Some personal identifiers have been redacted for privacy purposes

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor,
United States Department of Labor,
Complainant,

v.

MATSU ALABAMA, INC., d/b/a A Division of MATCOR AUTOMOTIVE, INC.,
Respondent.

OSHRC DOCKET No. **13-1713**

DECISION AND ORDER

COUNSEL: M. Patricia Smith, Solicitor of Labor, Theresa Ball, Associate Regional Solicitor, Joseph B. Luckett, Counsel, Schean G. Belton, Senior Trial Attorney and Willow E. Fort, Trial Attorney, for Complainant.

John J. Coleman, III, Esq., and Ronald W. Flowers, Jr., Esq., Burr & Forman, LLC, for Respondent.

JUDGE: John B. Gatto.

I. INTRODUCTION

Matsu Alabama, Inc. (dba A Division of Matcor Automotive, Inc.) (Matsu) manufactures automobile parts at a facility in Huntsville, Alabama. On April 3, 2013, the United States Department of Labor's Occupational Safety and Health Administration (OSHA) initiated an inspection of that facility in response to an employee complaint, which alleged that on April 2, 2013, [redacted], a temporary worker hired as a janitor, had been caught in a mechanical power press resulting in amputation injuries. As a result of the inspection, three citations were issued to Matsu on September 30, 2013, by the Birmingham, Alabama, OSHA Area Director pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 658(a), 651-678,[1] and the standards promulgated thereunder.[2]

[1] The Secretary of Labor assigned responsibility to OSHA for enforcement and delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA, and authorized the Assistant Secretary to redelegate his authority. *See* 65 FR 50017, 50018 (2000). The Assistant Secretary promulgated regulations authorizing OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§1903.14(a) and 1903.15(a).

Citation Number 1 alleges six serious violations involving the Lockout/Tagout (LOTO) standard,[3] the Mechanical Power Presses standard,[4] and the general Hand and Portable Powered Tools and Equipment standard,[5] with proposed penalties totaling $39,000. (Compl., Ex. A, pp. 1-8.) Citation Number 2 alleges a repeat violation of the general requirements of the Machine Guarding standard[6] with a proposed penalty of $35,000. (Compl., Ex. A, p. 9.) Citation Number 3 alleges an other-than-serious violation of the Recordkeeping and Reporting standard[7] with a proposed a penalty of $1,000.[8] (Compl., Ex. A, p. 10.)

Matsu timely contested the citations and the Secretary of Labor initiated the above-styled action with the Commission by filing a Complaint against Matsu pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a), seeking to affirm the citations. In response to the Secretary's allegations, Matsu argues the Secretary failed to establish any of the alleged violations and further, asserts multiple affirmative defenses, including unpreventable employee misconduct and preemption of certain cited standards. (Matsu Post-Trial Br., pp. 51, 70.) The Commission has jurisdiction of this action pursuant to section 10(c) of the Act.[9]

The Court issues this Decision and Order as its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, after hearing and carefully considering all the evidence and the arguments of counsel.[10] If any finding is in truth a

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[2] *See* 29 U.S.C. § 654(a)(2) (each employer shall comply with occupational safety and health standards promulgated under the Act).

[3] *See* 29 C.F.R. §1910.147.

[4] *See* 29 C.F.R. §1910.217.

[5] *See* 29 C.F.R. §1910.242.

[6] *See* 29 C.F.R. §1910.212.

[7] *See* 29 C.F.R. §1904.29(b)(3).

[8] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§666(a), (b), (c). A serious violation is defined in the statute; the other two classifications are not. *Id.* §666(k) (*see* Part III of this decision for definitions of the violation classifications relevant to this case).

[9] *See* Compl., ¶¶ 1, 2; Answer, ¶¶ 1, 2; *see also* Proposed Pretrial Order, ¶ 4; Attach. E, Stipulated Facts, ¶¶ 1, 2.

conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so. For the reasons indicated *infra*, the Court **VACATES** Citation Number 1, Item 2 and its proposed penalty of $7,000.00, **AFFIRMS** the remaining Citations, and **ASSESSES** penalties totaling $103,000.00.

II. BACKGROUND

At all times relevant to this action, Matsu operated a facility located in Huntsville, Alabama, its principal place of business, where it manufactured automotive parts utilizing mechanical power presses and employed approximately 208 of its own employees and used an additional 45-50 temporary employees provided by Surge Staffing, LLC, (Surge), an onsite staffing agency. (Jt. Proposed Pretrial Order, Attach. E, Stipulated Facts, ¶¶ 3, 4.) In January of 2012, for the first time, Surge assigned an onsite manager, Jesse Williams, to oversee Surge employees at Matsu's facility. (Tr. 1068.) In February of 2013, Adam Wolfsberger replaced Williams as Surge's onsite manager. (Tr. 243, 1068.) That same month, [redacted] applied online to work for Surge and subsequently went for an interview at Matsu's Huntsville facility where he and two other Surge applicants met with Wolfsberger.[11] (Tr. 116, 118-119, 242.) [redacted] and the other two applicants filled out some paperwork and were shown a short two minute power point presentation on safety. Wolfsberger gave them a quick walk around tour of the facility and described the available positions and shift hours. (Tr. 119, 122-123.) [redacted] was hired for the third shift janitor position, which included sweeping, mopping, and picking up trash. (Tr. 125, 136.)

Since Wolfsberger was not at the facility during the third shift, [redacted] was directed to report to Matsu's plant manager, Takumu Pinchon, and upon arrival at his first evening shift Pinchon directed [redacted] to another Surge employee for instructions. (Tr. 129-130, 131-133,

[10] A trial in this matter was held on July 15 and 16, 2014, in Huntsville, Alabama, and on November 20 and 21, 2014, in Birmingham, Alabama. The parties filed post-trial briefs on February 12, 2015, and February 13, 2015, and reply briefs on April 17, 2015 and April 20, 2015. The Court issued an order on August 24, 2015, *sua sponte* reversing an evidentiary ruling made at trial and provided the parties an opportunity to supplement the record within 15 business days with trial depositions and supplemental briefs. Matsu filed a supplemental brief on September 15, 2015.

[11] [redacted] testified he reported to Wolfsberger when he arrived at Matsu's facility and Wolfsberger was the person who gave the orientation presentation and assigned the applicants to the positions. (Tr. 118-128.) Wolfsberger, however, testified [redacted] was in the last group orientation of Williams. Based upon the specific and detailed testimony of [redacted] regarding the events that day, the Court credits Allen's testimony and finds Wolfsberger was the person who gave the orientation presentation and assigned [redacted] to his janitor position.

137.) Approximately one week after [redacted] began working at Matsu, Pinchon directed Matsu team leader Chris Hall to take [redacted] off of his janitorial duties and "put him on the press." (Tr. 138, 139, 1066.) [redacted] testified he never wanted to become a press operator but was afraid to decline the assignment: "I was really trying to keep my job. I've got three babies. [I was] really trying to do something different for them. I wasn't trying to lose my job." (Tr. 203.) At trial, Wolfsberger confirmed that [redacted] had never expressed a desire to work on the mechanical presses and, in fact, had "made comments about kind of being scared of" the presses. (Tr. 271.) Wolfsberger did not tell [redacted] he would be required to perform any assignments other than the janitorial position. (Tr. 254.) Wolfsberger also testified [redacted] would not have had an opportunity to speak with him regarding any concerns he had about working on the press since they worked different shifts. (Tr. 274.)

On [redacted]'s first press assignment, he worked loading blanks into a press with an employee named "Ninon," and the only instructions she gave him on how to operate the press were, "you turn around and get these blanks out of the bin. Get these blanks out of the bin. You load them in the machine and you make sure you get back." (Tr. 141, 142.) When [redacted] asked her what "get back" meant, Ninon told him, "'those light curtains. We've got light curtains that we have to stay out of.'" (*Id.*) Significantly, during the break on his first press assignment, Pinchon approached [redacted] and told him, "Don't tell nobody I've been putting you on the presses." (Tr. 143.) [redacted]'s second press assignment required him to grab metal pieces from the press after they had been cut in half. After [redacted] grabbed a metal piece, he would "step back real fast" because "the guy told me to stay out of the light curtain, and that's when he showed me that it had light curtains. That's when I really, really saw them up close." (Tr. 145.)

The last time Pinchon had Hall assign [redacted] to work on a press was April 2, 2013, the day of the accident, approximately five weeks after [redacted] had started working at Matsu's facility.[12] (Tr. 137, 287.) Hall again approached [redacted] and told him, "[Pinchon] said he

[12] Matsu misrepresented the length of time [redacted] worked at Matsu's facility when it asserted in its brief it "had no way to predict that [redacted] would choose that night to ignore instruction he had consistently followed in *past months*." (Matsu's Post-Trial Brief, pp. 61-62) (emphasis added). It is undisputed [redacted] began working at Matsu's facility on February 24, 2013, and ended after the accident on April 2, 2013, a period of five weeks and two days.

wants you to help work with Jeffrey Carter on this press [Press Number 10]." (Tr. 37, 150.) [redacted] had never worked on Press Number 10 before and he was not familiar with its safety features. (Tr. 151.) Press Number 10 was similar to the first press [redacted] worked on except on the first press, both the operator and the loader stood next to each other on a platform, and with the platform, it was easier for [redacted] to load blanks since he didn't have to reach as high or lean into the machine. (Tr. 152-153, 163.)

For the first few hours, [redacted] was the Operator of Press Number 10 and controlled the button that activated the press. (Tr. 154.) However, after the meal break, Carter took over as the Operator while [redacted] began loading the blanks. (Tr. 156-157.) [redacted] has a slight build and weighs only 135 pounds and when he leaned close to the press in order to load the blanks, his entire body fit in the space between the press and the vertical light curtain that was meant to deactivate the machine if he was within the danger zone of the press. With Press Number 10, since there was no platform to stand on, Carter as the Operator, stood to the left side of [redacted] while [redacted] loaded the blanks. (Tr. 156-157, 183.)

As [redacted] was in the die of the press, he noticed Carter was turning or spinning away from him and then, in [redacted]'s words, "I just felt something on my back. It just felt like it was just coming—like the whole world was coming down on me. But it was the machine." (Tr. 157.) As [redacted] tried to squeeze himself out of the press, he stepped back and in doing so, stepped into the light curtain zone, which caused the press to stop cycling and instantly shut off. [redacted]'s hands were still inside the press when it shut off. (Tr. 194-197.) [redacted]'s right hand up to his wrist was caught in the press and although his left hand was almost out of the press, several of his left hand fingers were also caught inside the press. (Tr. 158, 195, 201.) The machine was burning [redacted]'s hands and a fan was brought to try and help keep him cool. (Tr. 197.)

Since [redacted]'s hands were extended above his head when the press stopped cycling, a platform was also brought for [redacted] to stand on so that he was level with the press. (*Id.*) [redacted] testified, "I was just talking to myself about [what] my daddy had told me." (Tr. 198.) [redacted]'s father had been a press operator for 30 years and he had told [redacted] every night before [redacted] went to work "don't let that monster eat you up." (*Id.*) It took approximately 45 minutes for emergency services to arrive at the facility and another 15 minutes to get the

machine off of [redacted]. (Tr. 199.) Meanwhile, the press continued to burn his hands. After [redacted] was finally extricated from the press, his whole left hand was "flat like a pancake," and some of his fingers had been amputated by the press. (Tr. 158, 195, 201.) His right hand was completely crushed and was amputated at the hospital that morning—and eventually was amputated to the middle of his forearm. (Tr. 200-202.)

The day after the accident, OSHA's Birmingham Area Office received an employee complaint regarding [redacted]'s accident and that same day Gary Vernon,[13] an OSHA Compliance Safety and Health Officer, went to Matsu's facility to open an investigation. (Tr. 286, 287; Ex. C-31, p. 1.) Upon his arrival Vernon met with Matsu's General Manager, Robert "Bobby" Todd, and conducted an opening conference with the on-site management, which included Gregg Patterson, the company's Human Resources Manager and safety person, and John Carney, the company's Vice President. (Tr. 289, 292-293.) In his first contact with the company, Vernon spent roughly six hours at the facility. Vernon spoke briefly with Todd about how Press Number 10 operated. (Tr. 294-296.) Over a period of days Vernon requested documents regarding the company safety programs and injury records. He also arranged employee and management interviews. (Tr. 296.)

In the midst of Vernon's investigation, OSHA received two additional employee complaints against the company. An April 24, 2013, employee complaint alleged an employee "had hand/fingers caught in-machine in Tool and Die maintenance area" resulting in a "crush or amputation injury to hand/finger." (Ex. C-31, p. 2.) Another employee complaint was received May 16, 2013, which alleged key controls and selection modes on the mechanical power presses were being left unsupervised and the doors of the motor controllers to the mechanical power presses were being left open. (Tr. 364-365.) Vernon investigated the two additional complaints

[13] Vernon has "about 14 years of experience in working in plants and facilities that actually have machine shops and they have milling and drilling machines." (Tr. 653-654.) Vernon was trained to recognize hazards on those machines at the OSHA Training Institute which, covered the standards of 29 CFR 1910 and the different aspects of guarding. (Tr. at 654.) "And in those classes they taught you which is the regular guarding requirements; they taught you about wood working; they taught you about mechanical power presses; they taught you – they taught us about transmission devices and things of that nature." (Tr. 654-655.) Vernon's training also included "working with milling and drilling machines in the various safety classes and also in observing work of employees actually performing their duties of drilling holes and tapping things and things of that nature." (Tr. at 654.) He has "observed employees operating drills before so [he] could identify what kind of guards need to be on the equipment." (Tr. 656.)

in the same manner as the first. He conducted a walk around of the areas identified in the employee complaints, took photographs, interviewed employees, and reviewed records. (Tr. 368-370.) At the conclusion of his investigation, Vernon recommended that the OSHA Area Director issue Matsu the three citations at issue.

III. ANALYSIS

In the Eleventh Circuit, the jurisdiction in which this case arose,[14] "[t]o make a prima facie showing that an employer violated an OSHA standard, the Secretary must show: "(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (citation omitted). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id.*, 567 F. App'x at 803 (citation omitted). However, "[a]s has often been said, OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented." *Central of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 623 (5th Cir.1978).[15]

A. Citation 1, Alleged "Serious" Violations

As indicated *supra*, Citation Number 1 alleges six serious violations involving three different standards. Whether the violative condition is "serious" depends on an application of section 17(k) of the Act, which indicates a "serious" violation is one that carries "a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). "The gravamen of a serious violation is the presence of a 'substantial probability' that a particular

[14] Matsu's facility is in Huntsville, Alabama, which is also its principal place of business. (Jt. Proposed Pretrial Order, Attach. E, ¶ 3.) Both party may appeal the final order in this case to the Eleventh Circuit Court of Appeals, and in addition, Matsu may also appeal to the District of Columbia Circuit. *See* 29 U.S.C. §660(a) & (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

[15] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. Immediately after the split, the Eleventh Circuit stated in *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981), that any opinion issued by the Fifth Circuit before the close of business on September 30, 1981 is binding precedent on the Eleventh Circuit.

violation could result in death or serious physical harm." *Chao v. OSHRC*, 401 F.3d 355, 367 (5th Cir. 2005) (*citing Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979).

Item 1, Alleged Violation of Section 1910.147(c)(4)(i) of the LOTO Standard

The Secretary alleges in Item 1 Matsu committed a serious violation of section 1910.147(c)(4)(i) of the LOTO standard, which requires that "[p]rocedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section." 29 C.F.R. § 1910.147(c)(4)(i). More specifically, the Secretary asserts on or about May 16, 2013, in the Press Line Room on Press Numbers 1 through 11, Matsu violated the LOTO standard when its tool and die shop employees "were performing maintenance and servicing activities on dies in the danger zone area without presses being locked and tagged out."[16] (Compl., Ex. A, p. 6.)

In order to prove that Matsu violated the LOTO provision at issue, the Commission[17] has held "the Secretary must show that the LOTO standard applies, [Matsu] failed to comply with the cited LOTO provision[], [Matsu] employees had access to the violative conditions, and [Matsu] either knew or should have known of these conditions with the exercise of reasonable diligence." *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216 (No. 10-2659, 2015). *See also Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

Application of LOTO standard

"The LOTO standard, which became effective January 2, 1990, was promulgated to prevent industrial accidents during servicing of machines that remain in an operational mode, are turned off but connected to a power source, retain stored energy, or are reactivated by another worker unaware that servicing is in progress." *Dayton Tire*, 23 BNA OSHC 1247, 1250 (No. 94-1374, 2010) (*citing Gen. Motors Corp.*, 22 BNA OSHC 1019, 1022 (No. 91-2843E, 2007) (consolidated)). "Specifically, the LOTO standard 'covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or

[16] The Secretary does not dispute Matsu developed and documented procedures for mechanical power presses at its facility but rather, asserts Matsu failed to utilize it when performing maintenance and servicing activities on the mechanical power press dies. (Sec'y Post-Trial Brief, p. 8; *see also* Ex. C-4.)

[17] Neither party cited to, nor has the Court found any, binding precedent of the Fifth or Eleventh Circuit involving the LOTO standard. The Court therefore applies the precedent of the Commission in deciding the alleged LOTO violation.

equipment, or release of stored energy could cause injury to employees.' 29 C.F.R. § 1910.147(a)(1)(i)." *Jacobs Field Servs.*, 25 BNA OSHC at 1217 (emphasis in original); *Dayton Tire*, 23 BNA OSHC at 1251. "Servicing and/or maintenance" is defined as "[w]orkplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment," including "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." 29 C.F.R. § 1910.147(b). Under the LOTO standard, "energized" means "connected to an energy source or containing residual or stored energy." *Id.*

However, servicing or maintenance that takes place "during normal production operations" is covered by the LOTO standard only if (1) "[a]n employee is required to remove or bypass a guard or other safety device," or (2) "[a]n employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed ... or where an associated danger zone exists during a machine operating cycle." 29 C.F.R. § 1910.147(a)(2)(ii). "Normal production operations" means "the utilization of a machine or equipment to perform its intended production function." 29 C.F.R. § 1910.147(b). An additional exception to this particular provision, known as the "minor servicing exception," provides:

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

29 C.F.R. § 1910.147(a)(2)(ii) (note).

Matsu asserts the Secretary "failed to establish that any work was performed on dies in presses that [did] not fall within an exception to the standard." (Jt. Proposed Pretrial Order, Attach. D, p. 1.) However, it is Matsu, not the Secretary, which "carries the burden of proof on this issue." *Dayton Tire*, 23 BNA OSHC at 1258; *see also Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194 (No. 90-2775, 2000) ("The Commission has repeatedly held... that 'the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim.'") (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Westvaco Corp.*, 16 BNA

OSHC 1374, 1377-78 (No. 90-1341, 1993) (noting that employer bears burden of proving minor servicing exception's applicability); *Gen. Motors Corp.*, 14 BNA OSHC 2064, 2067 n.14 (Nos. 82–630, 84–781, & 84–816, 1991) (consolidated) ("burden of proving the invalidity of a cited standard is on the employer").

To prove that its case comes within the exception, Matsu "must show that the adjustments are minor *and* made during *normal production operations*, and that effective alternative protection is provided." *Westvaco*, 16 BNA OSHC at 1380 (emphasis in original). Significantly, in *Westvaco*, the Commission held "adjustments made to prepare for normal production operations cannot, at the same point in time, be adjustments that are made 'during normal production operations.'" *Id.* Here, there is no dispute the mechanical presses are shut down while work was performed on dies in the presses.

Clint Davis,[18] a Matsu tool and die maker, testified his job requires him to troubleshoot and repair dies. (Tr. 943.) Matsu's tool and die makers periodically perform a number of adjustments and repairs to mechanical presses, including changing the dates stamped onto the manufactured parts, repairing broken punches, replacing springs, and sharpening punches. These adjustments and repairs take from 10 to 45 minutes. (Tr. 73-74, 944, 965-967.) When a repair or adjustment was required on a mechanical press, the tool and die shop received a call over the intercom system stating, for example, "Press 1, date change." (Tr. 63.) The tool and die maker responding to the call would gather his or her tool box and whatever equipment was indicated as needed for the repair or adjustment. (Tr. 64.) Davis stated he entered the press at least once a day to make adjustments, which took between 15 to 45 minutes. (Tr. 948-949.) Sometimes the tool and die maker pulls a damaged part from the press and takes it to the tool shop for repair, but "the majority of the time" the tool and die makers "work with the dies still in the presses." (Tr. 87.) While the tool and die maker is inside the press adjusting or repairing the dies, "the machine is shut down" and the press operator stayed "on lookout for anyone else around the area to let them know what's going on. They [were] basically the lookout for the tool makers." (Tr. 966-67; *see also* Matsu Post-Trial Br., pp. 39-40) ("Matsu procedure prescribes that the die . . . has completely cut power to the press upon its removal").

[18] Since there are two Davises referenced herein, Clint Davis and [redacted] , they are referred herein by their given names and their surnames.

Therefore, the Court concludes Matsu has not proven that this case falls within the exception at the end of section 1910.147(a)(2)(ii) since it's "tool changes and adjustments" and other "servicing activities" were not made "during normal production operations." Clearly, they could not have been since the machines were shut down and were not being utilized to perform their intended production function. *Westvaco*, 16 BNA OSHC at 1380. Thus, since the safety blocks were still subject to unexpected energization or start up, the LOTO standard provision contained in section 1910.147(c)(4)(i) applied to the cited conditions.

Compliance with the Terms of the Standard

In *Gen. Motors Corp., Delco Chassis Div. (GM-Delco)*, 17 BNA OSHC 1217, 1218 (Nos. 91- 2973, 91-3116 & 91-3117, 1995) (consolidated), *aff'd*, 89 F.3d 313, 315 (6th Cir. 1996), the Commission held the applicability of the LOTO standard is predicated on a showing "that *unexpected* energizing, start up or release of stored energy could occur and cause injury." Although the phrase "unexpected energization" is not defined in the standard, the Commission has held that "[e]nergization is 'unexpected' in the absence of some mechanism to provide adequate advance notice of machine activation." *Dayton Tire*, 23 BNA OSHC at 1251 (*citing General Motors Corp.*, 22 BNA OSHC at 1023; *accord Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2139 n.4 (No. 04-1475, 2007)).

Relying on the plain language of section 1910.147(a)(1)(i), and specifically emphasizing the standard's inclusion of the phrase "*unexpected* energization," the Commission has held that the "Secretary must show that there is some way in which the particular machine could energize, start up, or release stored energy without sufficient advance warning to the employee." *GM-Delco*, 17 BNA OSHC at 1219-20, *aff'd*, 89 F.3d 313, 315 (6th Cir. 1996) (affirming Commission and noting that, in context of LOTO standard, "use of the word 'unexpected' connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot start up without giving a servicing employee notice of what is about to happen").

Under this Commission precedent, therefore, the LOTO standard's use of the term "unexpected" unambiguously refers to the potential of a machine or equipment to "energize, start up, or release stored energy without sufficient advance notice to the employee." *See Ormet Corp.,* 14 BNA OSHC 2134, 2135 (No. 85-531, 1991). And the term does not require the

Secretary to quantify the specific risk level associated with such an event. As the Commission noted in *General Motors Corp.*, "[a]s evidenced by the fatality that prompted OSHA's inspection here, even momentary exposure to equipment that has not been fully deenergized and locked out poses a significant risk of serious harm or death." 22 BNA OSHC at 1048; *accord Burkes Mech.*, 21 BNA OSHC at 2142 (finding significant risk of serious injury or death to laborers working under conveyor that was not locked out, as illustrated by fatality); *see Int'l Union, UAW v. OSHA*, 37 F.3d 665, 670 (D.C. Cir. 1994) (rejecting pre-enforcement challenge to OSHA LOTO standard, and noting that in its supplemental statement of reasons to its rulemaking OSHA stated that "workers face a significant risk of material harm every time they perform service or maintenance work on powered industrial equipment" (*citing* 58 Fed. Reg. 16,612, 16,620 (Mar. 30, 1993)).

There is no dispute Matsu did not issue locks and tags to its tool and die makers and did not require them to lockout or tagout mechanical presses when they worked on them. (Tr. 70, 89, 421.) Nonetheless, Matsu argues "OSHA's own rules acknowledge that die blocks are the most effective means for the control of hazardous energy on mechanical power presses." (Matsu Post-Trial Br., p. 17) The Court does not agree. To the extent Matsu claims that use of safety blocks were "alternative measures," the Court finds that those measures were ineffective. Turning off the machine would not prevent its unexpected energization or startup. William Tarwater, a former Matsu tool and die maker for approximately two years, testified that pulling the die block did not shut down the press completely since the flywheel motor was still on. (Tr. pp. 68-70.) Therefore, the presses were still energized even when the die block was pulled.

Significantly, the safety blocks were *not* under the exclusive control of the tool and die makers. Therefore, Matsu did not prevent employee access to the point of operation of a press since an operator or other employees could remove the safety block without the tool and die maker's knowledge. Tarwater testified about an instance when he pulled the safety block on a mechanical press in order to repair a broken punch. (Tr. 59, 78.) Tarwater left the mechanical press area and went to the tool and die shop to retrieve a tool he needed. He returned to the press and began working inside of it to replace the punch. Richard Tate, Tarwater's supervisor and Matsu's Tool Room Supervisor, approached Tarwater and told him he was going to suspend Tarwater because he was working inside a press without using a safety block. Tarwater went to

the other side of the press and noticed someone had removed the safety block and placed it in its storage space. (Tr. 79, 943.) Upon further inquiry, Tate and Tarwater learned the press operator had returned to the press, observed the unlocked and untagged safety block in place and, not seeing a tool and die maker in the immediate area, the press operator removed the safety block in order to continue operating the press. (Tr. 79-80.)

Tarwater was clearly exposed to the potential of unexpected energization of this press by the operator. Tarwater stated he "would consider that a near miss" when he was working inside the press after the operator had removed the safety block he had set in place. (Tr. 82.) Tarwater also testified that anybody could remove a safety block pulled by a tool and die maker and the tool and die maker had no control over it while he was working. (Tr. 81.)

Tarwater's testimony on this issue regarding the removed safety block was undisputed. Tarwater testified the first day of trial on July 15, 2014. The trial continued the next day and then resumed in November, four months later. At no time did Matsu call anyone to the stand to rebut Tarwater's testimony or offer other evidence contradicting Tarwater's testimony that an operator had removed the safety block without Tarwater's knowledge, exposing him to crushing and amputation hazards.[19] Therefore, Matsu "has not demonstrated that the cited activities were 'performed using alternative measures which provide effective protection.'" *Dayton Tire*, 23 BNA OSHC at 1258. Thus, the Secretary has established Matsu failed to require its tool and die makers to use proper LOTO procedures when adjusting or repairing dies on mechanical presses in violation of the cited standard.

Employee Access to the Violative Condition

The Secretary contends when a tool and die operator is required to make adjustments or repairs to the dies of a press, the operator has access to its danger zone and is exposed to amputation or crushing injuries. Vernon photographed tool and die team leader Larry Sebastian[20] placing his hands and arms between the dies of a mechanical press. (Tr. 370; *see also*

[19] The Court closely observed Tarwater during his testimony. He was candid and responsive to the questions posed to him. He displayed no evasiveness, uneasiness, or deflective tactics. Tarwater gave no indication he harbored any animus towards Matsu. When asked if he wanted his job back at Matsu, Tarwater responded, "I wouldn't mind having that job back. They're not that easy to find for an older man like me." (Tr. 99.) The Court finds Tarwater a credible witness and gives considerable weight to his testimony.

[20] Since there are two Sebastians referenced herein, Larry Sebastian and Michael Sebastian, they are also referred

Ex. C-1, pp. 1, 5.) Vernon observed the press's safety block had been pulled but that LOTO procedures had not been implemented. (Tr. 393.) Matsu argues that since Vernon admitted he did not know whether Larry Sebastian was engaged in a die-setting operation at the time he was photographed, the Secretary failed to prove Larry Sebastian was performing maintenance or servicing within the meaning of the LOTO standard. (Tr. 445.) The Court does not agree with Matsu.

The photographs clearly show Larry Sebastian with his hands and arms inside the point of operation of the press on which he was working. The press is not engaged in normal production operations because the safety block had been pulled and placed in the press. Similarly, Tarwater also testified that when making adjustments and repairs to dies while they were still in the presses, he was required to lean into the die, entering the point of operation. (Tr. 59, 69, 77-78.) Likewise, Clint Davis also testified he used a hand or surface grinder to sharpen punches on the mechanical presses and described the manner in which he changed a broken spring on a component of the die. (Tr. 943, 967-968.) Both tasks required Davis to place his hands and arms within the danger zone of the press. "[T]he Commission may draw reasonable inferences from the evidence[.]" *Fluor Daniel,* 19 BNA OSHC 1529, 1531 (Nos. 96-1729 & 96-1730, 2001) (*citing Atlantic Battery Co.*, 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994)). The Court concludes the reasonable inference from the evidence is that Vernon observed Sebastian engaged in servicing or maintenance on the dies of the press when LOTO procedures had not been implemented.

Matsu nonetheless argues its procedure of pulling the safety block and placing it between the ram and the bolster "forecloses employee exposure." (Matsu Post-Trial Br., p. 31.) The Court finds no merit in Matsu's argument. As indicated *supra*, the safety blocks were *not* under the exclusive control of the tool and die makers and did not prevent employee access to the point of operation of a press since an operator or other employee could remove the safety block without the tool and die maker's knowledge. Even Tarwater's momentary exposure to equipment that has not been fully deenergized and locked out posed a significant risk of serious harm or death. *General Motors Corp.*, 22 BNA OSHC at 1048. Thus, the Court concludes the

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herein by their given names and their surnames.

Secretary has established Matsu's tool and die makers had access to the danger zone and were exposed to amputation or crushing injuries at the point of operation when working in the presses.

Employer Knowledge

Matsu does not dispute that its policy prevented tool and die makers from locking or tagging out its mechanical presses when they worked inside the presses making adjustments and repairs, but rather, argues it lacked fair notice because the Secretary did not cite it for violating the LOTO standard following a 2010 OSHA inspection[21] and "OSHA inspectors must cite violations they find." (Matsu Post-Trial Br., p. 40.) The Court does not agree. It is well-established that "an employer cannot rely on the failure of the Secretary to issue a citation for a particular condition during an earlier inspection as the basis for later arguing lack of knowledge of the same hazardous condition." *Wheeling-Pittsburgh Steel Corp.,* 16 BNA OSHC 1780, 1782 (No. 91-2524, 1994).[22] "In essence, the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard, and does not preclude the Secretary from pursuing a later citation." *Seibel Modern Mfg. & Welding Corp*., 15 BNA 1218, 1224 (No. 88-821, 1991).

In *Seibel*, the Commission noted it had previously "cautioned employers against freely drawing such inferences from uneventful inspections" since "an employer is required to comply with a standard regardless of whether it has previously been informed that a violation exists." *Id.* at 1223-1224 (citing *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1596 (No. 82-12, 1985);

[21] By Order dated December 24, 2014, the Court took judicial notice "that the Alabama Safe State Program is the OSHA-approved and funded state occupational safety and health consultation service for the State of Alabama established pursuant to the OSH Act. 29 U.S.C. §670(d)[,]" which sends consultants to perform safety audits of worksites. To the extent Matsu apparently argues it did not have notice since SafeState did not recommend implementing LOTO procedures following its audit of Matsu's facility, the Court finds this argument is not relevant for the sames reasons indicated *infra*. (*Id.*)

[22] Matsu cites three cases (*Martin v. Miami Indus.,* 983 F.2d 1067 (6th Cir. 1992); *Trinity Marine Nashville, Inc.,* 275 F.3d 423, 430 (5th Cir. 2001); and *Interstate Brands Corp.,* 20 BNA OSHC 1102 (No. 00-1077, 2003)) which it claims support its argument that OSHA cannot cite an employer for a violation if it did not cite the same alleged violative conditions in a previous inspection. The two circuit court opinions are not binding precedent since, as indicated *supra*, this case arose in the Eleventh Circuit. Further, all three cases are easily distinguishable from the present case. In each of the cases cited by Matsu, an OSHA compliance officer affirmatively told the employer that a specific condition or piece of equipment was in compliance with a later-cited standard or made recommendations that the employer followed. In the present case, Matsu presented no evidence that during the 2010 inspection OSHA's compliance officer informed Matsu it was not required to implement LOTO procedures when its tool and die makers adjust or repair dies in mechanical presses.

Columbian Art Works, Inc., 10 BNA OSHC 1132, 1133 (No. 78-29, 1981); *GAF Corp.*, 9 BNA OSHC 1451, 1457 (No. 77-1811, 1981). "These cases implicitly rule against deducing from uneventful prior inspections that particular operations are nonhazardous." *Id. See also International Harvester Co. v. OSHRC*, 628 F.2d 982, 985 n. 3 (7th Cir.1980) (earlier failure to cite for violation of a particular standard is not a decision that the employer was complying). *Cf. Cedar Construction Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C.Cir.1978) ("[w]e believe that recognizing such a right [to rely on uneventful prior inspections] would discourage self-enforcement of the Act by businessmen who have far greater knowledge about conditions at their workplaces than do OSHA inspectors"). The Court concludes the Secretary has established Matsu had actual knowledge of the cited condition since, in lieu of using the LOTO procedures, the company's own policy required the use of die blocks with its mechanical presses when tool and die makers worked inside the presses.

Preemption Claim

Matsu contends the LOTO standard does not apply to the cited mechanical presses because the "standard governing mechanical press die adjustment and repair displaces it."[23] (Matsu Post-Trial Br., p. 32.) The standard referred to by Matsu is the Mechanical Power Presses standard, which in relevant part mandates employers shall provide and enforce the use of safety blocks "whenever dies are being adjusted or repaired in the press." 29 C.F.R. § 1910.217(d)(9)(iv). Therefore, Matsu argues "[t]he mechanical power press standard requires only pulling die blocks, and not § 1910.147 lockout, before making die adjustments and repairs inside presses." (Matsu Post-Trial Br., p. 31.)

In the Eleventh Circuit, a "general standard setting forth measures that an employer must take to protect employees from a particular hazard is not preempted by a specific standard unless that specific standard addresses the same particular hazard as the general standard." *Brock v. Williams Enterprises of Georgia, Inc.,* 832 F.2d 567, 570 (11th Cir. 1987) (*citing L.R. Willson &*

[23] At the trial and in its briefs, Matsu relies heavily on statements made by Vernon in a deposition taken under Fed. R. Civ. P. 30(b)(6), which Matsu interprets as admissions by Vernon that the LOTO standard does not apply to the cited conditions and that Matsu's compliance with section 1910.217(d)(9)(iv) is all that is required. (Tr. 705, 707, 1033.) However, Vernon's statements are not dispositive of the issue since "'the Commission is not bound by the representations or interpretations of OSHA Compliance Officers." *Kaspar Wire Works, Inc. v. Sec'y of Labor,* 268 F.3d 1123, 1128 (D.C. Cir. 2001) (*citing L.R. Wilson & Sons, Inc. v. Donovan,* 685 F.2d 664, 676 (D.C.Cir.1982)).

Sons v. Donovan, 685 F.2d 664, 670 (D.C.Cir.1982)). The Court concludes the LOTO standard is not preempted by the Mechanical Power Presses standard.

An energy isolating device is "capable of being locked out if it has a hasp or other means of attachment to which, or through which, a lock can be affixed, or it has a locking mechanism built into it." 29 C.F.R. § 1910.147(b). An "affected employee" is "[a]n employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed." *Id.* 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. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section." *Id.*

As the Commission as held, the language of the LOTO standard is ambiguous as to whether it applies to the cited mechanical presses, which are also governed by the Mechanical Power Presses standard. *Tops Markets, Inc.*, 17 BNA OSHC 1935, 1935 (No. 94-2527, 1997), *aff'd without published opinion*, 132 F.3d 1482 (D.C. Cir. 1997). When the language of the standard fails to provide an unambiguous meaning, we look to the standard's legislative history. *Oberdorfer Industries, Inc.*, 20 BNA OSHC 1321, 1328-29 (Nos. 97-0469 & 97-0470, 2003) (consolidated). The preamble to a standard is the most authoritative evidence of the meaning of the standard. *Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC 1396, 1398 (No. 08-1292, 2015); *Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2092 (No. 96-0126, 2000); *Tops Markets*, 17 BNA OSHC at 1936.

The preamble to the LOTO standard states, "this standard focuses primarily on procedures—procedures that are necessary to provide effective control when dealing with potentially hazardous energy sources. Where current standards require the use of specific measures, those standards are *supplemented and not replaced* by the procedures and training requirements of this Final Rule." 54 Fed. Reg. 36665 (emphasis added). "With regard to servicing and/or maintenance which takes place during 'normal production operations,' it is important to note that this standard *is intended to work together with the existing machine guarding provisions of Subpart O of part 1910*[.]" 54 FR 36644-01 (emphasis added). The

preamble also states that it "*supplements and supports* the existing lockout related provisions contained elsewhere in the general industry standards by providing that comprehensive and uniform procedures be used for complying with those provisions" and further, it "*does not conflict with their requirements*" since those standards "provide limited coverage of machinery, equipment and industries and do not address lockout or tagout issues or methodology in any detail." *Id.* (emphasis added).

Significantly, the Commission has also held "that the LOTO standard protections prescribed for servicing and maintenance activities were designed to seamlessly dovetail with the machine guarding protections that apply during normal production operations under 29 C.F.R. Part 1910, subpart O." *Dayton Tire*, 23 BNA OSHC at 1254. Thus, the Mechanical Power Presses standard provides more limited coverage than does the LOTO standard since the Mechanical Power Presses standard is silent on lockout or tagout methodology and the hazard or requirements for the utilization of specific procedures to control the unexpected start-up of the power presses.[24]

The Court therefore finds the LOTO standard provides meaningful employee protection beyond that afforded by the Mechanical Power Presses standard. *The Cincinnati Gas & Electric Co.*, 21 BNA OSHC 1057 (No. 01-0711, 2005) (*citing Bratton Corp.*, 14 BNA OSHC 1893 (No. 83-132, 1990)). Accordingly, the preemption argument is rejected, the LOTO standard applies, and the Secretary properly resorted to the LOTO standard to attempt to safeguard Matsu's

[24] The energy control procedure required by the LOTO standard must "clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance." 29 C.F.R. §1910.147(c)(4)(i), (c)(4)(ii). Additionally, the LOTO standard prescribes a specific sequence for the application of energy controls to incorporate into each procedure. 29 C.F.R. §1910.147(d). It further requires employers to conduct an annual periodic inspection of the energy control procedure "to ensure that the procedure and the requirements of this standard are being followed." 29 C.F.R. §1910.147(c)(6). The LOTO standard also mandates both initial training and retraining in lockout procedures for servicing employees, and other employees who work near machines that are being serviced. 29 C.F.R. §1910.147(c)(7)(i), (c)(7)(III). Specifically, it requires initial lockout training to "ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees." 29 C.F.R. §1910.147(c)(7)(i). Retraining must be provided for servicing employees when "there is a change in their job assignments, a change in machines, equipment or processes that present a new hazard, or when there is a change in the energy control procedures." 29 C.F.R. §1910.147(c)(7)(III)(A). Additionally, the employer must provide retraining "whenever the employer has reason to believe[] that there are deviations from or inadequacies in the employee's knowledge or use of the energy control procedures." 29 C.F.R. §1910.147(c)(7)(III)(B). The employer must also certify "employee training has been accomplished and is being kept up to date." 29 C.F.R. §1910.147(c)(7)(iv).

employees from the hazard of an unexpected start-up of the power presses not covered in the Mechanical Power Presses standard.

Fair Notice Claim

"Generally speaking, an employer cannot be held in violation of the Act if it fails to receive prior fair notice of the conduct required of it." *Miami Indus. Inc.*, 15 BNA OSHC 1258, 1263 (No. 88-671, 1991). *See also Brock v. Williams Enterprises of Georgia, Inc.,* 832 F.2d 567, 572 (11th Cir. 1987) (*citing L.R. Willson & Sons v. Donovan*, 685 F.2d 664, 670 (D.C.Cir.1982) (due process mandates that an employer receive notice of the requirements of any OSHA regulation before he is cited for an alleged violation). Thus, Matsu argues the Secretary failed to provide Matsu with fair notice the LOTO standard applied to its mechanical presses. Because it "was not given sufficient notice of the standard's applicability to die adjustment and repair." (Matsu Post-Trial Br., p. 38.) The Court does not agree. The Secretary's intent to apply the LOTO standard to die changing is reflected in two Standard Interpretation Letters.

"Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a court in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness. In addition, of course, Congress expressly charged the Commission with making authoritative findings of fact and with applying the Secretary's standards to those facts in making a decision." *Martin v. OSHRC*, 499 U.S. 144, 152-55 (1991). Thus, if the legislative history does not resolve questions of ambiguity, we consider the reasonableness of the Secretary's interpretation. *Shaw Global Energy Services*, Inc., 23 BNA OSHC 2105, 2107 (No. 09-0555, 2012).

In a Standard Interpretation Letter issued April 22, 2005, the Secretary put employers on notice that "setting up" activities "by definition, involve work[s] that prepares a press to perform its intended normal production operation; therefore, this [minor servicing] exception generally would not apply to hydraulic and mechanical power press die-setting because the servicing activity is not taking place during NPOs." (Ex. C-2, n. 1.) In another Standard Interpretation Letter issued December 28, 2006, the Secretary reiterated that "die-setting activities constitute servicing activities and are covered by the LOTO standard, i.e., pursuant to the definitions of "setting up" and "servicing and/or maintenance" contained in 1910.147(b)." (Ex. C-5, p. 1.)

The Court concludes the Secretary's interpretation of the LOTO Standard is consistent with the regulatory language and is reasonable. Therefore, the Court concludes the LOTO standard and the definitions therein indicate "servicing and maintenance" include die setting and adjusting within the setting up activities on the presses. Moreover, when Matsu received the citation, the Commission was in agreement with the Secretary's interpretation. *See Dayton Tire*, 23 BNA OSHC at 1254; *Gen. Motors Corp.,* 22 BNA OSHC at 1019.

Matsu clearly had notice since it developed and documented procedures for mechanical power presses at its facility. (*See* Ex. C-4.) As the Secretary notes in his brief, and the Court agrees, in developing the procedures "it is evident that [Matsu] appreciated and recognized the hazards of stored energy sources with its mechanical power presses and the need to protect its employees from the hazard." (Sec'y Post-Trial Br., pp. 6-7.) Matsu's "Lockout Posted Procedure" stated that the purpose of the procedures was to establish "the minimum requirements for lockout whenever maintenance or servicing is done on equipment." (Ex. C-4.)

Matsu's LOTO procedures mirror the intent of OSHA's regulation and require its procedures "be used to ensure that the machine or equipment is stopped, isolated from all potentially hazardous energy sources and locked out." (*Id.*) Matsu's LOTO procedures also identified the different sources of energy and detailed the methods to be used to lockout and tagout each source of energy on the power presses. For example, in order to isolate power at the primary electrical disconnect for the power press, the knife switch was required to be placed in the "off" position and required a lock and tag be applied to the switch. (*Id.*) Therefore, Matsu had sufficient notice of the application of the LOTO standard to the cited conditions prior to the instant inspection.

Vagueness Claim

Matsu also asserts if the LOTO standard does apply, it is "unconstitutionally vague as applied. It is overbroad. It exceeds the scope of statutory authority." (Matsu Post-Trial Br., p. 36.) However, "a claim that a standard is vague is assessed not in the abstract, but in the particular factual context." *Dayton Tire*, 23 BNA OSHC at 1258 (*citing Bliss & Laughlin Indus., Inc. v. Sec'y of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982)). "Moreover, the [standard] will pass constitutional muster even though [it is] not drafted with the utmost precision; all that due process requires is a fair and reasonable warning." *Id.*; *cf. Pitt-Des Moines, Inc.*, 168 F.3d 976,

987 (7th Cir. 1999) (holding that "[t]he addition of an alternative, less specific means of compliance does not make the regulation unconstitutionally vague," and that employer relying on alternative "did so at its peril").

Thus, the Commission has held "the challenged elements of the minor servicing exception are necessarily broad enough to cover the myriad servicing activities to which the LOTO standard might apply. *Dayton Tire*, 23 BNA OSHC at 1258 (*citing Cargill*, Inc., 15 BNA OSHC 2149, 2152 (No. 90-3191, 1993) ("the due process clause does not impose drafting requirements of mathematical precision or impossible specificity."); *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2205 (No. 87-2059, 1993) (noting that Secretary needs to draft standard only "with as much exactitude as possible in light of the myriad conceivable situations which could arise and which could be capable of causing injury" (citation omitted)).

Moreover, the Court concludes, as the Commission did in *Dayton Tire*, that a reasonable employer "could determine what constitutes 'effective' alternative protection, given that the stated purpose of the LOTO standard is to prevent injury that could result from 'unexpected energization or startup of the machines or equipment, or release of stored energy." 29 C.F.R. § 1910.147(a)(1)(i)." *Dayton Tire*, 23 BNA OSHC at 1252. "This link to the standard's purpose is reinforced by the exception's cross-reference to 'subpart O of this part,' which prescribes machine guarding requirements. . . . As such, a reasonable employer could determine, based on knowledge of its employees' specific servicing activities and the machines upon which they work, what alternative measures would achieve this purpose and, thus, provide effective protection." *Id.* Therefore, the Court rejects Matsu's vagueness challenge.

Classification

Finally, the Secretary classified the violation as serious. As indicated *supra*, a serious violation is one that carries a substantial probability that death or serious physical harm could result. Here, employees were exposed to the hazard of crushing and amputation injuries due to Matsu's failure to require the use of LOTO procedures for its tool and die makers adjusting or repairing dies in its mechanical presses. Therefore, the violation was properly classified as serious. Thus, the Court concludes Item 1 should be affirmed.

Item 2, Alleged Violation of Section 1910.217(b)(7)(iii) of the Mechanical Power Presses Standard

The Secretary alleges in Item 2 Matsu committed a serious violation of section 1910.217(b)(7)(iii), a provision in the Mechanical Power Presses standard, which mandates that with machines using partial revolution clutches, the clutch's means of selecting "off," "inch" (also called "hand transfer"), "single stroke" and "continuance" (also called "progressive") mode must be "by means capable of supervision by the employer." 29 C.F.R. § 1910.217(b)(7)(iii). The Secretary asserts that on or about May 16, 2013,[25] in the Press Line Room on Presses 1 through 11, "press operators had their own keys, one key controlled numerous presses, and operators were able to change the press mode without supervision."

Applicability

Section 1910.217(b)(7)(iii) is a provision in the Mechanical Power Presses standard and since the Secretary cited eleven mechanical power presses in the press line room, section 1910.217(b)(7)(iii) applies to the cited conditions. This standard applies to machines used in metal manufacturing. *Oberdorfer Indus.*, 20 BNA OSHC at 1321 (affirming violation of standard for rotating lathes used to mold patterns from pieces of metal). Therefore, the Court concludes the cited standard clearly applied to the cited conditions. *S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014).

Compliance with the Terms of the Standard

Relevant to this citation item, Vernon "found that it was a routine occurrence that employees would have more than one key to one press and that some of the keys were routinely left in the presses as they were being operated." (Tr. 415.) Matsu admitted "supervisors, team leads and trained operators have keys." (Matsu Post-Trial Br., p. 18.) However, Vernon also admitted he did not determine whether Matsu's press operators had been trained and authorized to perform the supervisor function. (Tr. 748-749.) Nonetheless, the Secretary argues in his brief "OSHA interprets the term 'supervision of keys' to mean 'that only the employer or a designated responsible person, such as the supervisor or foreman qualified by experience or training will

[25] The alleged violation description for Item 2 cites May 16, 2013, as the approximate date of the alleged violation and refers to Matsu employees assigned to operate presses in the press line. [redacted] was injured April 2, 2013. The issue of whether Matsu failed to train and supervise [redacted] is addressed in Items 5a and 5b of Citation Number 1.

control the operation of the press to prevent its use by unauthorized persons.'" (Sec'y Post-Trial Br., p. 18.) Thus, the Secretary asserts Matsu violated the cited standard since there was "overwhelming evidence to support a finding that the keys did not remain under the supervision of [Matsu's] supervisors or foreman." (*Id.*) The Court does not agree with the Secretary.

The Secretary cites in his post-trial brief to a purported standard interpretation letter dated July 29, 1975, which is not in evidence since he failed to tender a copy as an exhibit at trial, failed to attach it as an exhibit to his post-trial brief, and failed to move the Court to take judicial notice of it. *See* Fed. R. Evid. 201(c)(2). Apparently, the Secretary assumed the Court would simply take judicial notice of the cited interpretation letter. However, the Court declines to do so since the Secretary had ample opportunity at trial to present any evidence he felt was relevant.[26] *See Article II Gun Shop Inc.*, 16 BNA OSHC 2035, 2036 (Nos. 91–2146 & 91–3127, 1994) (consolidated). Further, even applying the Secretary's interpretation that "supervision of keys" means "a designated responsible person, *such as* the supervisor or foreman," the Court does not agree with the Secretary that he established a violation of the cited standard (emphasis added). The relevant national consensus standard, ANSI B11.1-2009, the American National Standards Institute's (ANSI) American National Standard for Safety Requirements for Mechanical Power Presses, indicates in paragraph E9.6 that "[a]nyone who is trained and authorized by the user may perform the 'supervisor' function. There is no intent to imply that only a person with a title 'supervisor' can assume that function." (Ex. R-27, p. 104.)

More importantly, the Eleventh Circuit has held the use of the phrase "such as" indicates that the illustrations are not meant to be exhaustive. *United States v. Townsend*, 521 F. App'x 904, 909 (11th Cir.), *cert. denied*, 134 S. Ct. 203 (2013). Therefore, properly construed, the Secretary's interpretation that "supervision of keys" means "a designated responsible person, *such as* the supervisor or foreman," indicates that the illustrations are not meant to be exhaustive, and Matsu is free to designate any person— not just the supervisor or a foreman— as long as such person is "qualified by experience or training."

As indicated *supra*, Vernon admitted he did not determine whether Matsu's press operators had been trained and authorized to perform the supervisor function. Thus, the Court

[26] Clearly, the Secretary understood the necessity of providing the purported July 29, 1975 standard interpretation letter for the record since he did identify as exhibits multiple interpretive letters. *See e.g.,* Ex. C-2, Ex. C-5, Ex. C-23, Ex. C-24.

concludes the Secretary failed to establish Matsu did not comply with the terms of the cited standard since the Secretary offered no evidence demonstrating Matsu's press operators who maintained keys to the presses were not designated by Matsu as "responsible persons" that "qualified by experience or training." Therefore, the Court concludes Item 2 must be vacated.

Item 3, Alleged Violation of Section 1910.217(c)(3)(iii)(f) of the Mechanical Power Presses Standard

The Secretary alleges in Item 3 Matsu committed a serious violation of another provision in the Mechanical Power Presses standard, section 1910.217(c)(3)(iii)(f), which mandates in relevant part, "[g]uards shall be used to protect all areas of entry to the point of operation not protected by the presence sensing device." The Secretary asserts that on the day [redacted]was injured on Press Number 10, Matsu "failed to effectively guard the point of operation on mechanical power presses to prevent employee injury." The Court agrees.

Applicability

Matsu previously attached a crowder bar safeguard on Press Number 8 and Press Number 10, which was designed "to fill up that space where a person could actually walk into between the light curtain and the point of operation." (Tr. 318.) Matsu attached the crowder bar safeguard in response to an accident that occurred on May 1, 2012, when [redacted] , another temporary employee, had his hands at the point of operation and was not detected by the vertical light curtain (the presence sensing device) when the press cycled, which resulted in finger amputation injuries. (Tr. 500.) As a result of [redacted] 's amputation, Todd ordered a crowder bar safeguard to be placed across the point of operation on Press Number 8 and Press Number 10. (*Id.*) Thus, the crowder bar was a safeguard "used to protect all areas of entry to the point of operation not protected by the presence sensing device" and was used to ensure an operator placing a blank in the press would remain inside the light curtain's sensing area and out of the press. (Tr. 265, 769, 996.) Therefore, the cited standard clearly applied to the cited condition.

Compliance with the Terms of the Standard

Matsu asserts, citing footnote 118 of its post-trial brief that "[redacted]confirmed he lacked knowledge of any pre-injury bar bend." (Matsu Post-Trial Br., p. 13 and n. 118; *see also* Tr. 94; Ex. R-22, ¶¶ 7-8.) However, footnote 18 is a citation to Tarwater's Declaration and his trial testimony, neither of which support Matsu's assertion. Matsu also asserts in its post-trial

brief, citing footnote 119, that it "established [[redacted]] was not working near the bend but next to operator Jeff Carter." (Matsu Post-Trial Br., p. 13 and n. 119; *see also* Tr. 210.) The testimony Matsu points to is [redacted]'s cross-examination. On cross-examination, [redacted]was shown photographs, one of which was the bent crowder bar on Press Number 10. The following colloquy occurred between [redacted]and Matsu's Counsel:

> Q.: And, in fact, you never saw that before your accident occurred, did you, sir?
>
> [redacted]: I don't know anything about -- you know, I didn't know anything about it.
>
> Q.: Well, My question is: whether you knew something about it or not, did you see a bent bar before your accident there?
>
> [redacted]: I really didn't pay no attention, no, sir.
>
> Q.: Okay. So is the answer to my question, "no, you didn't see it"?
> [redacted]: I wasn't paying any -- no.
>
> Q.: Okay. I want to ask you something else.

The Court followed up with a brief line of questions:

> COURT: I want to be clear on your answer. You indicated you "don't know" if it was there or "no," it wasn't there?
>
> [redacted]: At that time, me doing the job, just going -- I didn't know anything about that bar, no, sir.
>
> COURT: Did you know one way or the other?
>
> [redacted]: One way or the other. They just stick me over there.

(Tr. 210.)

It is clear from [redacted]'s responses that having never been a machine operator before, he was not familiar with machine or its parts, including the crowder bar safeguard, and that he "didn't know anything about that bar." His testimony does not however establish the bar was *not* bent prior to the accident. On direct-examination, [redacted]credibly testified at the time of the accident he was standing on his "tippy toes inside the machine" with both hands extended above his head loading blanks and "*the bar was bent I was leaning on to go up inside the machine*."

(Tr. 157.) [redacted]'s direct examination testimony is consistent with Matsu's party admission made to Vernon under Fed. R. Evid. 801(d)(2)(D) by Hall,[27] Matsu's Team Leader over the press operators, that at the time of the accident the crowder was been bent and had been bent for approximately a month prior to the accident. (Tr. 318-19, 320, 329.)

Michael Sebastian testified he performed a daily inspection every morning, including an inspection of the crowder bar safeguard, and filled out a daily inspection sheet for Press Number 10, and testified the crowder bar safeguard was not bent the morning of [redacted]'s accident. (Tr. 992-993, 994, 996-997; *see also* Ex. R-3, p. 2.) His testimony conflicts with the company's party admission made by Hall to Vernon and [redacted]'s testimony. The Court therefore does not credit Michael Sebastian's testimony on this issue.

Thus, the Court finds the preponderance of evidence establishes the crowder bar safeguard was bent at the time of the accident and had been bent for approximately a month prior to the accident and therefore, did not provide the protection it was intended for—to keep [redacted]within the sensing area of the light curtain. [redacted]had his hands at the point of operation, which were not detected by the vertical light curtain when the press cycled. The Court therefore concludes the Secretary has established Matsu failed to protect [redacted]from all areas of entry to Press Number 10's point of operation that were not protected by the presence sensing device in violation of the cited regulation.

Employee Access to the Hazardous Condition

When the bent crowder bar safeguard failed to keep [redacted]within the sensing area of the light curtain on Press Number 10, his left hand was flattened "like a pancake" and some of his left hand fingers were amputated by the press. [redacted]'s right was completely crushed by the press and was eventually amputated to the middle of his forearm. Clearly, [redacted]'s access to the hazardous condition was established.

Employer Knowledge

[27] Supervisor/Team Leaders such as Hall were responsible for reviewing and signing off on the daily operator inspection sheets. (*See e.g.*, Ex. C-15, p. 1; Ex. R-3, pp. 1, 2.) Matsu's own training reports indicate employee questions should be directed to their supervisor "or team leader." (*See e.g.*, Ex. C-15, p. 1; C-16, p. 2.) Since Hall was one of the team leaders responsible for signing off on the daily operator inspection sheets, his statement regarding the crowder bar safeguard was clearly "within the scope of that relationship and while it existed."

"The Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307-08 (11th Cir. 2013); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir.1979). "An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *ComTran Grp.*, 722 F.3d at 1308. "An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *Id.* "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program . . . with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.*

As indicated *supra*, in response to [redacted] 's amputation on May 1, 2012, Todd ordered the crowder bar safeguard to be placed across the point of operation on Press Number 8 and Press Number 10. Therefore, the Court agrees with the Secretary that Matsu had knowledge of the violative condition since it took steps to address the need for additional guarding on the presses. (*See* Sec'y Post Trial Br., pp. 20-21.) As the Secretary states, and the Court agrees, the "single purpose of the crowder bar was to keep the operator's body within the detection beam of the vertical light curtain." *Id.* Further, the Secretary also asserts, and the Court agrees, Matsu knew of the violative condition since the issue of the unguarded points of operation on Press Number 8 and Press Number 10 had been discussed during company safety meetings prior to [redacted]'s accident on April 2, 2013. (*Id.*) In addition, as indicated *supra*, Matsu admitted to Vernon that the crowder bar safeguard was bent on the day of the accident and had been bent for approximately a month prior to the accident. Therefore, the Court concludes the Secretary has proven Matsu had actual knowledge of the violative condition.

Further, the Court finds Matsu had constructive knowledge of the violative condition. There is no dispute the crowder bar safeguard had been previously damaged and replaced nor is there any dispute it was bent after the accident. Vernon testified the maintenance supervisor, Ernie Sailors, told him the crowder bar safeguard "was a unistrut bar, which means that it's a lightweight bar that was put in to fill up an area between the mechanical -- between the light curtains and the point of operation." (Tr. 315-316; *see also* Ex. C-32, Tab 13, p. 5.) Even

assuming arguendo as Matsu asserts, the crowder bar safeguard was not bent prior to [redacted]'s shift on the evening of his accident, and was bent by either Carter or [redacted]during the course of their shift on the evening of the accident, given Matsu's knowledge the crowder bar safeguard was made of lightweight material and had a propensity to bend (since it had been previously damaged and replaced), Matsu knew or should have known the crowder bar safeguard was not capable of providing [redacted]the protection it was intended for— to keep him within the sensing area of the light curtain. [redacted]'s injuries could have been prevented had Matsu exercised reasonable diligence and care. *ComTran Grp.*, 722 F.3d at 1316. Therefore, the Court concludes the Secretary has also proven Matsu had constructive knowledge of the violative condition.

Classification

The Secretary classified the violation as serious. As indicated *supra*, a serious violation is one that carries a substantial probability that death or serious physical harm could result. [redacted]was permanently disabled when the crowder bar safeguard failed to keep him within the sensing area of the light curtain. Therefore, the violation met the statutory requirement to be classified as serious. Thus, the Court concludes Item 3 should be affirmed.

Employee Misconduct Defense

Matsu asserts the affirmative defense of unpreventable employee misconduct for Item 3. "This defense requires the employer to show that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered." *Eller-Ito Stevedoring*, 567 F. App'x at 804. The Commission has also long-recognized that OSHA's machine guarding standards were designed to protect employees from common human errors such as "neglect, distraction, inattention or inadvertence of an operator[.]" *Slyter Chair, Inc.*, 4 BNA OSHC 1110, 1112 (No. 1263, 1976). "The standard was designed to provide against such human weaknesses." *Id.* "This requirement implicitly recognizes that human characteristics such as skill, intelligence, carelessness, and fatigue, along with many other qualities play a part in an individual's job performance, and it avoids dependence on human conduct for safety." *B.C. Crocker*, 4 BNA OSHC 1775, 1777 (No. 4387, 1976). "The plain purposes of the standard are to avoid dependence upon human behavior and to provide a safe

environment for employees in the machine area from the hazards created by the machine's operation." *Akron Brick & Block Co.*, 23 BNA OSHC 1876, 1878 (No. 4859, 1976). Thus, the affirmative defense of employee misconduct applies in situations in which the behavior of the employee, and *not* the existence of a violative condition, is at issue.

Here, Matsu created the violative conditions cited in Citation 1, Item 3 by failing to protect [redacted]from all areas of entry to the press's point of operation that were not protected by the light curtain. *In Fibres South, Inc.*, 17 BNA OSHC 1474 (No. 94-2688, 1995) (ALJ), the company, like Matsu does here, contended the violation was the result of unpreventable employee misconduct. In that case Judge Brady found that Fibres South demonstrated "a basic misunderstanding of this affirmative defense. The unpreventable employee misconduct defense refers to the action or actions of an employee." *Id.*, 17 BNA OSHC at 1480. "The Secretary did not cite Fibres South on how its employees were cutting wrap, but for failing to guard the #2 Godet. Regardless of how [the employee] cut wrap, the #2 Godet was unguarded[.]" *Id.* Thus, Judge Brady held Fibres South failed to establish this defense.

The Court agrees with Judge Brady's analysis. Here, as in *Fibres South*, the Court finds Matsu demonstrates "a basic misunderstanding of this affirmative defense." The Secretary did not cite the company on how its employees were using the cited machines, but rather, cited Matsu for failing to protect employees from all areas of entry to the press's point of operation that were not protected by the light curtain, and like in *Fibres South*, regardless of how [redacted]was using Press Number 10, Matsu still failed to "protect all areas of entry to the point of operation not protected by the presence sensing device" in violation of section 1910.217(c)(3)(iii)(f). Thus, even strict implementation and employee compliance with Matsu's purported rules would not have obviated the guarding requirement imposed by the standard. *S&G Packaging Co., LLC*, 19 BNA OSHC at 1507-1508. There is no work rule that, if communicated to employees, would change the fact that Matsu failed to "protect all areas of entry to the point of operation not protected by the presence sensing device."

Although Matsu cites to [redacted]'s trial testimony and argues in its brief "[redacted]had received training how safely to perform hand transfer," (Post-Trial Br., p. 9; Tr. 216-18), the Court finds [redacted]was not adequately trained or supervised on the safe operation of mechanical presses when he was assigned press operator duties. [redacted]'s testimony reveals

that when he was asked if Ninon gave him "some training on one of those presses right before [he] started working," [redacted]testified, "Well, not really no training. She just say to get out the light curtain." When asked, "Okay, that wasn't training? She told you what to do, right?" [redacted]responded, "She said 'load this blank, and then she said step back.'" (Tr. 216.)

Matsu also cites Pinchon's witness statement in support of its assertion [redacted]had received training how safely to perform hand transfer. (Matsu Post-Trial Br., pp. 8-9, n. 75; *see also* Ex. C-29, p. 2.) However, the Court does not find Pinchon's witness statement probative and gives it no weight since, unlike other witness statements, it was not made under oath[28] and was not signed by Pinchon. Further, although Matsu listed Pinchon as a witness it "may" have at trial,[29] Matsu failed to call Pinchon to testify or make him available for cross-examination, and this failure to call a witness in its control raises an inference his testimony would be unfavorable to the company's position.[30] *Capeway Roofing Systems,* 20 BNA OSHC at 1342-1343; *see also Regina Contr. Co.*, 15 BNA OSHC 1044, 1049 (No. 87-1309, 1991).

Matsu also cites to a two page power point presentation given to all new employees as part of their orientation when hired. (Ex. R-6.) However, as indicated in the Item 4 analysis *infra*, Wolfsberger testified the two-minute power point presentation on safety shown during [redacted]'s orientation was not adequate to train an employee to safely operate a mechanical press since Wolfsberger had never operated a mechanical press and he was not qualified to train anyone in press safety. [redacted]was hired by Surge to be a janitor, not a mechanical press operator. The only work experience [redacted]had prior to working at Matsu's facility had been as a cook at a Shoney's Restaurant for a month or two and as a stocker at a Walmart. (Tr. 115.) Clearly, and tragically, the training provided to [redacted]was not tailored to the needs of an

[28] Above the blank signature line in Pinchon's purported witness statement is the following statement: "I have read and had the opportunity to correct this statement and these facts are true and correct to the best of my knowledge and belief. Public Law 91-596, Paragraph 17(g) makes it a criminal offense to knowingly make a false statement or misrepresentation in this statement."). *Cf.* Ex. C-32, pp. 71-78 (Todd's statement, which declared "under penalty of perjury under the laws of the United States of America that this statement is true and correct to the best of, my knowledge").

[29] *See* Jt. Proposed Pretrial Order, Attach. F-2, p. 2.

[30] Even if the Court were to consider Pinchon's Job Supervisor's Report reliable and probative, it does support Matsu's assertion "[redacted] chose not to notify Carter that he was going to go back into the point of operation."

employee such as [redacted]with virtually no work experience and certainly no experience working on a mechanical press.

Matsu also asserts that "[redacted]chose not to notify Carter that he was going to go back into the point of operation as [redacted]was trained." (Matsu Post-Trial Br., p. 10, n. 90, n. 91) (citation to footnotes omitted from quote). However, Matsu points to no admission by [redacted]in the record that he was ever trained "to notify Carter that he was going to go back into the point of operation." Further, [redacted]testified he did not have to make Carter aware of where he was when he pushed the buttons "because we went into the machine at the same time. I was right beside him," (Tr. 225), which was corroborated by Matsu's own post-trial brief, which admits "Carter was standing next to him." (Matsu Post-Trial Br., p. 10.)

In support of its assertion that [redacted]was trained, Matsu cites to Wolfsberger's testimony. (Matsu Post-Trial Br., p. 10, n. 87, n. 91; Tr. 266, 270.) However, contrary to this assertion, Wolfsberger actually testified he did *not* know what training [redacted]received before he worked on the press. (Tr. 270.) Further, Matsu cites to Vernon's testimony, which referenced his deposition, where Vernon was asked whether [redacted]was trained not to reenter the press after leaving without letting the operator know. In response, Vernon testified "I believe that's part of his generic training." (*Id.*, n. 91; Tr. 802.) However, Vernon's "belief" is not dispositive as to whether or not [redacted]actually received such "generic training."

Although Michael Sebastian, the operator for Press Number 10 on the first shift, received additional specialized training on different functions of the progress presses before he became an operator, such as how to load and unload dies as well as loading up the steels and the coils, [redacted]received no such specialized training. Rather, his only training was from Ninon: "you turn around and get these blanks out of the bin. Get these blanks out of the bin. You load them in the machine and you make sure you get back." (Tr. 141.) Despite [redacted]'s lack of specialized training, Pinchon admonished [redacted]not to tell anybody that Pinchon had been putting him on the presses. Thus, Matsu failed to establish this defense.

Item 4, Alleged Violation of Section 1910.217(e)(1)(i)
of the Mechanical Power Presses Standard

The Secretary alleges in Item 4 Matsu committed a serious violation of section 1910.217(e)(1)(i), another provision in the Mechanical Power Presses standard, which mandates

in relevant part that employers must establish and follow an inspection program having a general component and a directed component, and under the general component of the inspection program, employers must:

> (A) Conduct periodic and regular inspections of each power press to ensure that all of its parts, auxiliary equipment, and *safeguards*, including the clutch/brake mechanism, antirepeat feature, and single-stroke mechanism, are in a safe operating condition and adjustment;
> (B) Perform and complete necessary maintenance or repair, or both, before operating the press; and
> (C) Maintain a certification record of each inspection, and each maintenance and repair task performed, under the general component of the inspection program that includes the date of the inspection, maintenance, or repair work, the signature of the person who performed the inspection, maintenance, or repair work, and the serial number, or other identifier, of the power press inspected, maintained, and repaired.

29 C.F.R. § 1910.217(e)(1)(i) (emphasis added).

The Secretary asserts in Item 4 "[a] program of periodic and regular inspections of mechanical power press(es) was not established and followed to ensure that all parts, auxiliary equipment and safeguards were in a safe operating condition and adjustment[.]" Specifically, the Secretary asserts that on or about April 3, 2013, in the Press Line Room on Presses 10, Matsu "failed to conduct effective press inspections to ensure all press safety devices and auxiliary equipment were in safe operating condition and properly adjusted."

Applicability

Section 1910.217(e)(1)(i) is found in *Subpart O—Machinery and Machine Guarding*. Section 1910.217 is captioned "Mechanical power presses." The Secretary cited a mechanical power press in the press line room and asserted the crowder bar guard—which clearly was a "safeguard" within the meaning of the standard—was properly inspected and documented. Therefore, the Court concludes the cited standard clearly applied to the cited condition. *S. Pan Servs.*, 25 BNA OSHC at 1085.

Compliance with the Terms of the Standard

The Secretary argues the "OSHA investigation found that respondent performed minimal pre-shift inspections and utilized general check lists for its mechanical presses. There was no program that identified or documented that the auxiliary equipment and guard that had been

added to the presses was being checked." (Sec'y Post-Trial Br., p. 23.) In support of this assertion, the Secretary argues Matsu "utilized the same daily inspection sheet with the same enumerated items, even after adding the crowder bar. As such, employees conducting the inspections were not given notice to check the additions on the presses." (*Id.*, p. 24.) Thus, the Secretary argues that since Matsu's inspection checklist before and after it added the crowder bar safeguard were the same, "employees conducting the inspections were not given notice to check the additions on the presses." The Court does not agree with the Secretary that these facts alone establish a violation.

As Matsu argues, and the Court agrees, "OSHA's own [sample] check sheet does not require a separate category for each safety device nor mandate the use of any magic words." (Matsu Post-Trial Br., p.21; *see also* Ex. R-28, p. 120.) In fact, OSHA's own sample Inspection Checklist included in its training program lists "guards" and "presence sensing devices" under a single category. (*Id.*) Therefore, the Court does not agree with the Secretary that Matsu was required to list the crowder bar safeguard separately or that not having done so established inspections were not done in conformity with the cited standard.

However, as the Court has found *supra*, the crowder bar safeguard was bent at the time of the accident and had been bent for approximately a month prior to the accident, and as the Secretary notes, Wolfsberger testified that he saw the bent crowder bar on the press a few hours after the accident. Therefore, the Secretary has established Matsu failed to comply with the cited regulation.

Employee Access to the Violative Condition

Matsu exposed [redacted]to the hazard of entering the danger zone of the press's point of operation by failing to implement and follow a program of periodic and regular inspection of Press Number 10 to ensure that the Crowder bar safeguard was in a safe operating condition. As indicated *supra*, [redacted]'s left hand was flattened "like a pancake" and some of his left hand fingers were amputated by the press. [redacted]'s right was completely crushed by the press and was eventually amputated to the middle of his forearm. Clearly, [redacted]'s access to the hazardous condition was established.

Employer Knowledge

The company's party admission made by Hall to Vernon that the crowder bar safeguard was bent at the time of the accident and had been bent for approximately a month prior to the accident establishes Matsu had knowledge of the violative condition. Therefore, the Court concludes the Secretary has proven Matsu had actual knowledge of the violative condition.

Classification

The Secretary classified the violation as serious. As indicated *supra*, a serious violation is one that carries a substantial probability that death or serious physical harm could result. [redacted]sustained permanent amputation injuries as a result of Matsu's failure to properly inspect the Crowder bar safeguard, which failed to keep [redacted]within the sensing area of the light curtain. Therefore, the violation met the statutory requirement to be classified as serious. Thus, the Court concludes Item 4 should be affirmed.

Items 5a and 5b, Alleged Serious Violations of Section 1910.217(f)(2) of the Mechanical Power Presses Standard

The Secretary alleges in Item 5a and Item 5b Matsu committed a serious violation of another provision in the Mechanical Power Presses standard, section 1910.217(f)(2), which requires in relevant part that employers "shall train and instruct the operator in the safe method of work before starting work on any operation covered by this section. The employer shall insure by adequate supervision that correct operating procedures are being followed." Specifically, on or about April 3, 2013, in the Press Line Room on Presses 10 the Secretary asserts in Item 5a that, Matsu "failed to properly train and instruct press operators in all the safe methods of manual transfer for press operations" and in Item 5b Matsu "did not ensure new operators and helpers were following correct operating procedures for 'hands in die' stamping operations."

Applicability

Section 1910.217(f)(2) is found in *Subpart O—Machinery and Machine Guarding*. Section 1910.217 is captioned "Mechanical power presses." The Secretary cited a mechanical power press in the press line room. However, Matsu asserts that OSHA recognized that [redacted]was a helper and not an operator, and that Carter was the Operator. (Tr. 804.) Thus, Matsu argues section 1910.217(f)(2) did not apply to the cited condition because it "prescribes only that **operators** must be trained; it contains no such requirement for others who work on

presses." (Matsu's Post-Trial Br., p. 56) (emphasis in original). The Court finds Matsu's argument preposterous.

The day [redacted]was injured, he was clearly the "Operator" of Press Number 10 at the beginning of the shift since he was "pushing the control button" for approximately four hours before he switched tasks with Carter. To hold otherwise would run counter to the explicit purpose of section 2(b) of the Act "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651(b). Furthermore, to require an employer to train employees who operated a mechanical press full-time and have no such requirement for temporary employees who were required to fill in as operators is absurd. "[T]he law tries to avoid absurd results." *Cox Enterprises, Inc. v. News-Journal Corp.,* 794 F.3d 1259 n. 89 (11th Cir. July 22, 2015) (citation omitted). "Interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982). Therefore, the Court concludes the cited standard clearly applied to the cited condition. *S. Pan Servs.*, 25 BNA OSHC at 1085.

Compliance with the Terms of the Standard

The Secretary alleges Matsu failed to "train and instruct" [redacted]"in the safe method of work before starting" work on the mechanical presses. "To establish noncompliance with a training standard, the Secretary must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances. *See Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1019-20 (No. 87-1076, 1991); *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993)." *N & N Contractors, Inc*., 18 BNA OSHC 2121, 2126 (No. 96-0606, 2000).

Michael Sebastian was a Surge temporary employee for about a year-and-a-half years, and has been a Matsu employee for about four years. (Tr. 982-983.) He has been a press operator for about three years and operated Press Number 10 on the first shift. (Tr. 982, 986.) He referred to Surge employees as "associates" and differentiated between Operators, who press the activation buttons for the press, and helpers, who load blanks into the dies of the press. (Tr. 988.) He was not an Operator when he was a Surge employee. (Tr. 984.) While he was employed by Surge, he "mostly loaded blanks and draws into the press" and "checked parts at

the end of the press." (*Id.*) After he became a Matsu employee, Michael Sebastian was assigned to operate the mechanical presses and received on-the-job training by the supervisor at the time, Jason Dugger. (Tr. 983-984.) "There was a lot of training on different functions of the progressive presses, *how to load and unload dies* as well as loading up the steels and the coils and stuff like that." (Tr. 985) (emphasis added). When he was a Surge associate, he did not fill out an inspection sheet, and before he became an Operator, he received training related to the inspection sheet from Chris Hall, his team leader. (*Id.*)

Michael Sebastian testified he worked on another press for eight months before he received "kind of a promotion to Press 10." (Tr. 986.) He stated moving to Press Number 10 was a promotion because it "is a more critical press in the company." (Tr. 1010, 1013.) Matsu also provided Michael Sebastian with additional training on how Press Number 10 differed from the previous press he had worked on. (Tr. 986.) According to Michael Sebastian, Surge employees were not Operators and were not allowed to operate the press, and on average, about three months before they were "hired in" by Matsu. (Tr. 988.) Michael Sebastian testified he had never seen a Surge employee operate the press. (Tr.1010.) The Court credits this portion of his testimony since it was corroborated by the party admission of Patterson, Matsu's Human Resources Manager, that Surge associates were not allowed to operate the press. (Tr. 1081-82.)

In contrast to Sebastian's gradual introduction to the mechanical presses and his systematic training on them, [redacted]testified he was pulled from his janitorial duties "maybe a week or maybe a week-and-a-half into my job" to load blanks into a mechanical press. (Tr. 137.) [redacted]'s only "training" prior to this assignment consisted of the approximately two-minute power point presentation Surge's supervisor showed the three applicants their first day at Matsu's facility. (Tr. 237.) Contrary to Sebastian's and Patterson's testimony that Surge employees were not supposed to be operators, [redacted]was in fact the "operator" for the first half of the shift. (Tr. 154-155, 221.)

[redacted]was the only eyewitness to his accident who testified. In its brief, Matsu asserts [redacted]"lunged into the point of operation to make a part adjustment," relying on its "Supervisor's Incident Investigation Report," purportedly prepared by Todd, Matsu's General Manager, which placed the blame on [redacted]for his injuries. (Matsu Post-Trial Br., p. 10; Ex. R-12.) The Court finds no merit in this argument. As indicated *supra*, [redacted]credibly

testified he was standing on his "tippy toes" inside the machine at the time of the accident. (Tr. 157.) Significantly, Matsu did not call Carter to testify and Carter was the only other eyewitness to the accident—he alone could have corroborated the position taken by Matsu in this litigation and refuted [redacted]'s testimony—yet Matsu elected not to call him as a witness, even though Matsu listed Cater as a witness it "may" have at trial. Matsu's failure to call Carter as a witness raises an inference his testimony would be unfavorable to the company's position. *Capeway Roofing Systems,* 20 BNA OSHC at 1342-1343.

Although Matsu offers Todd's "Supervisor's Incident Investigation Report" as evidence of [redacted]'s culpability, the Court considers this report to be a self-serving document drafted with the intention of assigning fault for the injury to [redacted], a temporary Surge employee, and exonerating Carter, Matsu's employee, who was the operator at the time of the accident and in control of the press's cycle. Again, Matsu failed to call to testify its General Manager, Todd, the purported author of that report. Matsu's failure to call Todd as a witness raises an inference his testimony would not support the company's position, *Capeway Roofing Systems,* 20 BNA OSHC at 1342-1343, and thus, Todd's purported Investigative Report lacks the assurances of reliability present in [redacted]'s testimony. *Regina*, 15 BNA OSHC at 1050. The Court therefore gives little weight to this report and finds the preponderance of evidence establishes [redacted]did not "lunge" into the point of operation to make a part adjustment, but rather, was standing on his "tippy toes" inside the machine at the time of the accident.

As to training,—or, in this case, lack of training— significantly, as indicated *supra*, Wolfsberger testified the power point presentation on safety shown during [redacted]'s orientation was not adequate to train an employee to safely operate a mechanical press, especially since Wolfsberger had never operated a mechanical press and he was not qualified to train anyone in press safety. Clearly, and tragically, the training provided to [redacted]was not tailored to the needs of an employee such as [redacted]with no experience working on a mechanical press. Although Sebastian received additional specialized training before he became an operator on different functions of the progress presses, such as how to load and unload dies as well as loading up the steels and the coils, [redacted]received no such training. Wolfsberger described his surprise when he learned [redacted]was the employee who had been injured on Press Number 10.

Wolfsberger: I saw [Pinchon] there and I asked him what happened. He said somebody's hands got caught in the press. I asked him who it was, and he said "[redacted]."

Q.: What was your response?

Wolfsberger: "Why in the hell was he on a press?"

Q.: Why would you say that?

Wolfsberger: Because he should not have been on the press. There was no reason for it.

Q.: Why?

Wolfsberger: He was a janitor. He wasn't trained.

Q.: What did Mr. Pinchon tell you about that?

Wolfsberger: That they were behind and they needed help to get the parts done.

(Tr. 255.) The Court concludes the Secretary has established Matsu failed to adequately train and instruct [redacted]in the safe use of mechanical presses as cited in Item 5a.

The Secretary also alleges Matsu failed to "insure by adequate supervision that correct operating procedures [were] being followed." [redacted]testified that when Hall pulled him from his regular duties, Hall led him over to the press, made sure he had protective sleeves, gloves, and glasses, and "then he'd walk off." (Tr. 151.) [redacted]testified neither Pinchon nor Hall ever came by to check on him once he was assigned to a press. (Tr. 155-56.) Matsu did not call either Pinchon or Hall to testify regarding their supervision of [redacted]. The Court infers from this that the testimony of Pinchon and Hall would fail to support its position that Matsu adequately supervised [redacted]. The Court concludes the Secretary has established Matsu failed to adequately supervise [redacted]as cited in Item 5b.

Employee Access to the Violative Condition

Matsu exposed [redacted] to the hazard of entering the danger zone of the press's point of operation without adequate safety training or supervision. As indicated *supra*, [redacted]'s left hand was flattened "like a pancake" and some of his left hand fingers were amputated by the press. [redacted]'s right was completely crushed by the press and was eventually amputated to

the middle of his forearm. Clearly, [redacted]'s access to the hazardous condition was established.

Employer Knowledge

The Secretary must establish Matsu knew of the violative condition. Because section 1910.217(f)(2) requires the employer to provide safety training and supervision to employees, employer knowledge is generally established along with employer noncompliance. "The fourth prong of [the Secretary's burden of proof]—employer knowledge of the violative condition—will almost invariably be present where the alleged violative condition is inadequate training of employees. *See e.g.*, *Compass Envtl., Inc. v. OSHRC*, 663 F.3d 1164, 1168 (10th Cir. 2011) (*citing e.g., Andrew Elec. Co.,* 22 BNA OSHC 1593 (No. 08-0103, 2009) (ALJ) ("The standard at section 1926.21(b)(2) addresses safety training, so the employer necessarily knows whether or not it instructed each employee in the recognition and avoidance of unsafe conditions...."); *Lane Constr. Corp.,* 23 BNA OSHC 1097 (No. 09-0348, 2009) (ALJ) ("As the employer, Lane had actual knowledge of its training program.")).

An employer's obligation to train is "dependent upon the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1236 (99-0344, 2000). "Employees must be given instructions on '(1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions.'" *Capform Inc.*, 19 BNA OSHC 1374, 1376 (No. 99-0322, 2001) *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished) (*quoting Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1020 (No. 94-200, 1997)).

Here, although Michael Sebastian received additional specialized training before he became an operator on different functions of the progress presses, such as how to load and unload dies as well as loading up the steels and the coils, [redacted] received no such training. Despite this lack of training, Pinchon admonished [redacted] not to tell anybody that Pinchon had been putting [redacted] on the presses. The Court finds Matsu "failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *El Paso Crane & Rigging*, 16 BNA OSHC at 1424. The Court concludes the Secretary has

established Matsu knew or should have known it had failed to adequately train and supervise [redacted] in the safe method of operating a mechanical press.

Classification

The Secretary classified the violation as serious. As indicated *supra*, a serious violation is one that carries a substantial probability that death or serious physical harm could result. [redacted] was permanently disabled when the crowder bar safeguard failed to keep him within the sensing area of the light curtain. Therefore, the violations met the statutory requirement to be classified as serious. Thus, the Court concludes Items 5a and 5b should be affirmed.

Infeasibility of Compliance Defense

In Matsu's Answer, it raised as its fourth affirmative defense, "[t]he means of compliance prescribed by the applicable standards cited by Complainant would have been infeasible under the circumstances." (Answer, p. 3.) In its brief, *Matsu* asserts Citation 1, Item 5b must be vacated because "OSHA offers no evidence that its ill-defined proposed level of supervision was feasible." The Court finds no merit in these arguments since again, it is Matsu, not the Secretary, that has the burden of proof on this affirmative defense. As such, in the Eleventh Circuit, Matsu must prove "(i) that compliance with a particular standard either is impossible or will render performance of the work impossible; and (ii) that it (the employer) undertook alternative steps to protect its workers (or that no such steps were available)." *M.C. Dean, Inc. v. Sec'y of Labor*, 505 F. App'x 929, 936-37 (11th Cir. 2013) (*citing Harry C. Crooker & Sons, Inc. v. OSHRC*, 537 F.3d 79, 82 (1st Cir.2008)).

Here, Matsu presented no evidence "(i) that compliance with a particular standard either is impossible or will render performance of the work impossible; and (ii) that it undertook alternative steps to protect its workers (or that no such steps were available)." Therefore, Matsu has failed to establish the affirmative defense of infeasibility. Thus, the Court concludes Items 5a and 5b should be affirmed.

Item 6, Alleged Violation of Section 1910.242(b) of the General Hand and Portable Powered Tools and Equipment Standard

The Secretary alleges in Item 6 Matsu committed a serious violation of section 1910.242(b), a provision in the General Hand and Portable Powered Tools and Equipment standard, which provides: "[c]ompressed air shall not be used for cleaning purposes except

where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment." Specifically, the Secretary asserts that on or about April 24, 2013, in the Tool and Die Shop Matsu "failed to reduce compressed air nozzles used for cleaning metal parts to less than 30 p.s.i. Air nozzles were used at 85 p.s.i."

Applicability

Section 1910.242(b) is found in *Subpart P—Hand and Portable Powered Tools and Other Hand-Held Equipment.* Section 1910.242 is captioned "Hand and portable powered tools and equipment, general" and subsection (b) refers to "Compressed air used for cleaning." Therefore, the Court concludes the cited standard clearly applied to the cited condition. *S. Pan Servs.*, 25 BNA OSHC at 1085.

Compliance with the Terms of the Standard

During his April 24, 2013, inspection of Matsu's tool and die shop, Vernon observed an employee using a drilling machine with an air nozzle next to him. (Tr. 54.4) Tool and die makers use compressed air from air nozzles to blow away metal chips and shavings produced during the machining process. (Tr. 543.) Vernon observed the air nozzle appeared to be modified. (Tr. 542.) He testified, "I took my certified air tester and I tested it to see if it was going to blow 30 p.s.i. and it read 85 p.s.i." (*Id.*) Todd told Vernon in an interview on August 16, 2013, after the inspection he had replaced all of the air nozzles in the tool and die shop because they had all been modified to above 30 p.s.i. (Tr. 543.) The Court concludes the Secretary has established Matsu failed to comply with the terms of § 1910.242(b).

Employee Access to the Hazardous Condition

Vernon observed a Matsu tool and die maker using a drilling machine with the noncompliant air nozzle readily available for use. Todd conceded all of the air nozzles in the tool and die shop had been modified. Vernon testified the hazard created by using compressed air for cleaning that was higher than 30 p.s.i. is that metal chips and shavings could be blown into an employee's hands, face and eyes. (Tr. 545.) Therefore, the Court concludes the Secretary has established Matsu's tool and die makers had access to compressed air used for cleaning that had not been reduced to less than 30 p.s.i.

Employer Knowledge

Matsu contends the Secretary failed to establish the company knew the air nozzle Vernon tested exceeded the allowable p.s.i. Specifically, Matsu argues "OSHA never had any evidence that Matsu was aware of the nozzle's existence—let alone that Matsu used it on a hose for cleaning with compressed air. OSHA did not even offer evidence concerning how long the nozzle had been on Matsu's premises." (Matsu's Post-Trial Br., p. 63.) The Court does not

agree. Although the Secretary adduced no evidence Matsu had *actual* knowledge its tool and die makers were using noncompliant air nozzles, the record clearly established Matsu had *constructive* knowledge because it could have known of the violative condition with the exercise of reasonable diligence.

On August 16, 2013, Vernon interviewed Todd and when Vernon asked Todd if they replaced any air nozzles as a result of them being defective, Todd admitted they replaced ten. (Tr. 543.) Since Tate was Matsu's tool room supervisor, he was present in the tool room on a daily basis where modified air nozzles were in plain sight. Vernon was able to tell the air nozzle he tested was modified just by looking at it. (Tr. 542.) Todd stated that when he checked the air nozzles in the tool room, every one of them ("at least 10") had been modified. The uniformity of the modifications suggests it was the tool and die makers' standard practice to increase the p.s.i. of the air nozzles. With the exercise of reasonable diligence, Tate, Matsu's supervisor, should have observed and abated the modifications.

> [T]he conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge." *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996). Additionally, constructive knowledge may be found where a supervisory employee was in close proximity to a readily apparent violation. *Hamilton Fixture*, 16 BNA OSHC [at 1089].

KS Energy Services, Inc., 22 BNA OSHC 1261, 1265-1266 (No. 06-1416, 2008). Therefore, Tate's constructive knowledge of the use of the noncompliant air nozzles is imputed to Matsu. *ComTran Grp.*, 722 F.3d at 1307; *Access Equip. Sys.*, 18 BNA at 1726. Thus, the Court concludes the Secretary has established Matsu had constructive knowledge of its noncompliance with section 1910.242(b).

Classification

The Secretary classified the violation as serious. As indicated *supra*, a serious violation is one that carries a substantial probability that death or serious physical harm could result. Since the use of compressed air exceeding 30 p.s.i. may blow metal chips and shavings into an employee's exposed skin and eyes, resulting in cuts or serious eye injuries, Item 6 was properly classified as serious. Therefore, the Court concludes Item 6 should be affirmed.

B. Alleged Repeated Violation

Section 17(a) of the Act provides that any employer who "repeatedly violates the requirements of section 5 of the Act, any standard, rule or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation." 29 U.S.C. §666(a). "Congress, unfortunately, did not define the term 'repeatedly.'" *Bunge*, 638 F.2d at 836. However, a Commission majority finally construed "repeatedly" in *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979), where it held that a violation was repeated if, "at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *See also Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2106 (No. 09-0240, 2012), *aff'd Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386 (5th Cir. 2013).

The Eleventh Circuit held a violation is "repeated" for purposes of 29 U.S.C. §666(a) if "(1) the same standard has been violated more than once and (2) there is a 'substantial similarity of violative elements' between the current and prior violations" and further, "[t]he prior citation on which the repeat violation is based must have become a final order of the Commission." *D & S Grading Co. v. Sec'y of Labor*, 899 F.2d 1145, 1147 (11th Cir. 1990) (*citing Bunge*, 638 F.2d at 837). "Once substantial similarity is shown, the burden shifts to the employer to disprove substantial similarity or prove any affirmative defense it may have." *Id.*, 899 F.2d at 1148 (*citing Bunge*, 638 F.2d at 838).

Citation 2, Item 1, Alleged Violation of Section 1910.212(a)(1) of the Machine Guarding Standard

Under section 1910.212(a)(1), the Secretary is required "to prove that a hazard within the meaning of the standard exists in the employer's workplace." *Buffets, Inc.*, 21 BNA OSHC 1065, 1065 (No. 03-2097, 2005) (*citing ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993) (*citing Armour Food Co.*, 14 BNA OSHC 1817, 1821 (No. 86-247, 1990)), *rev'd on other grounds*, 2 F.3d 653 (8th Cir. 1994)). Specifically, the Secretary "must show that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated." *Id.* (*citing Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No. 89-553, 1991)). The mere fact that it is not impossible for an employee to come into contact with

the moving parts of a particular machine does not, by itself, prove that the employee is exposed to a hazard. *Armour Food*, 14 BNA OSHC at 1821.

The Secretary alleges in Citation Number 2, Item 1 Matsu committed a repeat violation of section 1910.212(a)(1), a provision in the Machine Guarding standard, which mandates, "[o]ne 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." Specifically, the Secretary asserts that on or about April 24, 2013, in the tool and die shop, there was no machine guard to protect employees from the point of operation on the (a) RD-1600 Sharp Radial Arm Drill, (b) Takang Turret Milling Machine, (c) Sharp Milling Machine, and (d) Sharp-KMA Milling and Drilling Machine.

Applicability

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding.* Section 1910.212 is captioned "General requirements for all machines." This standard applies to machines used in metal manufacturing. *Oberdorfer Indus.*, 20 BNA OSHC at 1321. Citation Number 2, Item 1 cites four instances of machines that were not equipped with guards for their points of operation. Therefore, where such machines expose employees to injury, the machines must be equipped with a guard. 29 C.F.R. § 1910.212(a)(l). Thus, the Court concludes the cited standard applied to the cited conditions. *S. Pan Servs.*, 25 BNA OSHC at 1085.

Compliance with the Terms of the Standard

Vernon learned that on April 19, 2013, Matsu tool and die maker [redacted] sustained an amputation while using the Sharp Radial Arm Drill Press in the tool and die shop. Matsu's *Supervisor Incident Investigation Report* stated:

> [redacted] was working on a drill press tapping the threads on a die he was working on. Mr. [redacted] reached for something inside the work area. He was wearing gloves which is against procedure. As he reached inside of the work area the backside of his glove became caught on the tap in the spindle.[31] The spindle twisted the glove and in turn wrapped his left hand around the tap backwards

[31] At trial, Matsu referred to it as "the rotating chuck or spindle." (Tr. 734.)

> causing severe trauma to the left thumb and middle fingers. [redacted] was taken to Huntsville Hospital where he underwent surgery to repair his left hand.

(Tr. 658; Ex. C-20.) Vernon inspected Matsu's tool and die shop on April 24, 2013, and observed the four cited machines were not guarded. (Ex. C-19; Tr. 625.) Specifically, while Vernon was inspecting the tool and die area, he observed some of the machines were set up with a chuck. (Tr. 658.) When Vernon asked if the machines had guards for the rotating parts, he was told they did not. (*Id*.) Vernon took photographs of the cited machines.[32] In all of the photographs, the unguarded rotating chucks or spindle were visible. Therefore, the Court concludes the Secretary established Matsu failed to guard the rotating parts of the cited machines.

Employee Access to the Hazardous Condition

Section 1910.212(a)(1) is a general standard. It applies generally to protect employees who are exposed to point-of-operation hazards. Unlike specific standards, the Secretary must show that the hazard addressed by the general standard existed. *Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993). The two seminal Commission cases that are relevant to the Court's inquiry here are *Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980), and *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976). *Gilles & Cotting* addressed the general question of employee exposure to hazards. *Rockwell* addressed the specific question of employee exposure arising from the actual operation of a machine.

In *Gilles & Cotting*, the Commission set forth a test for employee exposure based on the principle of "reasonable predictability." 3 BNA OSHC at 2003. The Commission held that the Secretary bore the burden of proving "that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Id.*[33] In *Rockwell*, the Commission set forth the standard of employee exposure to hazards presented

[32] Pages 3 and 4 of Ex. C-19 show the RD-1600 Sharp Radial Arm Drill, cited in Instance (a). Pages 5 and 6 of Ex. C-19 show the Takang Turret Milling Machine, cited under Instance (b). Pages 7 and 8 of Ex. C-19 show the Sharp Milling Machine, cited under Instance (c) (page 8 shows a Matsu employee using the unguarded machine). Pages 9 and 10 of Ex. C-19 shows the KMA-3 Sharp-KMA Milling and Drilling Machine, cited under Instance (d).

[33] *See also Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1078 n. 6 (No. 90–2148, 1995); *Carpenter Contracting Corp.*, 11 BNA OSHC 2027, 2029–31 & n. 3 (No. 81–838, 1984); *Otis Elevator Co.*, 6 BNA OSHC 2048, 2050 (No. 16057, 1978).

by the employee's operation of a machine. The Commission stated: "The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury." 9 BNA OSHC at 1097–98. "Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.' *Id.*

Here, the danger zone was where "the rotating parts are or the part is— the part that's being manipulated." (Tr. 660.) Vernon testified employees using the machines had access to the rotating parts, and when they were turned on and rotating, could be exposed to the rotating parts resulting in lacerations, fractures, and amputations. (Tr. 653, 659.) They were also exposed to the hazards of metal shavings flying off from the drilled material. (Tr. 628.) Vernon observed an employee using the Sharp Milling Machine cited in instance (c) of Citation 2, Item 1. (Tr. 662-663.) The employee was using the machine to drill a piece of metal stock. (Tr. 663, 669-671; *see also* C-19, p. 6.) The machine did not have a guard in place or a guard available for use at the time it was being used and the employee was not wearing eye protection. (Tr. Vol. III, pp. 662-663; *see also* Ex. C-l9, p. 6.)

Matsu argues the Secretary failed to prove employees actually were exposed to hazards created by the rotating parts of the cited machines. (Matsu Post-Trial Br., p. 26.) In support of this position, Matsu relies on *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1422 (No. 89-553, 1991). (Matsu Post-Trial Br., p. 65.) In *Jefferson Smurfit*, the Commission held in order for the Secretary to meet his burden, he "must do more than show that it may be physically possible for an employee to come into contact with the unguarded machinery in question." However, the present case is distinguishable from *Jefferson Smurfit* since here, the Secretary did do more— he proved, and Matsu does not dispute, that [redacted] was *actually* injured when he came into contact with the Sharp Radial Arm Drill Press. Had Matsu properly guarded that machine, [redacted] would not have had access to the zone of danger.

Under Commission precedent, the Secretary must show either that Matsu's employees were actually exposed to the violative condition *or* that it is "reasonably predictable by operational necessity" that "employees *have been*, are, or will be in the zone of danger." *S&G Packaging Co., LLC*, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (emphasis added) (*citing Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citing *Gilles &*

Cotting, Inc., 3 BNA OSHC 2002, 2003 (No. 504, 1976)). Therefore, as to the Sharp Radial Arm Drill Press, the Secretary has established actual exposure to the violative condition cited condition.

As to the remaining three cited machines, employee entry into the zone of danger may also be reasonably predictable when such entry occurs by "unsafe operating procedures, poor training, or employee inadvertence" and "carelessness." *H. B. Zachry Co. (Int'l)*, 8 BNA OSHC 1669, 1674 (No. 76-2617, 1980) (citations omitted). Here, all of the alleged violations were grouped together "because they were substantially similar," in that "they all operated as a drill—they had a drill capacity to them," and the hazard was the same, "there were rotating parts . . . the rotating spindle or the rotating drill bit or the rotating auger or the rotating chuck." (Tr. 652-653, 659.) Employees using the cited machines would be doing precise work. (Tr. pp. 659.) The machines were used by the tool and die maintenance employees as needed in order to fix other machines, fixtures, or parts necessary to continue production. (Tr. pp. 668, 671-672.)

As such, the tool and die maintenance employees would use the cited machines to work on parts, fixtures, or stock varying in size from very large to very small. (Tr. pp. 668, 671-672; *see also* Ex. C-21.) When working on small parts, the employees would necessarily be in close proximity to the rotating chucks and spindles in order to perform the required tasks. (Tr. pp. 659.) This close work increased the hazard of being pulled into the machines. (Tr. pp. 659.)

Tarwater testified he worked with pieces of parts that were 12 inches or less with the drilling and milling machines in the die shop and on those smaller pieces, in order to do his job, "You'd have to be right there with it. . . . 6 or 8 inches" to the rotating chuck or the rotating spindles. (Tr. 94.) Since all of the cited machines operated as a drill, it was reasonably predictable at the time of Vernon's inspection—as evidenced by [redacted] 's accident during the week previous to the inspection, that Matsu's employees *have been*, are, or will enter into the zone of danger "by operational necessity" or as the result of "unsafe operating procedures, poor training, or employee inadvertence" and "carelessness." Therefore, the Secretary has established the element of exposure as to all four cited machines.

Matsu asserts [redacted] "was not performing any task remotely related to normal operation." (Matsu Post-Trial Br., p. 66.) However, Matsu offers no probative evidence in support of this assertion. Rather, Matsu cites in part to Vernon's testimony, which does not

support its position. (*Id., n. 477*; *see also* Tr. 729.) Matsu could have, but did not, call Mitchel to testify as to whether he was "performing any task remotely related to normal operation." Significantly, Matsu also relies on its *Supervisor's Incident Investigation Report* prepared by Tate after [redacted] 's accident, which did *not* indicate [redacted] violated company policy by "reaching for something inside of the work area." (Ex. C-20.) Matsu's failure to call Tate as a witness raises an inference his testimony would not support Matsu's position that [redacted] was "not performing any task remotely related to normal operation."

Clint Davis testified that although he was there the day of the accident, he did not witness the accident. (Tr. 962.) The only other evidence of record is the report itself, which indicated [redacted] was "performing regular duties at the time of the incident." (Ex. C-20.) The Court therefore finds the preponderance of evidence establishes [redacted] was "performing regular duties at the time of the incident" that were "reasonably predictable by operational necessity." Even assuming *arguendo* Matsu assertion is accurate that [redacted] "was not performing any task remotely related to normal operation," then the accident was the result of either "unsafe operating procedures, poor training, or employee inadvertence" and "carelessness." Either way, the Court concludes the Secretary has established the element of exposure. Because the Court finds that the unguarded points of operation of the cited machines exposed employees to injury contrary to section 1910.212(a)(1), the Secretary has satisfied his burden of proof.

Employer Knowledge

As indicated *supra*, when Vernon took photographs of the cited machines, the unguarded rotating chucks or spindle were clearly visible. Matsu does not dispute that it had previously been cited for violating the same standard and that the prior citation had become a final order and offered no evidence to rebut the Secretary's prima facie showing of similarity. Therefore, the Court concludes the Secretary has established Matsu had actual knowledge of its noncompliance with section 1910.212(a)(1).

Repeat Classification

On October 30, 2010, OSHA conducted an inspection at Matsu's Huntsville, Alabama facility. (Ex. C-18, p. 8.) During that inspection, the Compliance Safety and Health Officer observed that a drill press located in the maintenance shop was not provided with a guard so as to protect the operator from the rotating chuck and bit. (*Id.*) Matsu was issued a citation for

violating 29 C.F.R. 1910.212 (a)(1). (*Id.*) On June 8, 2011, Matsu and the Secretary entered into a settlement agreement reducing the violation to an other-than-serious violation of the Act, which became a final order of the Commission on August 8, 2011. (*Id.*, pp. 11-16, 19.)

Matsu argued at trial this item cannot be a repeat because in the settlement agreement the previous citation for this violation was reduced to nonserious. The Court does not agree. The classification of the prior violation is immaterial to the determination of whether the present violation is properly classified as repeat. By way of example, in three separate Commission cases involving repeat violations, each Judge affirmed the repeat violation, when the prior "other than serious" violation became a final order of the Commission.

In *Hubbard Constr. Co.*, 24 BNA OSHC 1689 (No. 11-3022, 2013)(ALJ), like the present case, the parties settled the prior citation as an "other than serious" violation through an informal settlement agreement, which became a final order of the Commission. Despite the different classifications, since the prior and present violations were of the same standard, Judge Coleman affirmed the present violation as a repeat violation. Likewise, in *KS Energy Serv. Inc.*, 23 BNA OSHC 1484 (No. 09-1272, 2011) (ALJ), Judge Loye affirmed a repeat violation where the parties settled the prior citation as an "other than serious" violation through an informal settlement agreement, which became a final order of the Commission. In *Beverly Enterprises-Alabama, Inc.*, 19 BNA OSHC 1365 (No. 00-1357, 2001) (ALJ), Judge Spies also affirmed a repeat violation where the prior "other than serious" violation was not contested and became a final order of the Commission.

Although the Court is not bound by these decisions, it agrees with them.[34] The Court concludes when an employer violates the same standard more than once, it is properly considered a repeat violation if there is substantial similarity of violative elements and the prior violation has become a final order of the Commission, even when the prior final order of the Commission affirmed a violation as other-than-serious. Thus, the violation was properly classified as a repeated violation.

[34] *See KS Energy Serv. Inc.*, 23 BNA OSHC 1483 (No. 09-1272, 2011) (citing *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976)) (finding that unreviewed administrative law judge decision does not constitute binding precedent for the Commission).

Employee Misconduct Defense

In Matsu's brief, it argues Citation 2 Item 1 must be vacated because Matsu can prove unpreventable employee misconduct. (Matsu Post-Trial Br., p. 63.) Specifically, Matsu asserts [redacted] "violated a rule forbidding gloves and his glove was caught by the chuck when he grabbed it." (*Id.*, p. 66.) Matsu again relies on its "Supervisor's Incident Investigation Report" prepared by Tate after [redacted] 's accident, also not called by Matsu to testify, which stated [redacted] violated policy by wearing gloves. (Ex. C-20.) However, this statement is corroborated by Patterson' testimony that [redacted] violated the company's policy by wearing gloves. (Tr. 1077-78.) Nonetheless, the cited standard requires physical guarding of hazards. *Collator Corp.*, 3 BNA OSHC 2041 (No. 2004, 1976).

As indicated *supra*, the affirmative defense of employee misconduct applies in situations in which the behavior of the *employee*, and *not the existence of a violative condition*, is at issue. As noted above, operation of the machines placed employees within the zone of danger. Here, however, Matsu created the violative conditions cited in Citation 2, Item 1 by failing to guard the points of operation for the four cited machines. And once again, the Court finds Matsu demonstrates "a basic misunderstanding of this affirmative defense." The Secretary did not cite Matsu on how its employees were using the cited machines, but rather, cited Matsu for failing to guard them and regardless of how Matsu's employees were using the cited machines, the machines were still unguarded in violation of section 1910.212(a)(1). Thus, even strict implementation and employee compliance with Matsu's rules would not have obviated the guarding requirement imposed by the standard. *S&G Packaging Co., LLC*, 19 BNA OSHC at 1507-1508. There is no work rule that, if communicated to employees, would change the fact that Matsu failed to properly guard the machines. Thus, Matsu failed to establish this defense.

Infeasibility of Compliance Defense

In its brief, Matsu argues Citation 2, Item 1 must be vacated because "OSHA must be expected to prove that compliance is feasible." (Matsu Post-Trial Br., pp. 60, 69.) Again, the Court finds no merit in this argument. Section 1910.212(a)(1) "has been recognized by the Commission as a performance standard, and as such the standard requires that the employer exercise a certain degree of judgment in evaluating whether its machinery is in compliance with the standard and what types of guarding methods would be appropriate to achieve compliance."

Hamilton Die Cast, Inc., 11 BNA OSHC 2169, 2172 (No. 79-1686, 1984) (*citing Stacey Manufacturing Co.*, 10 BNA OSHC 1534 (No. 76-1656, 1982); *George C. Christopher & Son, Inc.*, 10 BNA OSHC 1436 (No. 76-647, 1982).

As indicated *supra*, Matsu, not the Secretary, has the burden to prove this affirmative defense, *Pitt-Des Moines, Inc.*, 16 BNA OSHC at 1433, and was required to show that the means of compliance set forth in the standard were infeasible and that there were no feasible alternative means of protection. *M.C. Dean*, 505 F. App'x at 936-37; *V.I.P. Structures, Inc.*, 16 BNA OSHC at 1874. The standard indicates "[e]xamples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc." 29 C.F.R. §1910.212(a)(1). Matsu failed to show why equipping the four cited machines with guards for their points of operation was not feasible and failed to show that there were no feasible alternative means of protection. Therefore, Matsu has again failed to establish the affirmative defense of infeasibility. Thus, the Court concludes Citation Number 2, Item 1 should be affirmed.

C. Alleged Other-Than-Serious Violation

As to an other-than-serious violation, "[w]here the Secretary does not allege, nor is there evidence to support a conclusion that there was a substantial probability that the violation could have resulted in death or serious physical harm, the violation is properly characterized "as other-than-serious." *See Trinity Indus. Inc.*, 15 BNA OSHC 1579, 1588 (Nos. 88-1545, 88-1547, 1992), *rev'd and remanded by Reich v. Trinity Indus., Inc.*, 16 F.3d 1149 (11th Cir. 1994) (holding the Commission improperly applied the test for a "willful" violation). Thus, a violation is considered other-than-serious when "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 and Warehouse Co.*, 1 BNA OSHC 1219, 1222 (No. 1, 1973).

**Citation 3, Item 1, Alleged Violation of Section 1904.29(b)(3)
of the Recordkeeping and Reporting Occupational
Injuries and Illnesses Standard**

The Secretary alleges in Citation Number 3, Item 1 Matsu committed an other-than-serious violation of section 1904.29(b)(3), which requires employers to "enter each recordable injury or illness on the OSHA 300 Log and 301 Incident Report within seven (7) calendar days

of receiving information that a recordable injury or illness has occurred." Specifically, the Secretary asserts that on or about April 24, 2013, Matsu "failed to record an amputation lost time accident for a temporary employee supervised by Matsu Alabama on the OSHA 300 Log within 7 days."

Applicability

Section 8(c)(1) of the Act requires all employers to keep such records as the Secretary of Labor and the Secretary of Health, Education, and Welfare might require by regulation. 29 U.S.C. §657(c)(1). Section 8(c)(2) of the Act requires the Secretaries of the two departments to prescribe regulations requiring employers to keep records of work-related injuries and illnesses. 29 U.S.C. §657(c)(2). The Secretary's cited regulation, section 1904.29(b)(3), is part of his *Recording and Reporting Occupational Injuries and Illnesses* standard found in Subpart C of Part 1904, which sets out its scope in a "Note to Subpart B," that "All employers covered by the Occupational Safety and Health Act (OSH Act) are covered by these Part 1904 regulations." Therefore, the Court concludes the cited standard clearly applied to the cited condition.

Compliance with the Terms of the Standard

[redacted] sustained amputation and crushing injuries to his hands on April 2, 2013, at Matsu's facility. His injuries resulted in "medical treatment beyond first aid," and in his inability to perform any work for the foreseeable future. (Tr. 202-203.) Matsu stipulated it did not record [redacted]'s injuries on its OSHA 300 Log within seven days of the accident. (Tr. 552.) Based upon these undisputed facts, the Secretary asserts he has established Matsu violated section 1904.29(b)(3). Matsu argues it was not required to record [redacted]'s injuries because Surge employed [redacted]. The Court does not agree with Matsu.

Matsu contends it had agreed verbally with Surge that each company would record injuries on the OSHA 300 Log for its own employees. Patterson testified he and Surge vice-president Melissa Chapman worked out an arrangement whereby each company kept a separate OSHA 300 Log for its employees. (Tr. 1052, 1069.) In its brief, Matsu cites to a November 21, 2012, Standard Interpretation Letter purportedly issued by the Secretary and argues "[t]he foregoing forecloses the citation, which must be vacated." (Matsu Post Trial Br., p. 71 n. 511.) However, any reliance by Matsu on this purported Standard Interpretation Letter was misplaced. First, this interpretation letter referenced in Matsu's brief is not in evidence since Matsu failed to

tender a copy as an exhibit at trial, failed to attach it to his brief, and failed to move the Court to take judicial notice of it. *See* Fed. R. Evid. 201(c)(2). Like the Secretary, Matsu apparently assumed the Court would simply take judicial notice of the cited interpretation letter. However, the Court declines to do so since Matsu, like the Secretary, had ample opportunity at trial to present any evidence it felt was relevant. *Article II Gun Shop Inc.*, 16 BNA OSHC at 2036. More importantly, as indicated *infra*, the meaning of section 1904.31(b)(2) is clear and does not require administrative interpretation by the Secretary.

The Court recognizes "that an agency's construction of its own regulations is entitled to substantial deference," *Georgia Pac. Corp. v. OSHRC*, 25 F.3d 999, 1004 (11th Cir. 1994) (*quoting Martin v. OSHRC*, 499 U.S. 144, 150 (1991)), if the Secretary's interpretation is "consistent with the regulatory language and is otherwise reasonable." *Id.*; *Martin*, 499 U.S. at 156 (emphasis in original); *Brock*, 832 F.2d at 569-70. However, "under the well-known principles enunciated in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984), we *first* examine the language of the standard and then, *if necessary*, the available legislative history, to determine the standard's meaning." *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1574 (No. 91-237, 1994) (emphasis added).

Section 1904.31(b)(2), another provision in the *Recordkeeping and Reporting Occupational Injuries and Illnesses* standard, provides that if an employer "obtain[s] employees from a temporary help service, employee leasing service, or personnel supply service," the employer "must record these injuries and illnesses if [the employer] supervise[s] these employees on a day-to-day basis." 29 C.F.R. § 1904.31(b)(2). It also indicates that "the personnel supply service, temporary help service, employee leasing service, or contractor" is not required to record the injuries or illnesses occurring to temporary, leased or contract employees that "[the employer] supervise[s] on a day-to-day basis." 29 C.F.R. § 1904.31(b)(4). Further, "the temporary help service, employee leasing service, personnel supply service, or contractor should coordinate [with the employer's] efforts to make sure that each injury and illness is recorded only once: either on [the employer's] OSHA 300 Log (if the employer] provide[s] day-to-day supervision) or on the other employer's OSHA 300 Log (if that company provides day-to-day supervision)." *Id.*

The meaning of section 1904.31(b)(2) is clear and does not require administrative interpretation by the Secretary. The record reflects Matsu carried on the day-to-day supervision of [redacted] and under section 1904.31(b)(2), Matsu, not Surge, was required to comply with the cited provision of the standard. Therefore, the Court concludes the Secretary established Matsu failed to comply with the cited provision.

Employee Access to the Violative Condition

Commission precedent has established that the Secretary need not prove harm to any particular employee resulting from a recordkeeping violation since the recordkeeping requirements of the Act "play a crucial role in providing the information necessary to make workplaces safer and healthier." *Kaspar Wire Works*, 18 BNA OSHC at 2178 (*citing General Motors Corp.*, 8 BNA OSHC 2036, 2041 (No. 76-5033, 1980)). "[A] requirement that the Secretary demonstrate exposure of employees to a hazard is not appropriate in cases dealing with recordkeeping regulations. . . . Recordkeeping regulations . . . are not intended to eliminate an existing and identified hazard in a particular workplace. . . . [T]hey are promulgated pursuant to a different section of the Act, section 8, which mandates that the Secretary prescribe recordkeeping and reporting requirements for work-related injuries and illnesses and authorizes the Secretary to make other provisions as the Secretary deems necessary for the implementation of the Act." *Thermal Reduction Corp.,* 12 BNA OSHC 1264, 1268 (No. 81-2135, 1985). Therefore, "the 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).

Employer Knowledge

In the context of recordkeeping violations, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known, of the errors and omissions during the limitations period." *Gen. Dynamics*, 15 BNA OSHC at 2132 n. 16. Here, Matsu admits that it was aware of the Act's recordkeeping requirements (Tr. 552.) Matsu was also aware that [redacted] suffered a serious, recordable injury while working on a mechanical power press at its Huntsville plant. (Ex. C-26.) Matsu was also aware that Surge did not have any supervisors present on the third shift and that Surge employees working on that shift were supervised by Matsu on a day-to-day basis. (Tr. pp. 138-139, 143-144, 252-253, 594-596.)

Significantly, Vernon met with representatives from Matsu and Matsu's counsel on April 3, 2013, and informed Matsu that as the employer supervising and directing [redacted]'s day-to-day work, it had the responsibility to record his injury. (*Id.*) Despite this assistance and information, Vernon discovered that Matsu had not recorded [redacted]'s injury on its OSHA 300 Log when he returned to the Matsu facility on April 24, 2014. (*Id.*; Ex. C-25.) Therefore, the Court concludes the Secretary has established Matsu had actual knowledge of its noncompliance with section 1904.29(b)(3). Further, with the exercise of reasonable diligence Matsu could have known of the omissions during the recording period.

Classification

An "other-than-serious" violation is different from a "*de minimis* violation," which according to the Commission, "has no direct or immediate relationship to safety or health." *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1861, 1865 (No. 90-3312, 1994). Violations have been classified as *de minimis* when the Commission has found that the violations were so 'trifling' that the entry of an abatement order or the assessment of a penalty was inappropriate. *General Motors*, 8 BNA OSHC at 2041 (*citing Continental Oil Co.*, 7 BNA OSHC 1432 (No. 13750, 1979), and cases cited therein). In addition to a technical noncompliance with a standard, a *de minimis* violation is one "which the departure from the standard bears such a negligible relationship to employee safety as to render inappropriate the assessment of a penalty or the entry of an abatement order." *Erie Coke Corp.*, 15 BNA OSHC 1561, 1571 (No. 91-3606, 1992).

However, the reporting requirements of the Act "cannot be properly classified as *de minimis*, for to do so would weaken significantly the reporting requirements of the Act and the Secretary's regulations." *General Motors*, 8 BNA OSHC at 2041. Since the Secretary does not allege, nor is there evidence to support a conclusion that there was a substantial probability that the violation could have resulted in death or serious physical harm, the recordkeeping violation was properly characterized as "other-than-serious." Thus, the Court concludes Citation Number 3, Item 1 should be affirmed.

IV. PENALTY DETERMINATION

"The Commission has the exclusive authority to assess penalties once a proposed penalty is contested." *Chao v. OSHRC*, 401 F.3d 355, 376 (5th Cir. 2005) (citation omitted). The Commission is to "giv[e] due consideration to the appropriateness of the penalty with respect to

[1] the size of the business of the employer being charged, [2] the gravity of the violation, [3] the good faith of the employer, and [4] the history of previous violations." 29 U.S.C. § 666(j). "These factors are not necessarily accorded equal weight...." *Chao v. OSHRC*, 401 F.3d at 376 (*citing J.A. Jones Constr.*, 15 BNA OSHC at 22016). "Gravity of violation is the key factor." *See id.* The Court has considered Matsu's size, history of violations, and good faith, but finds the gravity of the serious and repeated violations warrant the assessment of the maximum penalties, even if Matsu rated "perfect marks on the other three criteria." *Nacirema Operating Co., Inc.*, 1 BNA OSHC 1001, 1003 (No. 4, 1972).

Further, any basis for giving good faith effect to reduce the penalty is diminished by Matsu's "failure to adequately prepare and train" [redacted], an inexperienced employee, "which demonstrates a lack of good faith." *MEI Holdings, Inc.* 18 BNA OSHC 2025, 2029 (No. 96-740, 2000). *See also Gen. Motors*, 22 BNA OSHC at 1048 (giving no credit for good faith when management tolerated and encouraged hazardous work practices); *Access Equipment Systems, Inc.*, 18 BNA OSHC 1718, 1728-29 (No. 95-1449, 1999) (no reduction for good faith where there was evidence for and against good faith); *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1625 (No. 88-1962) (lack of good faith as a significant factor in penalty assessment).

Likewise, with respect to the "history of prior violations" factor, the Court considered the October 30, 2010, citation, which became a final order of the Commission on August 8, 2011, issued to Matsu for failing to provide a guard on a drill press located in the maintenance shop. "At a minimum, the [2010] citation put the company on notice that its safety precautions were inadequate. It also allowed [Matsu] sufficient time to take corrective action, as the instant violations did not occur until some [two and a half] years later." *D & S Grading*, 899 F.2d at 1148; *Bunge*, 638 F.2d at 838 n. 13.

As to the gravity of the violations, all of the tool and die makers using Matsu's mechanical presses were exposed on a daily basis to the unexpected energization of the mechanical presses on which they worked. Matsu's failure to guard the rotating chuck and drill bit on the machines exposed the employees using those machines to the hazards associated with being caught up in a rotating part. Employees were also exposed to the hazard of crushing and amputation injuries due to Matsu's failure to require the use of LOTO procedures for its tool and die makers adjusting or repairing dies in its mechanical presses. The use of compressed air

exceeding 30 p.s.i. also exposed employees to potential cuts or serious eye injuries. Given the extent of physical injuries that did occur, and the high probable extent of physical injuries should future accidents occur, the Court finds the gravity of all of these hazards, except the recordkeeping violation, are high.

Matsu is subject to a civil penalty of up to $7,000.00 for each serious violation. 29 U.S.C. §666(b). The Secretary proposed the maximum statutory civil penalty of $7,000.00 for each individual and grouped serious violation in Citation Number 1, except Item 6, where he proposed a penalty of $4,000.00. For Citation Number 3, Item 1, the other-than-serious violation, Matsu is also subject to a civil penalty of up to $7,000.00. 29 U.S.C. §666(c). The Secretary proposed a penalty of $1,000.00 for Citation Number 3, Item 1. The Court finds the Secretary's proposed penalties for Citation Number 1 and Citation Number 3 are appropriate, except for Citation Number 1, Item 2, where the Court finds no penalty should be assessed.

For Citation Number 2, Item 1, the repeated violation of section 1910.212 (a)(1), Matsu is subject to a civil penalty of not more than $70,000.00 but not less than $5,000.00. 29 U.S.C. §666(a). The Secretary proposed a penalty of $35,000.00. The Court does not agree with the Secretary's proposed penalty. The Commission may, where appropriate, assess a penalty higher than that proposed by the Secretary. *R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1075 (Nos. 91–1873 & 91–2027, 1995) (consolidated). Although gravity normally is the most significant consideration, each factor can be accorded the weight that is reasonable in the circumstances. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006 (No. 92-424, 1994). There is ample authority to establish that in situations of this nature, a substantial penalty is warranted under section 17(j) to accomplish the civil, remedial purpose of inducing the cited employer to satisfy its statutory obligation to provide a safe workplace.

For example, in *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995), the Commission doubled the $14,000 penalty assessed by the judge in view of the employer's blatant disregard for the safety of its employees and the high gravity of the violations. *See also Wheeling–Pittsburgh*, 16 BNA at 1785 (large size, lack of good faith, and high gravity as factors in assessing a penalty of high magnitude); *Hern Iron Works*, 16 BNA OSHC at 1625 (lack of good faith as a significant factor in penalty assessment). Penalties must be assessed in an amount sufficient to preclude their being assumed by the employer as "simply another cost of

doing business." *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994). *See E.L. Davis Contrac. Co.*, 16 BNA OSHC 2046, 2053 (No. 92-35, 1994) (where Commission assessed a penalty of $60,000 to cause the company to appreciate "the vital importance of complying with OSHA regulations").

Given the seriousness of [redacted] 's injuries, and the gravity of the repeated violation for failing to guard the cited machines, even after his amputation injuries, and based on the totality of the record, the Court finds the maximum civil penalty of $70,000.00 is appropriate for Citation Number 2, Item 1. Further, even assuming *arguendo* the Secretary only established a violation of the Sharp Radial Arm Drill Press cited in Item 1(a), given Matsu's bad faith in taking no action in abatement despite [redacted] 's amputation injuries the week before, and the repeated nature of the violation, the Court still finds the maximum civil penalty of $70,000.00 is appropriate for Citation Number 2, Item 1, which is necessary to cause Matsu to appreciate the vital importance of complying with OSHA regulations, *E.L. Davis Contrac.*, 16 BNA OSHC at 2053, and hopefully, to preclude their being assumed by Matsu as simply another cost of doing business. *Quality Stamping Prods.*, 16 BNA OSHC at 1929. *See also Wheeling-Pittsburgh*, 16 BNA OSHC at 1786 (Commission affirmed proposed grouped penalty where compliance officer testified the penalty is calculated for the first instance of a violation and only the penalty for the first instance is proposed).

Finally, the Court notes Matsu's "conduct was of such character as to be willful in the civil sense. That is, it was intentional, knowing or voluntary as distinguished from accidental, and it may be characterized as conduct marked by careless disregard." *Wetmore & Parman, Inc.*, 1 BNA OSHC 1099, 1101 (No. 221, 1973) (*citing United States v. Illinois Cent. R. Co.*, 303 U.S. 239, 243 (1938)). As the Commission has also found, a violation is willful "if committed with intentional, knowing, or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Westar Mech., Inc.*, 19 BNA OSHC 1568, 1574 (Nos. 97-0226 & 97-0227, 2001) (consolidated). "A willful violation is differentiated by a heightened awareness — of the illegality of the conduct or conditions — and by a state of mind — conscious disregard or plain indifference." *Id.*

Here, even though [redacted] was a temporary employee hired by Surge as a janitor, with no press operator experience and no training tailored to the needs of such an employee, Matsu

made its choice to place [redacted] on press duties, without the knowledge or approval of Surge,[35] "a conscious, intentional, deliberate, voluntary decision, which, regardless of a venial motive, is properly described as willful." *United States v. Pugh*, 515 F.3d 1179, 1193 (11th Cir. 2008). Sadly, as a result of Matsu's misconduct, which was clearly marked by its careless disregard of and plain indifference to [redacted]'s safety, [redacted] was trapped in Press Number 10, resulting in the loss of some fingers on his left hand, which was flattened "like a pancake," and the amputation of his right arm to the middle of his forearm. Given [redacted]'s slight build and that his entire body fit in the space between the press and the vertical light curtain, Matsu knew or should have known the crowder bar safeguard was not capable of providing [redacted] the protection it was intended for— to keep him within the sensing area of the light curtain. [redacted]'s injuries could have been prevented had Matsu exercised reasonable diligence and care. *ComTran Grp.*, 722 F.3d at 1316.

Matsu had a heightened awareness of the illegality of the conduct or conditions— and the requisite state of mind— the conscious disregard or plain indifference to [redacted]'s safety— as demonstrated when Pinchon approached [redacted] and told him, "Don't tell nobody I've been putting you on the presses." (Tr. 143.) Had the Secretary pleaded a willful violation, there was ample evidence to support such a classification. However, such citation is not before the Court because the Secretary, although possessed of the facts, did not choose to allege a willful violation. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT Citation Number 1, Item 2 is **VACATED** without the assessment of a penalty.

IT IS FURTHER ORDERED THAT Citation Number 1, Items 1, 3, 4, 5a and 5b, and 6, Citation Number 2, Item 1, and Citation Number 3, Item 1 are **AFFIRMED**.

[35] As indicated *supra*, when Wolfsberger learned [redacted] was the employee who had been injured on Press Number 10, Wolfsberger response was "Why in the hell was he on a press? . . . he should not have been on the press. … He was a janitor. He wasn't trained." (Tr. 255.)

IT IS FURTHER ORDERED THAT Matsu is assessed and directed to pay to the Secretary [36] the following civil penalties:

1. $7,000.00 for Citation Number 1, Item 1;
2. $7,000.00 for Citation Number 1, Item 3;
3. $7,000.00 for Citation Number 1, Item 4;
4. $7,000.00 for Citation Number 1, Items 5a and 5b (grouped);
5. $4,000.00 for Citation Number 1, Item 6;
6. $70,000.00 for Citation Number 2, Item 1; and
7. $1,000.00 for Citation Number 3, Item 1.

SO ORDERED THIS 29th day of **September, 2015**.

/s/
JOHN B. GATTO, Judge
U.S. Occupational Safety and
Health Review Commission

[36] *See* section 17(l) of the Act, which mandates that civil penalties owed under this Act "shall be paid to the Secretary for deposit into the Treasury of the United States[.]" 29 U.S.C. §666(l).