs in this manner, which was sometime before AJM opened the Facility in 2009. (T. 1335). But it is far from clear on this record whether this modification was made to facilitate the work of adjusters rather than some other cohort of employees such as the maintenance mechanics, who are required to remove the scrap chute from time to time. (E.g., T. 1230, 1346-47, 2423-24, 2477-78, 2498). AJM's subsequent implementation in February 2015 of the work rule that was directed only at adjusters and that prohibited adjusters from raising the scrap chute to clear paper jams dispels the inference that the modification was made to entice adjusters to raise the scrap chute. Other evidence that some employees were unaware that the scrap chute could be raised prior to the rule being implemented in February 2015 (T. 2098, 2279), or had discovered only through inadvertence that the scrap chute could pivot upward (T. 2609, 2687), further suggests that AJM's modification to the way the scrap chutes were mounted in the PCMs was not made with a view to encouraging or allowing adjusters to raise the scrap chute. (T. 1346-47, 1375-76).

With the possible exception of Dallas Benjamin's testimony that he lifted the scrap chute 10 to 15 times a day over the course of his three weeks of employment as an adjuster-trainee, the

testimony of former and current employees regarding their practices after the rule was implemented was facially credible. It is entirely believable that W.F., Griner, D.F., and Beals lifted the scrap chute in the manner and frequency with which they testified. Testimony that they had observed floor supervisors do the same is no more credible than the testimony of two of the supervisors they identified who essentially controverted having violated the rule themselves.

The whole of the evidence is insufficient, though barely, to prove by a preponderance that supervisory or managerial personnel had actual knowledge of the rule having been violated through the time of W.F.'s amputation injury on May 8, 2016. The evidence is insufficient to establish by a preponderance that AJM did not adequately supervise adjusters to prevent violations of the rule prohibiting the raising of the scrap chute to clear paper jams.

iii. Anticipating Hazards, and Measures to Prevent Occurrence of Violations

The managers and supervisors at the Facility uniformly believed that adjusters had no need to raise the scrap chute to perform their duties. (E.g., T. 2609, 2498-2500). It was only after an employee was injured in February 2015 after raising the scrap chute while attempting to clear a paper jam that AJM implemented a rule prohibiting that conduct. Even though the rule was not intended to protect adjusters from the gravitational energy present in the raised scrap chute (see footnote 18 *supra*), compliance with the rule would have the unintended ancillary effect of preventing the hazardous physical condition involved in instance "d" from materializing. AJM's rule prohibiting the raising of the scrap chute to clear paper jams was an adequate measure to anticipate and prevent hazards from materializing in view of the AJM's conclusion that there existed no enticement for adjusters to raise the scrap chute to clear paper jams to make their work go faster and to increase their personal productivity. Although W.F. testified that it was his regular practice to raise the scrap chute to clear paper jams and that he believed doing so reduced the time

it took to clear paper jams, the whole of the evidence was insufficient to establish that this practice was widespread among other adjusters, or that it provided a more expeditious means for adjusters to clear paper jams.

iv. Regular Enforcement of Disciplinary Procedures

About 250 employees staffed the Facility covering three shifts a day that included a bustling production floor with more than 30 PCMs. Of the 88 documented disciplinary enforcements in the record for violation of the AJM's Rule 6 (the safe work practices rule) from 2013 to September 30, 2016 (the date the citation was issued), 83 for were for a first violation (requiring a written warning), five were for a second violation (requiring a three-day suspension), and none were for a third violation (requiring termination).

Forty-seven of the 88 violations were for unspecified violations of Rule 6. Sixteen were for unspecified "safety apparel" violations, and eight were for failing to wear earplugs and/or safety glasses. (Exs. R-6, R-23, R. 26 at 2–3 and 9–10; see footnote 5 *supra* regarding duplications in disciplinary actions reflected in Exs. R-6 and R-23).

In the more than three years of disciplinary actions for safety violations in the record that preceded the issuance of the citation, seven of the 88 disciplinary actions were for employees operating machines with guards off. That number of disciplinary actions for violation of this fundamental rule of the workplace is particularly notable, in that while accompanying the CO on his 30-minute walkaround on August 25, 2016, Finckbone and Cutler between them observed the three adjusters involved in instances "a", "b", and "c" (Beals, Mendieta, and Thompson) violating that same rule. No formal discipline was imposed on any of those three employees for those infractions.

While it seems probable that at least some of the 47 unspecified Rule 6 disciplinary actions during this period had been for operating machines with guards off, the whole of the record

strongly suggests that formal discipline as a consequence of breaching that rule was far from regular. Rather, it seems likely that supervisors frequently utilized their discretion simply to deliver oral warnings and coaching. This is what Cutler, the human resources manager, testified that he did regarding Thompson's violation of the rule that he observed on August 25, 2016 during the CO's 30-minute walkaround. And this is apparently what Finckbone, the plant manager, did with respect to Mendieta's violation that same day. (*See, e.g*. T. 527-28, 840, 1727-29, 2124-28, 2453-54).

While AJM's enforcement of its disciplinary protocol for safety infractions appears to have been far from uniform, the whole of the evidence does not indicate that the discretion that floor supervisors possessed to forego formal discipline rendered AJM's disciplinary program ineffective or inadequate. It is notable that several of the former employees that the Secretary called to testify had been disciplined for violations of various work rules including safety rules. W.F. was disciplined in November 2013 for operating machines with guards off. (Ex. R-23 at 54). James Beals was disciplined three times doing the same thing—in August and October 2015 and again in January 2016 (although, contrary to the disciplinary protocol set forth in Rule 6, he was not terminated for what in actuality had been his third violation of Rule 6 over a six-month period). (Ex. R-26 at 2-3, 9-10, 12-13).

v. Lack of Reasonable Diligence to Prevent or Discover Violative Condition for Instance "d" Not Proven

Upon consideration of the factors relevant to determining whether the Secretary met his burden to prove that AJM failed to exercise reasonable diligence to prevent and discover the violative condition, the evidence is closely balanced and is in equipoise. The Secretary has failed to meet his burden to prove this element of the alleged violation by a preponderance of the

evidence. *See Stanley Roofing Co., Inc.*, 21 BNA OSHC at 1464; *Schaffer v. Weast*, 546 U.S. at 56.

8. LOTO Citation Vacated

There is substantial evidence in the record that would support opposite findings on the credibility and reliability of certain testimony. In the final analysis, the undersigned did not find one result more convincing than other differing results, all of which were grounded in crediting some testimony over other countervailing testimony. The undersigned is not reluctant to find that a witness has not been truthful or fully forthcoming when such a finding is warranted and reasons for that finding can be articulated. *E.g., Outfront Media, Inc.*, No. 17-2202, 2020 WL 3119466, at *13 & *19 (O.S.H.R.C.A.L.J., May 4, 2020). But on this record, there are insufficient reasons to discredit certain testimony or to accord greater credit to countervailing testimony on certain dispositive matters. This is the epitome of the evidence being in equipoise. The Secretary having failed to establish any of the four instances alleged to have violated the LOTO standard, citation 2, item 1 must be vacated.

B. <u>Hand Protection Citation– Section 1910.138(a)</u>

Serious citation 1, as first amended by the Secretary's complaint and amended a second time during the hearing, alleges that AJM violated § 1910.138(a) on or about August 17, 2016, averring that AJM "did not provide or ensure use of hand protection to employees who were exposed to harmful temperatures from the paper products exiting the Peerless Cutting Machines." The cited standard, § 1910.138(a), is titled "Hand protection" and is contained in the "Personal Protective Equipment" (PPE) subpart of Part 1910.

Section 1910.138(a) provides as follows: "*General requirements*. Employers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations;

severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes."

The Secretary's theory of the violation was that employees were exposed to a thermal hazard from having to handle stacks of paper plates and bowls that were heated from having recently been processed through the PCM's heated forming dies. (Sec'y Br. 46-53).

"To establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present," the Secretary must demonstrate that "there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE." *Wal-Mart Distrib. Ctr. No. 6016*, 25 BNA OSHC 1396, 1400-01 (No. 08-1292, 2015), *aff'd in relevant part and vacated in part on other grounds*, 819 F.3d 200 (5th Cir. 2016). "The Secretary must show more than the mere possibility of or a potential for injury." *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1783 (No. 90-0050, 1996) (consolidated). Rather, in order to establish that an identified alleged hazard presents a "significant risk of harm," the Secretary must prove that the circumstances in the workplace are "likely to give rise to the alleged hazard" for which the PPE is needed. *See Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57, 63-67 (2d Cir. 1983).

The Secretary failed to prove that handling the paper products presented a significant risk of injury to employees from harmful temperatures. There was no evidence of the actual temperature of the stacks of paper plates and bowls that employees handled. There was no evidence of any employee having ever sustained a thermal injury from handling the stacks of paper plates, notwithstanding that a substantial number of packers, about 90% on the first shift (T. 2370) and about 70% on the third shift (T. 1937), opted not to wear gloves. There was no evidence regarding how much time it takes for a stack of plates or bowls to cool to within 30 °F. (or any

other temperature) of the ambient temperature. There was no scientific or technical evidence respecting the temperatures at which the heated paper products, which by nature are non-conductive, are likely to present a significant risk of thermal injury to persons who were required to repeatedly handle the products. There was no scientific or technical evidence of the properties of the paper stock used at the Facility in retaining and dissipating heat following the paper's contact with the heated forming dies. There is no evidence of any measured time interval between the moment a stack of paper plates or bowls is discharged from the stacker and when the stack reaches the runout table, where the packers would handle them. (T. 2298).

The absence of the type of evidence described above would not necessarily be fatal to the Secretary's case, if there had been reliable testimonial evidence that handling the paper products presented a significant risk of injury from harmful temperatures. But testimony on the risk of such injury was not sufficiently probative to carry the Secretary's burden of proof.

The only witness that the Secretary presented who had worked as a packer at the Facility was Mr. Merris Hopson, who was a former employee who had worked as a packer for two months in 2016. (T. 563). Hopson's testimony, even when accepted at face value, is insufficient evidence to meet the Secretary's burden of proof. He testified he had not experienced any pain or discomfort due to heat from handling the plates, that the heat of the products caused "[j]ust a little tingling, I guess, smoothness in my fingers," and that there were never instances when the paper products were too hot to handle. (T. 559, 562). Hopson indicated that he and other packers allowed the stacks of products that are conveyed to the runout table "to cool off a little bit" before handling them. (T. 560). Hopson suggested further that in the atypical circumstances when a PCM malfunctions in a way that results in the forming die scorching the paper, packers would not immediately handle the scorched product. (T. 560-61).

Several other former AJM employees who had not worked as packers provided conclusory unsupported testimony that there was a significant risk of harm from handling the plates. (T. 238). For example, James Beals made the intuitively impossible supposition that the temperature of the plates exiting the forming dies was as much as 600 °F. (T. 238, 250).

James Griner was another former adjuster at AJM who provided conclusory testimony that "sometimes them plates come out pretty hot, and they burned my hands," but then he indicated that the product "didn't technically burn" (T. 357) and that he was never actually burned but rather that the product is "hot enough to where you can only hold them for a couple of seconds … and that's it." (T. 340). He testified that "not too often" but "every now and then" there would be malfunction and the forming dies would get too hot and the damaged product would be too hot to pick up. (T. 338-39). He did not testify having ever witnessed an employee handle product in that condition.

The CO testified that he conducted private interviews with two packers (Y. Valdez and T. Woolery). One of those packers told the CO that she bought and wore her own gloves because the product was "too hot for her hands" (T. 806, 812), and the other packer told the CO that the "paper plates are very hot when they" exit the PCM so he bought and used his own gloves. (T. 812). The statements of these two packers to the CO, not subjected to exploration on cross-examination, are insufficiently probative to establish that handling the product objectively posed a significant risk of thermal injury to employees.

The Secretary's evidence presented in support of the alleged PPE violation was substantially outweighed by countervailing testimony presented by AJM supporting its argument that the conditions at the Facility do not pose a significant risk of injury from contact with plates that retain residual heat after having exited the PCMs. (*See* evidence cited at Resp't Br. 35).

Accordingly, the amended PPE violation that was originally alleged as serious citation 1, item 1, is vacated for the Secretary's failure to carry his burden of proof.

IV. ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). If any finding is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding. Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1, item 1, as amended, alleging a serious violation of 29 C.F.R. § 1910.138(a), having not been proven, is VACATED.

2. Citation 2, item 1, as amended, alleging four instances ("a", "b", "c" and "d") of a repeated violation of 29 C.F.R. § 1910.147(c)(4)(i), having not been proven, is VACATED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: September 8, 2020