United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Riverdale Mills Corporation, Respondent.	OSHRC Docket No.: **19-1566 & 19-2011**

Appearances:

Scott Miller, Esq. and Joseph R. Landry, Esq.
U.S. Department of Labor, Office of the Solicitor, Boston, MA
For Complainant

Travis W. Vance, Esq. and Davis I. Klass, Esq.
Fisher & Phillips, LLC
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Riverdale Mills Corporation (Riverdale) manufactures coated wire mesh products at its facility in Northbridge, Massachusetts. On April 3, 2019, a Riverdale employee suffered a severe injury to his right arm as he attempted to adjust a length of mesh as it moved through rotating rollers on the Coating Line. The Northbridge Police Department notified the Occupational Safety and Health Administration of the incident. An OSHA Compliance Safety and Health Officer (CSHO) opened a safety inspection at Riverdale's facility later that day. On June 27, 2019, an OSHA Industrial Hygienist (IH) opened a health inspection of the facility.

On September 26, 2019, the Secretary issued a Citation and Notification of Penalty to Riverdale (the Safety Citation), alleging violations of eight safety standards of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 (Act). On December 13, 2019, the Secretary

issued a second Citation (the Health Citation) to Riverdale, alleging violations of four health standards of the Act. After Riverdale contested the Citations, the Commission docketed the Safety and Health Citations as Nos. 19-1566 and 19-2011, respectively. The Safety and Health cases were consolidated for hearing and disposition on February 4, 2020.

The Secretary withdrew Items 7 and 8 of the Safety Citation prior to hearing. The remaining Safety items at issue allege serious violations of 29 C.F.R. § 1910.147, titled *The control of hazardous energy (lockout/tagout)*, known as the LOTO standard. Item 2 alleges a violation of 29 C.F.R. § 1910.147(c)(6)(i); Item 3, alleges a violation of 29 C.F.R. § 1910.147(c)(7)(i)(A); and Items 5a, 5b, 5c, and 5e allege violations of 29 C.F.R. §§1910.147(d)(2), (3), (4)(i), and (c)(4)(i).[1] In the alternative to Instance (a) of Item 5e, Item 6 alleges a violation of 29 C.F.R. § 1910.212(a)(1), a machine guarding standard (Tr. 7-8). The penalties proposed by the Secretary for the remaining Safety items total $32,393.

The Secretary also withdrew Items 1 and 2 of Citation No. 1 of the Health Citation prior to hearing. Remaining from the Health Citation are Item 3 of Citation No. 1, alleging a serious violation of 29 C.F.R. § 1910.1200(h)(1), for failing to provide an employee with information and training on hazardous chemicals; and Item 1 of Citation No. 2, alleging an other-than-serious violation of 29 C.F.R. § 1910.1200(g)(11), for failing to make safety data sheets readily available to OSHA. The Secretary proposes a penalty of $8,525 for Item 3 of Health Citation No. 1 and no penalty for Item 1 of Health Citation No. 2.

The Court held a hearing in this matter from June 14 to June 17 and from August 16 to 19, 2021, in Boston, Massachusetts.[2] The parties have filed post-hearing briefs. For the reasons discussed below, the Court makes the following determinations:

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[1] In the complaint for the Safety Citation, the Secretary amended the designation of Item 1 to Item 5e and grouped it with Items 5a through 5d (the Secretary later withdrew Item 5d). The Secretary withdrew Item 4 but incorporated this language from its alleged violation description into Items 5a through 5c: "On 4/3/2019 the application of energy control (lockout or tagout) actions were not done in the sequence prescribed by the standard in that none of the prescribed steps were performed." (Complaint, ¶ V.A & V.B; Exh. A) The Secretary subsequently moved for leave to amend Items 3, 5c and 5e of the Safety Citation. Judge Gatto, to whom this case was originally assigned, granted in part and denied in part the Secretary's motion in an order issued August 24, 2020. The quoted text of the alleged violation descriptions for the cited items in this decision reflect the amendments made in the Secretary's complaint and Judge Gatto's order.

[2]After the Secretary rested, Riverdale moved for a judgment on partial findings under Fed. R. Civ. P. 52(c) ("If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence.") Riverdale argued the motion separately for the Health Citation (Tr. 1246-58, 1262-66) and the Safety Citation (Tr. 1277-98, 1313-17). The Secretary responded by arguing he had met his *prima facie* case on each of the

Under the Safety Citation, Item 2 of Citation No.1 is **AFFIRMED** and a penalty of $8,525 is assessed. Items 3, 5a, 5b, 5c, 5e, and 6 are **VACATED.**

Under the Health Citation, Item 3 of Citation No. 1 and Item 1 of Citation No. 2 are **AFFIRMED.** A penalty of $8,525 is assessed for Item 3 of Citation No. 1. No penalty is assessed for Item 1 of Citation No. 2.

JURISDICTION AND COVERAGE

Riverdale timely contested the Citations. The parties agree the Commission has jurisdiction over this action and Riverdale is a covered employer under the Act (Tr. 38). Based on the agreement and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and Riverdale is a covered employer under § 3(5) of the Act.

BACKGROUND

Riverdale manufactures coated wire mesh products at its facility in Northbridge, Massachusetts. The coating process occurs on the *coating line*. The coating line is more than 200 feet long and comprises a series of integrated machines and equipment through which the mesh passes, in conveyor-belt fashion, as it is coated, cured, and cooled. The coating line processes rolls of mesh with different gauges and widths of mesh openings, and it applies assorted colors of PVC coating, according to the specifications of the order being run (Tr. 78-79).

Operation of the Coating Line

A splice operator works at the beginning of the coating line and two spindle operators work at its end. The lead coating line operator works at various stations along the coating line and instructs the other operators (Tr. 79-80, 174, 449). To begin the process, a large roll of mesh is placed in the cradle at the first station of the coating line. The splice operator attaches the next roll of mesh to the end of the one being processed, if that particular order requires it (Tr. 79-83). The splice operator uses a *rack* to connect the separate lengths of mesh as they move through the coating line (Tr. 82-83).[3]

The rear drive rollers and the main drive rollers propel the mesh through the coating line. The rear drive rollers are located about 25 feet from the start of the coating line. The main drive

remaining citation items and asking the Court to deny Riverdale's motion (Tr. 1258-61, 1266-67, 1298-1313, 1318-19). The Court deferred ruling on the motion (Tr. 1321). The Court now denies Riverdale's motion.

[3]A former coating line operator described a rack as "generally 12-and-a-half gauge or 10-and-a-half gauge mesh that would be cut into about maybe two-feet lengths with needles bent over like a staple that would be placed underneath the two adjoining pieces that banged over like you're stapling." (Tr. 83)

rollers are located approximately 150 feet downstream from the rear drive rollers (Tr. 84). Between the two sets of rollers, the mesh moves through a series of rinse and wash tanks to remove dirt and debris. From there, the mesh moves through a *wrapper*, designed to "vibrate the mesh to get any excess water off before going into the primer tank." (Tr. 85) The mesh moves to the primer tank. The primer facilitates the PVC coating to adhere to the mesh. The coating line then moves the mesh to the preheat oven, which "heat[s] up the water so the PVC compound can . . . adhere to [it]." (Tr. 85-86) From there, the mesh goes through the fluidized PVC vat (the fluid bed), where "the PVC is put into a fluid state where it cascades around like a waterfall, travels through it, and picks up the PVC powder." (Tr. 86) The mesh then moves to the post-cure oven, which melts the PVC, and then to the cooling chamber. After the cooling chamber, the mesh goes through the main drive rollers, which pull the mesh and maintain tension with the rear drive rollers, to keep the mesh suspended. Finally, the mesh travels to the spindle collection area, where it is rolled up to be cut into smaller rolls (Tr. 87).

On one side of the coating line is a brick wall and on the other side is an aisle. A catwalk rises above the area of the main drive rollers, guarded by a yellow metal railing system (Exh. C-4; Tr. 90-91, 96, 112-13).[4] Next to the main drive rollers is the collection area for the spindle (Tr. 106). There are three different spindles at the end of the coating line (Exh. C4, p. 5a; Tr. 109-10, 1015). The spindle in use collects the coated mesh wire as it emerges from the main drive rollers. When the mesh is collected to its specified length, the spindle operators tie it off or staple it (depending on its gauge), and cut, remove, and place it on pallets (Exh. C-4, p. 5; Tr. 87-88, 111-12). As the finished mesh roll is being removed from the spindle, the next order of mesh moves through the coating line. It folds over on itself and gathers on the floor in the collecting area (Exh. C-40; Tr. 112).

Recurring Problems on the Coating Line

Production problems arise almost every shift on the coating line, including "[t]ension, temperatures, how the wire is welded. Not enough powder in the bed[,]. . . [s]plice breaks; missed splices; not getting rolls off the spindle fast enough; too much collection; shutdowns; startups."

[4] Page 42 of Exhibit C-39 is a photograph showing the catwalk above the main drive rollers. Yellow metal caging can be seen attached to the railing system. At the time of the accident on April 3, 2019, the railing system was in place, but there was space between its vertical supports and between the top rail and the catwalk surface, through which employees could extend their arms and legs. After the accident, Riverdale installed the caging (also referred to as "security fencing") to the railing system, which prevents employees from extending their arms and legs through the railing (Tr. 92, 95, 103).

(Tr. 134) A splice break ("when the two rolls that are attached down at splice come apart . . . where they are attached" (Tr. 135)) causes problems up and down the line: "Lines have got to stop. Mesh is just sitting in hot ovens, sitting in the powder. It could cause heavy coating and lead to a lot of issues." (Tr. 135-36) The coating line also could be shut down due to "equipment failure or mesh that can get jammed up in the drive or too much collection in the collection area, and they can't pick it up because of the weight." (Tr. 136) These issues could affect the quality of the mesh, resulting in a non-conforming product (NCP), which is unusable (Tr. 135).

The April 3, 2019, Accident

The accident that triggered OSHA's Safety inspection in this case occurred the morning of April 3, 2019, during Riverdale's third shift.[5] JR (the lead coating line operator) was working at the fluid bed. The spindle operators were AT (the injured employee) and NM. Production lead AM and supervisor Brian Johnson were onsite (Tr. 176).

Spindle operators AT and NM were collecting mesh on the spindle when they noticed the mesh was out of alignment. It had strayed too far from its intended track to collect on the spindle. The spindle operators used the intercom to call JR for help (Tr. 340, 436, 696, 1463-65, 1482-83).

JR arrived and went up on the catwalk above the main drive. He sat on the catwalk facing the spindle area, extended his leg through a gap in the rails, and pressed his foot on the edge of the moving mesh, about 1½ feet from the nearest rotating roller (Tr. 340-43, 353-58). He was able to move the track of the mesh using this method (Tr. 342). JR left the catwalk and went to the fluid bed station to adjust the mesh's alignment using positioning poles (Tr. 406-07).

After JR went to the fluid bed station, AT left the spindle station and went to a yellow gate on the wall side of the main drive area.[6] A sign was posted on the gate stating,

DANGER
DO NOT ENTER THE AREA
WHILE MACHINE IS RUNNING

(Exh. R-20; Tr. 473-74, 621)

AT opened the gate and entered the area immediately next to the main drive rollers. He attempted to adjust the mesh's alignment near the main drive rollers by grabbing the mesh with

[5] The third shift runs from 9:30 p.m. to 7:15 a m. on Sundays and Mondays, and from 11:00 p.m. to 7:15 a m. on the other days of the week (Tr. 76-77).

[6] There are gates on both the wall side and the aisle side of the coating line (Tr. 543).

his right hand (Tr. 469-70, 472, 1463). As AT did so, his right arm was pulled into the rollers, breaking bones and degloving the skin from his hand to his bicep (Tr. 700).

JR heard AT screaming. He ran to the main drive area and pushed the emergency stop button to deenergize the machinery. AT was unable to remove his arm from the drive rollers. Production lead AM called 911, and EMTs and members of the Northbridge Police Department responded to the call. Eventually a Riverdale employee used a forklift to raise one of the drive rollers so emergency personnel could extricate AT's arm from the machinery. They transported him to a hospital (Exh. C-4, p. 1a; Tr. 88, 701).[7] Two CSHOs arrived later that day to open an investigation after the Northbridge Police Department notified OSHA of the incident (Tr. 885-86).

On June 27, 2019, IH Ann Hart arrived at Riverdale's facility to conduct a Health inspection. She met with Riverdale management personnel, including owner James Knott, corporate counsel Cyril Means, and plant safety manager David Stevens. IH Hart conducted a walkaround inspection with Knott and Means. She interviewed a machine operator and obtained a signed employee statement from him (Exh. C-27; Tr. 1080-82).

Subsequently, the Secretary issued the Safety and Health Citations that gave rise to this proceeding.

THE CITATIONS

The Secretary's Burden of Proof

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., Inc., No. 90-1747, 1994 WL 682922, at *6 (OSHRC Dec. 5, 1994).

The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. See 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Northbridge, Massachusetts, in the First Circuit. Riverdale's principal place of business is also in Massachusetts. Where it is highly probable that a

[7] AT remained hospitalized for a week. He subsequently underwent five surgical procedures for steel plate insertion, debridement, and skin grafts (Tr.701).

case will be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case, even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv*., No. 96-1719, 2000 WL 294514, at *4 (OSHRC March 16, 2000). Here, the parties do not contend, and the Court has not found, relevant First Circuit precedent that differs from the Commission's precedent. The Court therefore applies Commission precedent in this case.

THE SAFETY CITATION (No. 19-1566)

Item 2: Alleged Serious Violation of § 1910.147(c)(6)(i)

The Alleged Violation Description

Item 2 alleges:

> 29 CFR 1910.147(c)(6)(i): The employer did not conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirement of this standard of this standard were being followed:
>
> (a) Site: In Building 1, at the Coating Line, at the Big Spindle . . . : On 4/26/2019 the employer had not conducted a periodic inspection of Energy Control Procedure RMC-022 for the Big Spindle since 4/26/2016.

The Cited Standard

Section 1910.147(c)(1) requires employers to establish an energy control program that includes periodic inspections to ensure employees are trained to lock out machines or equipment before performing servicing or maintenance on them.[8] The cited standard, § 1910.147(c)(6)(i), provides,

> The employer shall conduct a periodic inspection of the energy control procedure at least annually to ensure that the procedure and the requirements of this standard are being followed.

ANALYSIS

(1) The Applicability of the Cited Standard

The cited standard is found in Subpart J (*General Environmental Controls*)) of the Part 1910 general industry standards. Section 1910.147 addresses "the control of hazardous energy (lockout/tagout)," known as LOTO. The *Scope* section of the LOTO standard states it "covers the servicing and maintenance of machines and equipment in which the *unexpected energization* or

[8] Section 1910.147(c)(1) provides:

> The employer shall establish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energizing, startup or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source and rendered inoperative.

start up of the machines or equipment, or release of stored energy, could harm employees. This standard establishes minimum performance requirements for the control of such hazardous energy." § 1910.147(a)(1)(i) (emphasis in original). The LOTO standard "applies to the control of energy during servicing and/or maintenance of machines and equipment" but not to normal production operations. § 1910.147(a)(2)(1).

Here, the Secretary cited Riverdale for failing to conduct periodic inspections of authorized employees for the energy control procedure relating the application of LOTO to a spindle when performing maintenance on it. Riverdale admits the cited standard applies to the violative activity alleged in Item 2 of the Safety Citation (Exh. C-103, p. 8, ¶ 14). The Court determines § 1910.147(c)(6)(i) applies to the cited activity.

(2) Compliance with the Standard's Terms

Sections 1910.147(c)(6)(i)(A) through (D) set out the specific requirements for periodic inspections:

> (A) The periodic inspection shall be performed by an authorized employee other than the ones(s) utilizing the energy control procedure being inspected.
>
> (B) The periodic inspection shall be conducted to correct any deviations or inadequacies identified.
>
> (C) Where lockout is used for energy control, the periodic inspection shall include a review, between the inspector and each authorized employee, of that employee's responsibilities under the energy control procedure being inspected.
>
> (D) Where tagout is used for energy control, the periodic inspection shall include a review, between the inspector and each authorized and affected employee, of that employee's responsibilities under the energy control procedure being inspected, and the elements set forth in paragraph (c)(7)(ii) of this section.

Riverdale has a written LOTO procedure that requires its facility manager to "conduct an annual review of the written energy control procedures with maintenance supervision to ensure that the procedure and the requirements of the Program are being followed." (R-57, p.13, ¶ 7.0) Riverdale's written procedure tracks OSHA's requirements for a compliant energy control procedure:

> 7.1 Each AUTHORIZED EMPLOYEE shall undergo at the minimum an annual inspection of their understanding of LOCKOUT/TAGOUT procedures by undergoing a LOCKOUT/TAGOUT Practical Demonstration conducted by the Facilities Manager to identify any deviations or inadequacies.
>
> . . .
>
> 7.3 A *Lockout Tagout Practical Demonstration Checklist (Appendix B)* will be used to record the results of each inspection and filed on the Riverdale Mills fileserver[.]

(Exh. R-57, p. 13) (emphasis in original) Under the LOTO standard, an *authorized employee* is "[a] person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment." § 1910.1457(b).

Page 16 of Riverdale's written LOTO procedure (Exh.R-57) is a checklist form listing a number of tasks on which the authorized employee is to be tested for lockout and tagout procedures. The words *Pass* and *Fail* are next to each task so the person conducting the inspection can circle the appropriate word. The checklist states twice (for both the lockout and the tagout sections) that "Failure in any category above must be marked as an Overall Fail and training must be retaken prior to retest." (*Id*.)

Riverdale maintains a *Lockout Tagout Log* that records the dates LOTO is applied and removed from a piece of equipment and the names of the authorized employees performing the LOTO procedure (Exh. C-16). On April 26, 2019, Riverdale employees TB and EM were members of the maintenance department. TB was the maintenance supervisor and EM was a maintenance mechanic (Tr. 829, 841). That day, TB and EM applied and then removed LOTO to and from a piece of equipment listed as a "C-Spindle." (Exh, C-20, p. 4) TB testified "C-spindle" refers to a coating line spindle. He stated he and EM were performing maintenance on a spindle that day, and they were authorized employees (Tr. 839-42).[9]

TB testified he had worked for Riverdale from the late 1990s to approximately 2005 and then left for other employment. He returned to Riverdale and worked from approximately 2016 to December of 2019. He held the position of maintenance supervisor the last 14 months of his employment with Riverdale (Tr. 828-29). During the time TB worked both as a maintenance

[9] Riverdale argues the Secretary "presented no evidence regarding when [TB] became an authorized employee." (Riverdale's *Brief*, p. 8) Riverdale's argument is disingenuous. The record establishes that one of the main functions of the maintenance department is to apply LOTO to machinery and equipment when performing servicing work. TB is Riverdale's maintenance supervisor. He testified he and EM were authorized employees (Tr. 842). TB testified employees in the maintenance department performed "[s]ervice on equipment, machines building facilities, preventive maintenance." (Tr. 832) Both as a maintenance mechanic and a maintenance supervisor, TB performed maintenance on the coating line using the LOTO "program that applied to the maintenance department." (Tr. 834) He testified the maintenance department used Riverdale's *Lockout Tagout Log* to record "the individual locking out, the time, date, and piece of equipment." (Tr. 835) TB stated Riverdale management informed him he "was in charge" of the LOTO program (Tr. 850). When he hired EM, he trained him as an authorized employee (Tr. 864). The Court finds TB and EM were authorized employees in that they "lock[ed] out or tag[ged] out machines or equipment in order to perform servicing or maintenance on that machine or equipment." § 1910.1457(b).

mechanic and as a maintenance supervisor, Riverdale personnel never performed a periodic inspection of his proficiency in LOTO procedures (Tr. 843, 864).[10]

As part of its inspection, OSHA requested from Riverdale copies of completed periodic inspections for "each piece of equipment comprising the Coating Line" between April 26, 2016, and April 26, 2019 (the date TB and EM applied LOTO to one of the coating line's spindles) (Exh. C-14, p. 2). Riverdale did not produce any completed periodic inspection records that meet the requirements of 1910.147(c)(6)(i)(A) through (D), including its own *Practical Demonstration Checklist* for that time period (Tr. 937-38, 940-41, 949-51).

Riverdale makes several arguments in opposition to the Secretary's case, none of them meritorious. First, Riverdale argues the alleged violation description for Item 2 misidentifies the "C-spindle" to which TB and EM applied LOTO as "the Big Spindle." Riverdale contends there are three spindles on the coating line and "no evidence was presented regarding which of the three, if any, was the 'big spindle' identified in the citation." (Riverdale's *Brief*, p. 5) The evidence establishes TB and EM applied LOTO to a spindle on the coating line on April 19, 2019. TB stated he had not been the subject of a periodic inspection for LOTO proficiency for *any* energy control procedures. When asked why not, TB responded the previous "supervisors that were there were not there long enough." (Tr. 843)

Periodic inspections are required for *each* authorized employee. §§ 1910.147(c)(6)(i)(C) and (D). TB, an authorized employee, testified Riverdale had never, in the cumulative nine years he worked at the facility, performed a periodic inspection with him, either as a mechanic or a supervisor. Therefore, when TB applied LOTO to a spindle on the coating line on April 26, 2019, Riverdale was in noncompliance with the cited standard.

Riverdale also contends that TB, "as the employee conducting periodic inspections, was not required to inspect himself." (Riverdale's *Brief,* p. 8) This argument is nonsensical. No one has suggested an authorized employee should conduct a periodic inspection on himself. Any authorized employee may conduct a periodic inspection for the authorized employee applying the LOTO. The LOTO standard specifically states that the periodic inspection "shall be performed by

[10] Riverdale's failure to conduct a periodic inspection for TB is established by his testimony. The Secretary also contends Riverdale did not conduct a periodic inspection for EM. The Secretary was unable, however, to establish how long EM had been working for Riverdale at the time he and TB applied LOTO to the spindle. TB stated he hired EM and he "wanted to say" EM had worked at Riverdale for more than a year by April 26, 2019, but he was not "sure about that." (Tr. 858) Because the record does not establish EM had worked for Riverdale for at least a year, the Secretary cannot establish Riverdale failed to conduct an annual periodic inspection with him.

an authorized employee *other than the ones(s) utilizing the energy control procedure being inspected.*" § 1910.147(c)(6)(i)(a) (emphasis added). Riverdale's own written LOTO procedure states that periodic inspections shall be "conducted by the Facilities Manager to identify any deviations or inadequacies." (Exh. R-57, p. 13, ¶ 7.1) It was incumbent on Riverdale to ensure an authorized employee conducted a periodic inspection with TB in order to comply with the cited standard.

Finally, Riverdale argues its failure to produce periodic inspection certifications, either by its *Practical Demonstration Checklist* forms or by other documentation, cannot be used as evidence it failed to comply with § 1910.147(c)(6)(i) because the cited subsection does not require certification. Certification is required by § 1910.147(c)(6)(ii) (the next subsection after the cited subsection), which provides:

> The employer shall certify that the periodic inspections have been performed. The certification shall identify the machine or equipment on which the energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection.

Riverdale misconstrues the significance of its failure to produce certifications of periodic inspections. The Secretary alleges Riverdale failed to conduct periodic inspections of authorized employees in the use of LOTO procedures. In support of this allegation, the Secretary adduced evidence that on April 26, 2019, Riverdale's maintenance supervisor and a maintenance mechanic applied LOTO to a spindle on the coating line. Riverdale failed to provide periodic inspection certifications for either of the two employees in response to a request from the Secretary for such documentation for "each piece of equipment comprising the Coating Line" between April 26, 2016, and April 26, 2019." (Exh. C-14, p. 2) At the hearing, the maintenance supervisor testified he had worked at Riverdale for a total of nine years and had never been subject to a periodic inspection. With this, the Secretary has made a prima facie case establishing Riverdale failed to comply with § 1910.147(c)(6)(i).

Riverdale could rebut the Secretary's case with evidence it had, in fact, conducted periodic inspections of authorized employees. One way to do so would be to adduce certifications of the periodic inspections. Since both § 1910.147(c)(6)(ii) and Riverdale's written LOTO program require these certifications to be maintained, it is reasonable to infer that Riverdale would have produced the certifications if they existed.

In *Well Solutions, Inc., Rig No. 30*, No. 91-340, 1995 WL 242595 (OSHRC April 19, 1995), the Secretary alleged the respondent (WS) failed to provide required first aid training to an employee or employees where no medical facility was near the worksite. OSHA conducted a fatality investigation of WS after an explosion killed two men in four-man crew. The two surviving employees testified they had not received training in first aid. It was their opinion that one of the two deceased employees (who was their cousin) also had not received first aid training. There was no specific evidence regarding whether the other deceased employee had been trained in first aid. WS argued the Secretary should have made a greater effort to determine whether the deceased employees had received first aid training. The Commission rejected this argument.

> [W]e conclude that the Secretary has introduced sufficient evidence to establish a prima facie showing of a violation. WS presented no evidence to rebut the Secretary's case, even though it would have possession of any first aid training records. While the Secretary's evidence is not overwhelming, it is sufficient in the absence of rebuttal, and therefore we conclude that the Secretary has proven a violation of section 1910.151(b).

Id. at *4.

Here, Riverdale was required to maintain periodic inspection certifications for each authorized employee. If Riverdale had conducted the required periodic inspections, it is expected Riverdale would have possession of the certifications. Because Riverdale did not produce the certifications, the Court finds the Secretary's case (specifically TB's undisputed testimony that Riverdale had *never* conducted a periodic inspection with him during his employment) is unrebutted.

The Secretary has established Riverdale violated § 1910.147(c)(6)(i).

(3) Employee Access to the Violative Condition

It is undisputed TB and EM applied LOTO to a spindle on the coating line on April 26, 2019. TB testified that, according to Riverdale's energy control procedures for the coating line spindle, the spindle presents electric and pneumatic hazards, including "the quick disconnect for the couplings for the compressed air, which may contain debris, which could be released [at] 110 psi." (Tr. 842)

Without conducting the required periodic inspections, the employer cannot ensure its authorized employees understand and will implement the appropriate LOTO procedures for the relevant equipment and machinery. In the preamble to the LOTO standard, OSHA states the cited standard "will assure that employees follow and maintain proficiency in the energy control

procedure, and that the inspector will be better able to determine whether changes are needed." Control of Hazardous Energy Sources (Lockout/Tagout), 54 FR 36644-01, 36673 (September 1, 1989).

The Secretary has established employee access to the violative condition.

(4) Employer Knowledge

TB was Riverdale's maintenance supervisor on April 26, 2019. He knew Riverdale had never conducted a periodic inspection of his LOTO proficiency. The Tenth Circuit has held that employer knowledge of the violative condition "will almost invariably be present where the alleged violative condition is inadequate training of employees." *Compass Env't, Inc. v. Occupational Safety & Health Rev. Comm'n*, 663 F.3d 1164, 1168 (10th Cir. 2011).[11] The Court finds employer knowledge is likewise present where the violative condition concerns the employer's failure to conduct periodic inspections of authorized employees. TB's knowledge that Riverdale had never conducted a periodic inspection with him under § 1910.147(c)(6)(i) when he was a maintenance mechanic and that he, as maintenance supervisor, had never conducted such inspections on other employees, is imputed to Riverdale.[12]

The Secretary has established Riverdale had actual knowledge of the violative condition. The Court finds the Secretary has established all elements of his burden of proof. Therefore, Item 2 is **AFFIRMED.**

Characterization of the Violation

The Secretary characterized the violation of § 1910.147(c)(6)(i) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Here, an authorized employee was exposed to the electrical and pneumatic hazards presented in the application of LOTO to a spindle on the coating line without undergoing a period inspection to confirm his proficiency. The violation is properly characterized as serious.

Items 3, 5a, 5b, 5c, and 5e: Alleged Serious Violation of §§ 1910.147(c)(7)(i)(A), (d)(2), (d)(2), (d)(4)(i), and (c)(4)(i)

Alleged Violation Descriptions

[11] Although the cited case is not precedential in this proceeding, the Court finds its reasoning persuasive.

[12] TB testified he began conducting periodic inspections of maintenance department employees after OSHA's Safety inspection occurred (Tr. 843-50).

The alleged violation descriptions (AVDs) for Item 3, 5a, 5b, 5c, and 5e of the Safety Citation each cite two incidents that occurred on April 3, 2019, when the lead coating line operator and a spindle operator attempted to adjust an order of mesh after it became misaligned as it moved through the coating line. Items 3, 5a, 5b, and 5e each cite two instances. Instance (a) cites the lead coating line operator's attempt to realign the mesh by extending his leg through the rails of the catwalk and placing his foot on the mesh as it moved through the coating line. Instance (b) cites the spindle operator's attempt to realign the mesh by opening the gate to the main drive area, entering it, and reaching near the main drive rollers to adjust the mesh with his right hand. Item 5c combines both of the incidents in Instance (a) ("employees at the catwalk and Main Drive engaged in activities requiring the use of" LOTO).

Riverdale does not dispute the lead coating line operator and the spindle operator engaged in the cited conduct. It contends, however, that the LOTO standard (subsections of which the Secretary alleges Riverdale violated for each of the five items) does not apply to the cited activity. Because the five items cite the same employee conduct and related subsections of the LOTO standard, the Court groups the five items for the purpose of discussing the applicability of the standard.

For reference, the AVDs and the cited standard subsections and of the five items are as follows:

Item 3

The AVD

> 29 CFR 1910.147(c)(7)(i)(A): Authorized employee(s) did not receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.
>
> (a) Site: Building 1, at the Coating Line, on the catwalk above the Main Drive component . . . : On 4/3/2019 affected employees performed the duties of authorized employees including when those employees performed tasks from the catwalk that required them to remove or bypass guards in order to adjust moving wire mesh material while the Coating Line was operating.
>
> (b) Site: In Building 1, at the Coating Line, at the Main Drive on the wall side . . . : On 4/3/2019 affected employees performed the duties of authorized employees when those employees performed tasks that required they remove or bypass guards in order to adjust moving wire mesh material.

The Cited Standard

Section 1910.147(c)(7)(i)(A) provides:

Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

Item 5a

The AVD

29 CFR 1910.147(d)(2): The machine or equipment was not turned off or shut down using the procedures established for the machine or equipment:

(a) Site: Building 1, at the Coating Line, on the catwalk above the Main Drive component . . . : On 4/3/2019 On 4/3/2019 the application of energy control (lockout or tagout) actions were not done in the sequence prescribed by the standard in that none of the prescribed steps were performed. On 4/3/2019 a Coating Line Operator did not turn off or shut down the Main Drive using the procedures established for the machines or equipment prior to starting work covered by this subpart.

(b) Site: Building 1, at the Coating Line, at the Main Drive on the wall side . . . : On 4/3/2019 the application of energy control (lockout or tagout) actions were not done in the sequence prescribed by the standard in that none of the prescribed steps were performed. On 4/3/2019 a Coating Line Operator did not turn off or shut down the Main Drive using the procedures established for the machines or equipment prior to starting work covered by this subpart.

The Cited Standard

Section 1910.147(d)(2) provides:

The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment. An orderly shutdown must be utilized to avoid any additional or increased hazard(s) to employees as a result of the equipment stoppage.

Item 5b

The AVD

29 CFR 1910.147(d)(3): All energy isolating devices that were needed to control the energy to the machine or equipment were not physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s):

(a) Site: Building 1, at the Coating Line, on the catwalk above the Main Drive component . . . : On 4/3/2019 the application of energy control (lockout or tagout) actions were not done in the sequence prescribed by the standard in that none of the prescribed steps were performed. On 4/3/2019 the energy isolating device that w[as] needed to control the energy to the Main Drive was not moved into the off position to isolate the machine or equipment from the energy source(s) prior to starting work covered by this subpart.

(b) Site: Building 1, at the Coating Line, at the Main Drive on the aisle side . . . : On 4/3/2019 the application of energy control (lockout or tagout) actions were not done in the sequence prescribed by the standard in that none of the prescribed steps were performed. On 4/3/2019 the energy isolating device that w[as] needed to control the energy to the Main Drive was not moved into the off position to isolate

the machine or equipment from the energy source(s) prior to starting work covered by this subpart.

The Cited Standard

Section 1910.147(d)(3) provides:

All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s).

Item 5c

The AVD

29 CFR 1910.147(d)(4)(i): Lockout or tagout devices were not affixed to each energy isolating device by authorized employees.

(a) Site: At the Coating Line . . . On 4/3/2019 the application of energy control (lockout or tagout) actions were not done in the sequence prescribed by the standard in that none of the prescribed steps were performed. On 4/3/2019 employees at the catwalk and Main Drive were engaged in activities requiring the use of Lockout/Tagout procedures and Lockout/Tagout devices were not affixed to energy isolating devices by employees prior to commencing with work.

The Cited Standard

Section 1910.147(d)(4)(i) provides:

Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.

Item 5e

29 CFR 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:

(a) Site: Building 1, at the Coating Line, on the catwalk above the Main Drive component . . .: On 4/3/2019 a Coating Line Operator working from the catwalk did not utilize Lockout/Tagout procedures for the control of potentially hazardous energy prior to commencing with activities covered by this subpart. This included using his foot on the moving wire mesh in order to straighten it.

(b) Site: Building 1, at the Coating Line, at the Main Drive on the wall side . . .: On 4/3/2019 a Coating Line Operator did not utilize Lockout/Tagout procedures for the control of potentially hazardous energy prior to commencing with activities covered by this subpart. This included accessing the main drive area while the wire mesh was moving in order to straighten it.

The Cited Standard

Section 1910.147(c)(4)(i) 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.

ANALYSIS

Applicability of the LOTO Standard

The LOTO standard applies to "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 harm employees." § 1910.147(a)(1)(i) (emphasis in the original). Section 1910.147(b) defines *servicing and/or maintenance* (referred to herein as "servicing work") as

> 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.

Here, it is undisputed JR, the lead coating line operator, and AT, the spindle operator (and injured employee) were not exposed to the unexpected energization, start up, or release of stored energy of the coating line machinery because it was operating when they attempted to realign the mesh.

The Secretary argues the employees were engaged in servicing work when they attempted to realign the mesh. Although the LOTO standard generally does not apply during normal production operations, it may apply to servicing work performed during production if it occurs under either of two specific conditions. Section 1910.147(a)(ii) provides:

> Normal production operations are not covered by this standard[.] . . . Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if:
>
> (A) An employee is required to remove or bypass a guard or other safety device; or
>
> (B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle.

Riverdale counters that, in attempting to realign the mesh as it proceeded along the coating line, JR and AT were not engaged in any of the activities defined as servicing work by § 1910.147(b): constructing, installing, setting up, adjusting, inspecting, modifying, lubricating, cleaning or unjamming machines or making adjustments or tool changes. Any adjustments they attempted were on the mesh, not the coating line machinery.

In support of his argument, the Secretary cites the preamble to the LOTO standard.

> [U]sing [a] . . . . table saw, it may be necessary for the employee to remove a piece of wood which has become jammed against the blade of the saw. In doing so, the employee might need to bypass or remove the guard on the saw and reach into the point of operation. Although this action takes place "during" normal production operations, it is not actually production, but is *servicing of the equipment to perform its production function*. When such servicing may expose the employee to the unexpected activation of the machinery or equipment, or to the release of stored energy, this Final Rule will apply. If the servicing is performed in a way which prevents such exposure, such as by the use of special tools and/or alternative procedures which keep the employee's body out of the areas of potential contact with machine components or which otherwise maintain effective guarding, this standard will not apply. *Thus, lockout or tagout is not required by this standard if the employer can demonstrate that the alternative means enables the servicing employee to clean or unjam or otherwise service* the machine without being exposed to unexpected energization or activation of the equipment or release of stored energy.

Control of Hazardous Energy Sources (Lockout/Tagout), 54 FR 36644-01, 36646-47 (Sept. 1, 1989) (emphasis added).

The example in the preamble to the LOTO standard is distinguishable from the situation at issue. In the example, a piece of wood "has become jammed against the blade of the saw." Jamming affects the operation of a machine, and the LOTO standard identifies unjamming as a form of servicing work. Here, the coating line machinery was operating in the manner intended—it was the mesh that went off track. JR and AT were not attempting to adjust or service "the equipment to perform its production function"; they were adjusting the mesh, i.e. the product being manufactured.[13] The Court finds JR and AT were not engaged in servicing work when they engaged in the cited conduct.

Assuming JR and AT were engaged in servicing work during normal production operations, the Secretary must establish Riverdale either required JR to extend his leg through the rails of the catwalk or required AT to open the gate to the main drive area ("An employee is required to remove or bypass a guard[.]" § 1910.147(a)(2)(ii)(A)); or Riverdale required JR to place his foot on top of the mesh to adjust it or required AT to reach towards the main drive rollers to grab the mesh to adjust it ("An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being

[13] Furthermore, Riverdale provided alternative means to enable coating line operators to realign the mesh without exposing themselves to hazardous conditions. The alternative means for realignment of the mesh are discussed in the section addressing witness testimony.

processed (point of operation) or where an associated danger zone exists during a machine operating cycle." § 1910.147(a)(2)(ii)(B)).

In support of his argument that Riverdale required JR and AT to bypass guards and insert parts of their bodies in machinery or associated danger zones, the Secretary cites *Burkes Mechanical, Inc.,* No. 04-475, 2007 WL 2046814 (OSHRC July 12, 2007). In that case, employees of Burkes Mechanical, Inc. (BMI) were required to continually clean debris underneath a moving conveyor (but not to clean the conveyor itself). BMI contended the LOTO standard did not apply to the employees' work because the employees were aware the conveyor was in operation while they were working near it. The Commission disagreed, finding the cleaning work created "an associated danger zone . . . during a machine operating cycle." § 1910.147(a)(2)(ii)(B). The Commission held,

> The preamble [of the LOTO standard] discusses hazards—quite similar to those presented in this case—that pertain to servicing or maintaining a machine during normal production operations:
>
> > Performance of maintenance or servicing activities on a machine or equipment that is in operation has the potential of exposing employees not only to contact with moving machinery components at the point of operation, but also to contact with other moving components, such as power transmission apparatus, and also increases the risk of injury due to the position the employee must assume and the need to remove, bypass or disable guards and other safety devices. In many cases, these activities expose the employee to the hazard of being pulled into the operating equipment when parts of the employee's body, clothing or the material or tools used for cleaning or servicing become entrapped or entangled in the machine or equipment mechanism.
> >
> > . . .
>
> *See* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,647. Here, an increased risk of injury existed for those BMI laborers cleaning in Areas B and C who had to assume cramped, awkward positions while shoveling the debris in close contact with the operating equipment and were, thus, exposed to the hazard of being pulled into the operating equipment.

Id. at *5.

Riverdale argues that, unlike BMI, it did not require its employees to work in an associated danger zone when attempting to realign the mesh as it moved through the coating line. Instead, Riverdale provided five different authorized methods to adjust the mesh that did not expose employees to points of operation or danger zones of the coating line. Several Riverdale employees, including JR and AT, testified regarding their training in methods for realigning the mesh when it went off track and what Riverdale required them to do.

Witness Testimony

AM, Production Lead

AM worked for Riverdale for approximately six years. He worked as the lead coating line operator and later became a production lead, the position he held the night of AT's accident (Tr. 519). AM was working that night, but he did not see the accident occur (Tr.603, 635). AM was no longer working for Riverdale at the time of the hearing (Tr. 518).

AM trained JR to take over the position of lead coating line operator (Tr. 524-25). AM described how training was accomplished. "I learned from the guy before me. I picked up on little tricks he had, and it goes down the chain that way. You learn from the guy before you." (Tr. 564)

AM testified it was the lead coating line operator's responsibility (and not the responsibility of the spindle operators) to realign mesh that had gone off track on the coating line (Tr. 565). The mesh could only be realigned while the coating line was operating (Tr. 613). He trained JR to keep the mesh straight as it moves through the coating line by using "poles" to guide it.

> We have poles that we put up at the fluid beds. . . [W]e use guides at splice. Sometimes you've got to use them in other spots of the line to try and keep the mesh from walking. . . . There's a setup at the fluid bed where you can lock the poles in place so the mesh can't push them.

(Tr. 580-81) Another set of poles was near the catwalk that employees could use to move the mesh (Tr. 612). Near the splice end of the coating line, there were guards that could be used to adjust the track of the mesh (Tr. 613).

Coating line employees could also use camber rollers to realign mesh using controls on an operator panel (Tr. 611). "There are rollers underneath the catwalk after the cooling chamber that you can use to help prevent leans or help guide the mesh where you want it to go." (Tr. 602) In addition to the poles at the fluid bed, the poles at the catwalk, the camber rollers, and the guards near the splice end, coating line operators could adjust the mesh by offsetting the next spliced section so the mesh lines up correctly (Tr. 613).

AM stated he sometimes used his foot to move the mesh rather than the other available methods because "it fixes the problem quicker." (Tr. 664) He testified that moving the mesh with his foot is something JR "picked up from me, and I've seen him do it." (Tr. 590) AM conceded he had shown JR how he would sit on the catwalk platform and extend his leg through the rails to place his foot on the mesh to move it (Tr. 581). "If the mesh is walked too much to one side, then you've got to push it another way, the opposite way, that's where I use the trick [counsel is] referring to with the foot." (Tr. 582) AM described his technique:

> Me personally, and the way people have seen me do it, I sit on the catwalk because even with my leg fully extended out, I can't reach the drive. And you would just push it as it goes, take your foot off, push it a little, go with it and it will move whichever side you're trying to push it towards.

(Tr. 582)

AM conceded that even though he was supposed to notify supervisor Brian Johnson if the mesh became misaligned on the coating line and required correcting, he did not do so (Tr. 607). He also admitted he knew his method of aligning the mesh with his foot as he sat on the catwalk was contrary to Riverdale's safety rules.

> Q.: Did you recognize that when you put your foot through the catwalk to adjust the mesh while the mesh was moving that it was against Riverdale Mills's safety protocols at the time?
>
> AM: Yes.
>
> Q.: And you knew it was against their safety protocols because you were putting a part of your body past the yellow marking when the line was moving, correct?
>
> AM: Correct.
>
> Q.: And you also knew it was against protocol because doing so was not how you were trained, correct?
>
> AM: Correct.
>
> Q.: You were not trained to put your foot through the catwalk to move the mesh, correct?
>
> AM: Correct.
>
> Q.: And no one showed you to move the mesh with your foot, correct?
>
> AM: Correct.
>
> Q.: You were instructed on other ways to adjust the mesh, correct?
>
> AM: Using poles.
>
> Q.: You came up with adjusting the wire mesh with your foot on your own, right?
>
> AM: Yep.
>
> . . .
>
> Q.: And you never trained [JR] to use his foot past the catwalk, right?
>
> AM: I didn't tell him to do it, but I will own up and say he probably picked it up from me. He probably [saw] me do it and picked it up on his own, but it's not how I instructed him to do it.

(Tr. 615-17)

AM was not aware of anyone aside from himself and JR who used this method to align the mesh (Tr. 617). He did not use the method in the presence of supervisor Brian Johnson because he "didn't want to get in trouble or written up." (Tr. 618).

Regarding the yellow gate that led to the main drive area, AM stated he had never seen the gate opened or any coating line operators in the main drive area (Tr. 621-22). He testified there was no reason for a spindle operator to enter the main drive area (Tr. 637-38). When asked his opinion of AT as an employee, AM responded he "lacks common sense." (Tr. 668-89)

JR, Lead Coating Line Operator

JR worked for Riverdale from August 2018 to March 2021.[14] He was the lead coating line operator on the third shift. He was working in that position the night of the accident. (Tr. 75-77). JR received training for his position as lead coating operator from production lead AM in October 2018, through observation and on-the-job training (Tr. 131). He observed AM adjust the mesh with his foot from the catwalk (Tr. 380).

Like AM, he acknowledged he knew he was supposed to inform supervisor Brian Johnson if the mesh on the coating line needed to be corrected, but he did not do so (Tr. 403-04). He also conceded Riverdale had provided several methods for adjusting the mesh, and it was unnecessary to use his foot to realign it (Tr. 408-14). Like AM, he adjusted the mesh with his foot because "[i]t was easier to me." (Tr. 500)

JR was aware Riverdale's safety rules did not permit employees to use their feet to adjust the mesh from the catwalk.

> Q.: And you understood that using your foot was against Riverdale Mills's safety rules, correct?
>
> JR: Correct.
>
> Q.: And it was not standard operating procedure; is that right?
>
> JR: No.
>
> Q.: And it wasn't something that [AM] told you to do, correct?
>
> JR: Correct.
>
> Q.: You never moved the mesh with your foot in front of Brian Johnson, correct?
>
> JR: Not that I am aware of.
>
> Q.: You were not trained to put your boot or your foot through the catwalk to adjust the wire mesh, correct?
>
> JR: Correct.

(Tr. 427-28)

[14] JR left Riverdale's employment shortly after the April 3, 2019, accident. He returned to work at Riverdale in July 2020 and left again in March 2021. At the time of the hearing, JR was no longer at Riverdale (Tr. 74-76).

JR testified that both he and AM understood adjusting the mesh with their feet was not an authorized method for realigning the mesh.

> Q.: Did [AM] ever tell you not to [use your foot to adjust the mesh]?
>
> JR: Kind of.
>
> Q.: What do you mean?
>
> JR: He said I am not telling you to do this. He said you shouldn't but it works for me.

(Tr. 382)

Regarding AT's accident, JR testified there was no reason for AT to open the gate and enter the main drive area (Tr. 471). JR had never seen anyone attempt to adjust the mesh from the main drive area while the coating line was operating. He was surprised to see AT had attempted it (Tr. 472).

AT, Spindle Operator

AT began working for Riverdale in December of 2018 (Tr. 675). He worked as a spindle operator until the night of his accident on April 3, 2019 (Tr. 677). He often worked with spindle operators NM and MC (Tr. 689-90, 717). AT returned to Riverdale and performed light work in October of 2019 (Tr. 729). At the time of the hearing, he was unemployed (Tr. 674).

AT testified that part of his job was to adjust the mesh if it was misaligned. He adjusted the mesh in the main drive area from the aisle side "a couple of times a week . . . [b]y reaching in and pulling it over towards me or by pushing it away from me." (Tr. 699) He stated he had observed "multiple people do it" including AM, JR, and MC (Tr. 699) AT stated the gate to the main drive area was always open (Tr. 732-34, 743). "All of the time, 90 percent of the time it was open. I physically did not touch it." (Tr. 742-43)

When AT returned to Riverdale after his accident, he received a write-up as a disciplinary action and was retrained in safety procedures (Tr. 730). AT was upset by the write-up. "I believe I should have been coached, not disciplined." (Tr. 731)

ER, Spindle Operator

ER worked as a spindle operator on the coating line for one month (March 5 to April 5, 2019) until he was fired for drinking alcohol on the job (Tr. 799, 815-16, 818-21). He primarily worked the second shift on the coating line (Tr. 801). ER testified the yellow gate used to access the main drive area "was always open for at least the whole month I was working there." (Tr. 801)

On cross-examination, ER stated he contacted OSHA in April of 2019 after he was fired because he was mad at Riverdale (Tr. 821). He told the CSHO he spoke with that he had quit working at Riverdale (rather than being fired). ER admitted at the hearing that statement was "not true." (Tr. 813) He disputed the CSHO's notes showing he had told her he worked the third shift with AT and he left Riverdale due to an arm injury (Tr. 813-15).

NM, Spindle Operator

NM began working at Riverdale in November 2018. On April 3, 2018, he was a third-shift spindle operator working with AT. NM was still employed with Riverdale at the time of the hearing (Tr. 1452-53).

NM testified he never observed the yellow gate used to access the main drive area open while the coating line was operating (Tr. 1461). He had never observed coating line operators work in the main drive area with the gate open (Tr. 1462).

NM described AT's actions the night of his accident: "He bypassed a door, stuck his arm in and then it got stuck and trapped in which he broke his arm in two places." (Tr. 1461) "[AT] ran around me, went to the main drive. Thought he could help and then he stuck his arm in there, which he got caught and hurt himself." (Tr. 1463) NM testified that as he attempted to move the mesh from the spindle area, AT

> walked behind me, got into like the main drive area. Thought he could help [JR] by moving it. I don't know what he was thinking. Stuck his arm inside the yellow caution pinch-point area. Tried to grab it. And literally, glove got stuck and got his arm sucked in. That's not like a way how we move the mesh at all. We don't stick our hands in there.

(Tr. 1465)

NM had never seen AT or any other Riverdale employee enter the main drive area while the coating line was operating (Tr. 1467).

Brian Johnson, Third-Shift Supervisor

Brian Johnson began working for Riverdale in October of 2018 as a shift supervisor (Tr. 1132). He was working for Riverdale at the time of the hearing. On April 3, 2019, Johnson was the supervisor for Riverdale's third shift (Tr. 1323).

Johnson testified the yellow gate used to access the main drive area was always closed. He had seen only maintenance department employees enter the main drive area, and that was when the coating line was not operating and LOTO had been applied to the main drive (Tr. 1375). Coating line operators, including spindle operators, were not supposed to open the gate (Tr. 1377).

Johnson described his reaction to AT's accident.

> I was shocked that anybody would go through that safety area and open the gate. Regardless of what the situation was with the material. Don't -- doesn't matter. That is the most unsafe area on the entire -- on the entire line. But to pull the pin out and to put your hand into it, it's better than an 80-percent chance you're going to get severely hurt in that machine. And I was shocked that somebody would actually do it. It's just not something I've ever seen done before.

(Tr. 1377-78)

Johnson was also dismayed to learn of JR's technique of using his foot to straighten the mesh from the catwalk.

> I have never seen, as of even today, somebody trying that maneuver. It has never happened on my third shift to my knowledge. It has now been brought to my attention several months back that it was done under my watch. And that's -- that's totally wrong to do something like that.

(Tr. 1378)

Credibility Determination Regarding the Gate and Main Drive Area

The testimony of AM, JR, NM, and Brian Johnson is at odds with that of AT and ER. The first four employees testified the yellow gate used to access the main drive area was always kept shut, only maintenance department employees entered the area, and they entered only when the coating line was not operating and LOTO had been applied to the main drive. AT and ER, on the other hand, testified the gate was usually open and coating line operators frequently entered the area to realign the mesh by grabbing it with their hands.

The Court finds the testimony of AM, JR, NM, and Johnson to be more credible than that of AT and ER. AT and ER appeared defensive and forgetful of inconvenient details as they testified. They admitted they were angry at Riverdale (AT for being written up and ER for being fired). ER admitted he lied to the CSHO who interviewed him about the circumstances of his termination. In contrast, the testimony of the other four employees was internally consistent and consistent with each other. Their responses to questions were straightforward, with no signs of evasiveness or hesitation.

Of particular note is the testimony of AM and JR. Neither of these witnesses was working for Riverdale at the time of the hearing. They had no motivation to provide testimony favorable to Riverdale in the interest of job security. Both employees openly conceded they had attempted to realign the mesh with their feet from the catwalk, despite knowing it was a safety infraction that could get them in trouble if they were caught. AM testified regarding whether he applied LOTO procedures when he stopped the coating line to fix splice breaks. "As far as I'm concerned, we

were supposed to, but like I said, you're not being watched all the time. So me feeling comfortable, I didn't follow protocol all the time. I didn't lock it out all the time. I'm supposed to but I didn't." (Tr. 554) It is unlikely a witness would testify so candidly about his own misbehavior yet provide cover for his former employer by giving false testimony about the gate and main drive area.[15]

The Court concludes it is more likely than not that the gate to the main drive area was not left open, and coating line operators did not enter the area and attempt to realign the mesh with their hands.

No Requirement to Bypass Guard or Place Body Part in Point of Operation

Even if the testimony of AT and JR were deemed credible, it would not establish the LOTO standard applies to the cited activities. It is undisputed the coating line was engaged in its normal production operation on April 3, 2019. Sections 1910.147(a)(2)(ii)(A) and (B) provide the LOTO standard applies to servicing work during normal production operations "*only if*" employees are "*required* to remove or bypass a guard" or they are "*required* to place any" body part in the "point of operation" or "where an associated danger zone exists during a machine operating cycle." (emphasis added)

The *Application* section of the LOTO standard explicitly provides the standard applies only if the employer *requires* employees to take one of the two listed actions. Nowhere in the record is there evidence Riverdale required an employee to bypass the gate to the main drive area or to place his foot on the moving mesh from the catwalk. Neither of these actions was permitted by Riverdale's safety program, much less required. The two employees who used their feet to move the mesh while sitting on the catwalk knew to hide their actions from supervisor Johnson—otherwise they would be written up. AT's action of bypassing the gate to the main drive area and grabbing the mesh with his hand shocked his supervisor and coworkers—they had never seen anyone do that and could not comprehend why anyone would.[16]

Riverdale provided five methods for realigning mesh that had gone off track on the coating line. None of them required employees to bypass guards or place body parts in the point of

[15] The Court notes that instances of potential safety infractions by Riverdale employees at various stations of the coating line came to light during the hearing. The only instances at issue, however, in Items 3, 5a, 5b, 5c, 5e, and 6 are the actions of JR and AT on April 3, 2019, at the catwalk and the main drive area.

[16] The cause of the accident is not at issue. "The Commission has long held that '[d]etermining whether the standard was violated is not dependent on the cause of the accident.' *Am. Wrecking Corp*., 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003)." *Ceco Concrete,* No. 17-0843, 2021 WL 2311867, at *5, n.4 (OSHRC Feb. 26, 2021).

operation. Because the Secretary cannot establish Riverdale required employees to take either of these actions, he has failed to establish the five cited subsections of the LOTO standard apply to the cited conditions.

Items 3, 5a, 5b, 5c, and 5e are **VACATED**.[17]

Alternative Item 6: Alleged Serious Violation of § 1926.212(a)(1)

The Secretary alleged, in the alternative to Instance (a) of Item 5e, a serious violation of § 1926.212(a)(1). Item 6 addresses only the action of JR using his foot to adjust the mesh while sitting on the catwalk on April 3, 2019. The actions of AT in the main drive area are not at issue. The AVD of Item 2 states:

> 29 CFR 1910.212(a)(1): One or more methods of machine guarding was not provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks:
>
> (a) Site: Building 1, at the Coating Line, on the catwalk above the Main Drive component . . . : On 4/3/2019 a machine guard was not provided to protect a Coating Line Operator from moving parts of the Main Drive in that the operator placed a foot through the railing on the catwalk and on to the moving wire mesh in order to straighten it.

The Cited Standard

Section 1910.212(a)(1) provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are-barrier guards, two-hand tripping devices, electronic safety devices, etc.

ANALYSIS

(1) Applicability of the Cited Standard

Section 1910.212(a)(1) is found in Subpart O (*Machine and Machine Guarding*) of the general industry standards. Section 1910.212 is titled *General requirements for all machines*. The main drive rollers at issue are part of a machine. The cited standard applies.

(2) Compliance with the Terms of the Standard

Section 1910.212(a)(1) is a performance standard. Performance standards "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary

[17] The parties raised other issues on the merits of Items 3, 5a, 5c, and 5e, including whether JR was a supervisor (for the purpose of imputing employer knowledge), whether the coating line operators were authorized employees, and how LOTO was applied in areas of the coating line other than the catwalk and the main drive area. Because the Court finds the LOTO standard is not applicable to the cited conditions in the five items, those issues are moot.

to abate them." *Thomas Indus. Coatings, Inc.*, No. 97-1073, 2007 WL 4138237, at *4 (OSHRC Nov. 1, 2007). It is undisputed AM and JR were able to reach the moving mesh with their feet if they sat on the catwalk and extended their legs between the rails. Thus the main drive area was not guarded in the sense that employees could, with effort, make contact with the mesh near the main drive rollers. The issue is whether the Secretary established guarding was required.

To prove access to a hazard for the element of noncompliance, the Secretary must show that it is reasonably predictable by operational necessity or otherwise that employees could have been in the zone of danger of the main drive rollers.

> To make this determination, we consider whether, given "the manner in which the machine functions and how it is operated by the employees," they are exposed to a hazard. *Rockwell Int'l Corp*., 9 BNA OSHC 1092, 1097-98 (No. 12470, 1980). In other words, for the Secretary to establish the exposure to a hazard required for noncompliance, he "must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Aerospace Testing Alliance*, No. 16-1167, at 4 (OSHRC 2020) (quoting *Fabricated Metal Prods*., 18 BNA OSHC 1072, 1073-74 (No. 93-1853, 1997) (emphasis added)). Therefore, the occurrence of the operator's injury here does not, by itself, establish that [the company] failed to comply with § 1910.212(a)(1). Indeed, noncompliance in this case hinges on whether the operator's actions were reasonably predictable given the machine's normal operation.

Wayne Farms, No. 17-1174, 2020 WL 5815506 at *3 (OSHRC Sept. 22, 2020).

The actions of JR were not reasonably predictable given the coating line's normal operation. Riverdale provided five authorized methods for realigning the mesh, including using two sets of poles, cambers, guides, and offsetting splices. Extending a foot between rails while sitting on the catwalk is a shortcut AM came up with and JR observed. This rogue method was not operationally necessary or the result of employee inadvertence. It was an intentional, idiosyncratic act contrary to Riverdale's safety rules.

Furthermore, the Secretary has not established JR had access to the zone of danger when he extended his leg through the rails of the catwalk. Looking at the photograph admitted as Exhibit C-100a, JR marked the area where he placed his foot to adjust the mesh. He also marked the roller nearest to the catwalk. He described the area where he placed his foot as "[j]ust in front of the catwalk along the edge of the mesh." (Tr. 346) JR estimated the roller closest to the edge of the catwalk was "[m]aybe two feet" from the catwalk and the mesh was "[m]aybe half a foot" below the catwalk as it moved along the coating line (Tr. 353). He placed his foot "four to six inches"

from the edge of the catwalk when he straightened the mesh (Tr. 353). The Secretary does not dispute JR's estimates or offer alternative estimates. The Court credits JR's testimony regarding his estimates of the relevant distances.

The Commission has noted, "there is no hard and fast rule for determining exposure in a machine guarding case—rather, exposure must be determined on a case-by-case basis depending on 'the manner in which the machine functions and the way it is operated." *Dover High Performance Plastics, Inc*., No. 14-1268, 2020 WL 5880242, at *3, n. 5 (OSHRC Sept. 25, 2020). JR testified he sat on the catwalk and extended his leg through the rails (Tr. 341-42). As he did so, his arm was "wrapped around the railing," indicating his torso was next to the railing supports (Tr. 350). JR was able to place his foot "[f]our to six inches maybe" from the edge of the catwalk onto the mesh, meaning his foot was approximately eighteen inches from the closest roller (Tr. 353). AM, whose technique JR copied, testified he could not reach the main drive rollers from the catwalk. "[E]ven with my leg fully extended out, I can't reach the drive."(Tr. 582)

The Court finds the Secretary failed to establish Riverdale violated the terms of § 1910.212(a)(1) The Secretary did not prove JR was exposed to the rotating parts of the main drive rollers by operational necessity or by access to the zone of danger.

Item 6 is **VACATED**.

THE HEALTH CITATION (No. 19-2011)

Item 3 of Citation No. 1: Alleged Serious Violation of § 1910.1200(h)(1)

Item 3 of Citation No. 1 provides:

> 29 CFR 1910.1200(h)(1): Employees were not provided effective information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard that the employees had not been previously trained about was introduced into their work area:
>
> On or about 6/13/19 to 6/27/19 hazardous chemicals were used in the coating line work area, such as "soap," fluid bed chemicals, washer chemicals, and cooling chemicals, where an employee worked without first receiving effective information and training on such chemicals at the time of the initial assignment and/or whenever a new hazard was introduced into the work area.

The Cited Standard

Section 1910.1200 addresses hazard communication regarding toxic and hazardous substances. It requires that the "transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, safety data sheets and employee training." § 1910.1200(a)(1).

The cited standard, § 1910.1200(h)(1), states:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

(1) Applicability of the Cited Standard

The cited standard is found in Subpart Z (*Toxic and Hazardous Substances*). Section 1910.1200(b), the *Scope* section of the standard, provides in relevant part:

> (1) This section requires chemical manufacturers or importers to classify the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, safety data sheets, and information and training. . . . (Employers who do not produce or import chemicals need only focus on those parts of this rule that deal with establishing a workplace program and communicating information to their workers.)
>
> (2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

It is undisputed Riverdale employees worked with hazardous chemicals, including those listed in the AVDs of the items at issue under the Health Citation.[18] Section 1910.1200(h)(1) applies to the cited chemicals.

(2) Compliance with the Terms of the Standard

IH Hart opened a health inspection at Riverdale's facility on June 27, 2019. During her inspection, she interviewed a machine operator who had worked at Riverdale for two months at that time. IH Hart conducted the interview in the presence of Cyril Means, Riverdale's corporate counsel. She transcribed the machine worker's answers to her questions and then gave him the

[18] Riverdale considers some of the chemicals and recipes it uses at its facility to be proprietary information. The Court consented to the parties' agreement to place certain testimony and exhibits under seal and to use a Chemical Key (Exh. C-34 (Under Seal)) to refer to certain chemicals at issue. IH Hart explained the purpose of the Chemical Key: Riverdale "wanted to keep their chemicals confidential. So the area director made a list of them and numbered them so that the numbers could be used instead of the name[s]." (Tr. 1099) *See C*ommission Rule 52(e)(7) ("In connection with any discovery procedures and where a showing of good cause has been made, the Commission or Judge may make any order including ... [t]hat a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.").

statement to read over and sign (Exh. C-27; Tr. 1080-82). The information communicated in the machine operator's interview statement is the basis for the violation alleged in Item 3 (Tr. 1570).

The machine operator told IH Hart he uses chemicals in his work, including one the employees call *soap,* which is what the employees call sodium hydroxide (Tr. 1078). IH Hart testified its "corrosive. It can damage skin, eyes, any part of the body, really." (Tr. 1078)

The machine operator told IH Hart,

> If I get soap on me, it's going to eat my skin. I don't know what's in the soap that does that. Gets active with the sweat on me. I have a safety data sheet. I don't get training yet. About chemicals yet. Primer doesn't do anything. Only the soap hurts me. . . . When I first started, 2 [hours] training about forklifts, PPE, video. Nothing in video about chemicals. Soap literally will eat your flesh. Mostly maintenance adds soap. We have to check it, and if it needs more, I add it. I wear gloves. Lead operators add it. During the day . . . we have to add it. Make sure I'm not sweating and wear gloves. I wear a dust mask for it also. If it gets on skin, wash it off.

(Exh. C-27)

The primer to which the machine operator refers contains hazardous Chemical 6 (Exh. C-37 (Under Seal)). IH Hart asked to see the safety data sheet to which the machine operator referred. When he produced it, she discovered it was not a safety data sheet but a recipe for one of the products Riverdale uses at its facility (Exh. C-28 (Under Seal); Tr. 1082-83 (Under Seal)).

Riverdale argues the machine operator's statement is hearsay and should not weigh in the Court's consideration of this item. Riverdale is incorrect. Under Fed. R. Evid. 801(d)(2)(d),

> A statement that meets the following conditions is not hearsay:
> . . .
> (2) The statement is offered against an opposing party and:
> . . .
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed[.]

The machine operator was an employee at the time he made the statement to IH Hart, and his statement concerns his working conditions, a matter within the scope of his relationship with Riverdale. *See, Regina Constr. Co.,* No. 87-1309, 1991 WL 104227, at *3 (OSHRC May 15, 1991). The machine operator's statement is not hearsay, and the Court gives it considerable weight.

The Court also rejects Riverdale's claim that the machine operator's statement unfairly prejudices Riverdale under Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly

presenting cumulative evidence.").[19] Riverdale's legal counsel has robustly defended Riverdale's interests throughout this proceeding. Riverdale's corporate counsel was present at the machine operator's interview. At no time has Riverdale's counsel suggested the IH's transcription of the machine operator's responses is inaccurate or her conduct of the interview lacked transparency.

Next, Riverdale argues that even if the machine operator's statement is true, it shows Riverdale trained him in compliance with the cited standard. "Specifically, in his statement, [the machine operator] admitted that he knew the industry term for the chemical ("soap"), what PPE to wear while using the soap ("I wear gloves") and knew what to do if he had a dermal exposure ("If it gets on skin, wash it off")." (Riverdale's *Brief*, p. 25) None of this counteracts the machine operator's statement that he had not yet received training in the use of chemicals. The machine operator stated he routinely worked with soap. Knowing what the other employees call sodium hydroxide and that it will burn his skin does not establish Riverdale trained him in compliance with the standard.

David Stevens, Riverdale's plant safety manager, testified he provides hazard communication training to employees.

> [W]e make sure that they know exactly where the Safety Data Sheets are. We let them know -- there's a film that we watch before a video. We go back, we review the -- the key points of the film. We have a five-page training document that we go through with them. So we make sure that they get all of that information. And then I make sure that they nod their head north and south to me that they understand, and then they acknowledge that they've got it.

(Tr. 1531-32)

Stevens testified the machine operator received safety training on a number of topics on May 16, 2019, the day after he was hired (Exh. R-106; Tr. 1531). Exhibit R-106 is a form titled *Safety Training Checklist and Documentation* and lists twenty-one topics, such as crane training, forklift training, machine controls, etc. The only topic related to the item at issue is "Right to Know/Hazard Communication-(Location of safety data sheets and other reference material)." IH Hart requested hazard communication training documents at the opening conference ((Exh. C-26; Tr. 1056-58). By the time of the closing conference in September 2019, Riverdale had not provided the training documents to her (Tr. 1088-89).

[19] The Advisory Committee Notes for Fed. R. Evid. 403 states, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

The machine operator told IH Hart that he received no training with regard to chemicals. In contrast, he specifically mentioned he had received training in "steel toes . . . forklifts, [and] PPE." He also pointed out the safety video he watched did not address hazardous chemicals: "Nothing in video about chemicals." (Exh. C-27)[20] The Court credits the machine operator's statement that Riverdale did not provide hazard communication safety training to him.

The Secretary has established Riverdale did not provide the machine operator with "effective information and training on hazardous chemicals in [his] work area at the time of [his] initial assignment," as required by § 1910.1200(h)(1). The Court finds Riverdale failed to comply with the requirements of § 1910.1200(h)(1) with regard to the machine operator.

(3) Employee Access to the Hazardous Condition

The machine operator worked with soap and primer, both of which contain hazardous chemicals (Exh. C-27). The Secretary has established he had access to the hazardous chemicals.

(4) Employer Knowledge

As previously noted, when an employee has not received required safety training, the employer necessarily has knowledge of the failing. Riverdale's employee handbook includes a section on hazard communication training. It states:

> EMPLOYEE INFORMATION & TRAINING- 1910.1200(h) All employees deemed to have been or to be placed in contact with hazardous material will be so informed and *will be trained in safety procedures on a one-on-one basis by the Supervisor.* New and transferred employees will be trained by the Supervisor of that area as part of the training/orientation process. Use of the appropriate MSDS will be part of this training.

(Exh. C-9, p. 56, ¶ C) (emphasis added)

Riverdale has a hazard communication program that details the elements to be covered when training new employees:

> Prior to starting work each new employee of Riverdale Mills Corporation will attend a health and safety orientation and will receive information and training on the following:
>
> > *an overview of the requirements contained in the OSHA Hazard Communication Standard, 1910.1200;

[20] Riverdale did not produce the safety video or the purported five-page training document during discovery or at the hearing (Tr. 486-87, 493-94). The Court infers the missing training materials do not address the hazard communication training required by § 1910.1200(h)(1). *See N. Landing Line Constr. Co*., No. 96-0721, 2001 WL 826759, at *9 (OSHRC July 20, 2001) ("[D]eficiencies in [the employer's] response should be taken as establishing that there was no such evidence, not that the Secretary failed to carry her burden.") (*citing Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 403 n. 4 (4th Cir. 1979).

> * any operations in their work area where hazardous chemicals are present;
> * location and availability of our written hazard program;
> * physical and health hazards of the chemicals in their work area;
> * methods and observation techniques used to determine the presence or release of toxic and hazardous substances in the work area;
> * measures employees can take to protect themselves from hazards in their workplace, including specific procedures the employer has implemented to prevent exposure to hazardous chemicals such as appropriate work practices, emergency procedures, and personal protective equipment;
> * explanation of the labeling system and what the label information means; and
> * explanation of M[safety data sheets] and how employees can use this information to protect themselves.

(Exh. R-80, p. 2, ¶ 3)

It is clear from the machine operator's interview statement that he did not attend the specialized training in hazard communication outlined in Riverdale's program. Riverdale's policy, as stated in the employee handbook, is that newly-hired employees be trained *one-on-one* by their supervisors for hazard communication safety. The machine operator's supervisor necessarily knows he did not train the machine operator in hazardous communication safety. His knowledge is imputed to Riverdale.

The Court finds Riverdale knew it had not adequately trained the machine operator on hazardous chemicals in his work area.

The Court finds the Secretary has established all elements of his burden of proof. Therefore, Item 3 is **AFFIRMED.**

Characterization of the Violation

The Secretary characterized the violation cited in Item 3 as serious. IH Hart's description of the hazards presented by working with sodium hydroxide is sufficient to show "an accident is possible and there is a substantial probability that death or serious physical harm could result from the accident." Item 3 is properly characterized as serious.

Item 1 of Citation No. 2: Alleged Other-than-Serious Violation of § 1910.1200(g)(11)

Item 1 of Citation No. 2 provides:

> 29 CFR 1910.1200(g)(11): Safety data sheets were not made readily available, upon request, to designated representatives, the Assistant Secretary, and the Director, in accordance with the requirements of 29 CFR 1910.1020(e):

> . . . On or about 6/27/19, and again on 8/26/19, the employer did not make readily available, upon request, to the Assistant Secretary, and the Director, the safety data sheets for the hazardous materials used on the galvanizing and coating lines, such as, but not limited to, Chemical 4, Chemical 5, and Chemical 6 identified on the chemical key which is provided separately to the employer simultaneously with this citation.

The Cited Standard

Section 1910.1200(g)(11) provides:

> Safety data sheets shall also be made readily available, upon request, to designated representatives, the Assistant Secretary, and the Director, in accordance with the requirements of § 1910.1020(e).

(1) Applicability of the Cited Standard

Riverdale used hazardous chemicals in its facility for which safety data sheets are required (Exhs. C-25 & R-52 (Under Seal); Tr. 1064 & 1066 (Under Seal); Tr. 1065, 1121-22). Section 1910.1200(g)(1) applies to the cited condition.

(2) Compliance with the Terms of the Standard

The cited standard requires the employer to make safety data sheets readily available, upon request, to OSHA in accordance with the requirements of § 1910.1020(e). Section 1910.1020(e) provides:

> Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner. If the employer cannot reasonably provide access to the record within fifteen (15) working days, the employer shall within the fifteen (15) working days apprise the employee or designated representative requesting the record of the reason for the delay and the earliest date when the record can be made available.

On June 27, 2019, IH Hart held an opening conference attended by Riverdale owner James Knott, corporate counsel Cyril Means, and plant safety manager David Stevens. She conducted a walkaround inspection with James Knott and Cyril Means which took them along the coating line and the galvanizing line. She discussed the chemicals used by operators on the two lines with Knott (Tr. 1063-64, 1066 (Under Seal)). She requested all safety data sheets for Riverdale's coating and galvanizing lines that Riverdale had not previously provided. It was her impression Knott and Means understood she was talking about safety data sheets for chemicals used on the two lines (Exh. C-26; Tr. 1057-60, 1125). She gave her business card to the men. Her card listed her contact information, including her name, office address, email address, fax number, and telephone number (Tr. 1058-59).

Riverdale had not provided any of the documents she requested by the day of the closing conference, in September 2019 (Tr. 1088). On September 24, 2019 (after the closing conference), IH Hart's assistant area director received an email from one of Riverdale's attorneys with safety data sheets attached for some of the chemicals, including Chemicals 4, 5, and 6 (Exh. C-31 (Under Seal); Tr. 1089-90). Still missing were requested safety data sheets for Chemicals 2 and 3 (Tr. 1094 (Under Seal)). OSHA had not received those safety data sheets as of December 13, 2019, when the Secretary issued the Health Citation to Riverdale (Tr. 1094 (Under Seal)).

Riverdale contends it understood IH Hart's request for safety data sheets during the opening conference to pertain only to chemicals that presented air-contaminant hazards.

> [I]t is important to note that OSHA opened the inspection as a result of a complaint about air-contaminant hazards, and therefore Hart's request for [safety data sheets] on the first day of the inspection can only be understood as requesting [safety data sheets] applicable to possible air contaminants. The Secretary, however, has not claimed that the [safety data sheets] which were subsequently provided in September 2019 (and which are the basis for this citation item) relate specifically to potential air contaminants; rather, they relate to chemicals used on the coating line. Accordingly, as of June 27, 2021, [Riverdale] had already fully complied with OSHA's requests for [safety data sheets] related to potential air contaminants. If OSHA sought other [safety data sheets] than those related to air contaminants, it was the agency's burden, not RMC's, to clearly articulate which [safety data sheets] were sought.

(Riverdale's *Brief*, pp. 27-28)

Riverdale's argument would be more persuasive if one of the men attending the opening conference or walkaround inspection had testified to this effect at the hearing. Of the three men, only Stevens was called as a witness by Riverdale, and he was not questioned regarding his understanding of IH Hart's document request. IH Hart took the stand on the fifth day of the eight-day hearing. Means attended the entirety of the hearing and was present in the courtroom that day (Tr. 1036). If he disagreed with IH Hart's testimony, he could have informed Riverdale's counsel, who could have called Means or Knott to the stand to rebut IH Hart's testimony. Riverdale did not do so.

The situation here is analogous to the situation in *Capeway Roofing Sys., Inc.,* No. 00-1968, 2003 WL 22020485 (OSHRC Aug. 26, 2003). In that case, a CSHO named Holiday testified that on the day of the inspection, a foreman named Araujo told him his employees had been working on a roof without fall protection the previous day. Capeway argued the ALJ erred in crediting

CSHO Holiday's testimony over conflicting testimony that a second foreman had stated the employees had not been working on the roof that day. The Commission disagreed.

> [Foreman] Araujo was in the courtroom, yet he was not called to testify. If he had not made the admission to which CO Holiday testified, we would expect that he would have taken the witness stand to deny or explain it. The fact that he did not lends weight to Holiday's testimony, because Capeway had the opportunity to rebut it but did not. . . . It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party. . . . The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case.

Id. at *12 (citations omitted).

If Means or Knott agreed with Riverdale that it could "only be understood" that IH Hart was requesting safety data sheets relating to air contaminants the day of her opening conference, the Court would expect that one of the men would have taken the witness stand to dispute her testimony that she requested safety data sheets for the coating and galvanizing line chemicals. The fact that neither of them testified lends weight to IH Hart's testimony, because Riverdale had the opportunity to rebut it but did not. The Court credits IH Hart's testimony that she requested safety data sheets for the chemicals used on the coating line and galvanizing line.[21]

Finally, Riverdale argues §§ 1910.1200(g)(11) and 1910.1020(e) do not require the employer to give, send, or otherwise produce the requested safety data sheets to OSHA—the employer is required only to "make readily available" the safety data sheets.

> [Riverdale] was not required to provide copies of these documents; it only had to make them "readily available" for inspection. *Id.* § 1910.1200(g)(11). And they were readily available for Hart to inspect in person when she visited [Riverdale's] worksite. Hart chose not to inspect them then. Thus, [Riverdale] did not withhold [safety data sheets] documents at this or any other time.

(Riverdale's *Brief*, p. 29)

Under Riverdale's interpretation of "made readily available," an employer is required to do nothing to comply with § 1910.1200(g)(11) except maintain safety data sheets somewhere in its facility. An employer need not even respond to a request for documents, unless the IH asks to

[21] Riverdale also faults IH Hart because she emailed a second request for the safety data sheets on August 26, 2019, but used the email address for the senior James Knott instead of his son, the James Knott she met with the day of the opening conference. The elder James Knott had died the previous year and Riverdale was unaware of the email request (Tr. 1111). This failed request is immaterial to this proceeding because IH Hart made the request that triggered the requirements of §§ 1910.1200(g)(11) and 1910.1020(e) on June 27, 2019, at the opening conference.

see them in person at the facility. Riverdale's novel argument ignores the plain language of § 1910.1020(e), which is incorporated by reference in the cited standard. Section 1910.1020(e) requires the employer, upon request by an OSHA representative, to "assure that access is provided in a reasonable time, place, and manner," and provides fifteen days for the employer to provide access. Section 1910.1020(e) places an affirmative obligation on the employer to take action in response to the request for access to records. *Assure* is defined as "tell someone something positively or confidently to dispel any doubts they may have . . . make (someone) sure of something . . . make (something) certain to happen." *Assure*, The New Oxford American Dictionary (2d ed. 2005). The employer cannot sit back and ignore the request for documents until the OSHA representative asks to view them in person. Under the standard, the employer is required to either send the OSHA representative copies of the requested documents (surely the easiest method of compliance) or initiate arrangements as to the "time, place, and manner" for the OSHA representative to access the records. Regardless, the onus is on the employer to affirmatively respond to the Secretary.

The Secretary has established Riverdale failed to comply with the terms of § 1910.1200(g)(11).

(3) Employee Access to the Violative Conditions

Employee access to a hazard is not an element of the Secretary's burden of proof for a recordkeeping violation. "[T]he Secretary need not prove harm to any particular employee resulting from a violative record, to establish a violation." *Gen. Dynamics Corp*., 15 BNA OSHC 2122, 2132 n. 17 (No. 87-1195, 1993).

(4) Employer Knowledge

IH Hart requested the safety data sheets for chemicals used by employees on the coating line and galvanizing line in the presence of Riverdale owner James Knott and Riverdale corporate counsel Cyril Means. Neither of them assured that access to the safety data records was made readily available to IH Hart. Their knowledge of the request for safety data sheets and their failure to respond in accordance with the requirements of § 1910.1020(e) is imputed to Riverdale. The Secretary has established Riverdale had actual knowledge of the violation.

The Court finds the Secretary has established all elements of his burden of proof. Therefore, Item 1 is **AFFIRMED.**

Characterization of the Violation

The Secretary characterized the violation of § 1910.1200(g)((11) as other-than-serious. "[A] nonserious violation is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." *Crescent Wharf & Warehouse Co.,* 1 BNA OSHC 1219, 23 1222 (No. 1, 1973).

The violation is properly characterized as other-than-serious.

PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc*., 2007 WL 2046814, at*9. "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc*., No. 00-1052, 2005 WL 696568, at *3 (OSHRC Feb. 25, 2005) (citation omitted). "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors." *Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at * 2, n. 3 (OSHRC April 27, 1973).

Riverdale employed 135 to 150 employees (Tr. 984, 1100-01). IH Hart testified, "History is based on previous serious citations from OSHA in the last five years, which I didn't find." (Tr. 1101) The Court does not credit Riverdale with good faith. The record reveals Riverdale was lax in the areas of safety training, recordkeeping, and supervisory oversight.

The gravity of Item 2 of the Safety Citation is high. TB, the cited employee, had worked at Riverdale as an authorized employee for a total of nine years. Yet Riverdale had never conducted a periodic inspection with him, even though § 1910.147(c)(6)(i) requires the employer to conduct periodic inspections annually. Any deficiencies in TB's understanding and implementation of LOTO procedure went unnoticed for almost a decade. The Court assesses a penalty of $8,525 for Item 2 of the Safety Citation.

The gravity of Item 3 of Citation No. 1 of the Health Citation is also high. The machine operator was working with hazardous chemicals, including sodium hydroxide, which are corrosive and highly dangerous. Riverdale's failure to adequately train the machine operator under §

1910.1200(h)(1) imperiled his safety and health. The Court assesses a penalty of $8,525 for Item 3 of Citation No. 1 of the Health Citation.

The gravity of Item 1 of Citation No. 2 of the Health Citation is moderate. The Court assesses no penalty for Item 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED:**

1. Item 2 of the Safety Citation, alleging a serious violation of § 1910.147(c)(6)(i), is **AFFIRMED**, and a penalty of $8,525 is assessed;

2. Item 3 of the Safety Citation, alleging a serious violation of § 1910.147(c)(7)(i)(A), is **VACATED**, and no penalty is assessed;

3. Item 5a of the Safety Citation, alleging a serious violation of § 1910.147(d)(2), is **VACATED**, and no penalty is assessed;

4. Item 5b of the Safety Citation, alleging a serious violation of § 1910.147(d)(3), is **VACATED**, and no penalty is assessed;

5. Item 5c of the Safety Citation, alleging a serious violation of § 1910.147(d)(4)(i), is **VACATED**, and no penalty is assessed;

6. Item 5e of the Safety Citation, alleging a serious violation of § 1910.147(c)(4)(i), is **VACATED**, and no penalty is assessed;

7. Item 6 of the Safety Citation, alleging a serious violation of § 1910.212(a)(1), is **VACATED**, and no penalty is assessed;

8. Item 3 of Citation No. 1 of the Health Citation, alleging a serious violation of § 1910.1200(h)(1) is **AFFIRMED,** and a penalty of $8,525 is assessed; and

9. Item 1 of Citation No. 2 of the Health Citation, alleging an other-than-serious violation of § 1910.1200(g)(11), is **AFFIRMED,** and no penalty is assessed.

SO ORDERED.

/s/_____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: July 18, 2022
Atlanta, GA