United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BASIC GRAIN PRODUCTS, INC., Respondent.	OSHRC Docket No. 12-0725

Appearances:

Elizabeth R. Ashley, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio,
For Complainant

Spencer M. Youell, Esq. and Justin A. Morocco, Esq., Mowery Youell & Galeano, Ltd., Dublin, Ohio
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted a two-day inspection of Basic Grain Products, Inc. ("Respondent") on September 2, 2011 and November 4, 2011 at Respondent's facility in Coldwater, Ohio. As a result, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging four other-than-serious violations, eight serious violations, and two willful violations[1] with total proposed penalties of

1. Complainant has alleged, in the alternative, that the willful violations were also serious. (Tr. 659).

$112,000.00. Respondent timely contested the Citation. Prior to the trial, the parties settled Citation 1, Items 1, 2(a), 2(b), 3, 5, 6, and 7. In addition, the parties executed a Partial Settlement Agreement on January 25, 2013, which resolved Citation 3, Items 1–4. As a result, the parties agreed to proceed to trial on Citation 1, Item 4 with a proposed penalty of $7,000.00 and Citation 2, Items 1(a) and 1(b), with a proposed penalty of $70,000.00. A three-day trial was held in Columbus, Ohio on May 21–23, 2013. The parties timely submitted post-trial briefs.

Stipulations[2]

The parties stipulated to the following:

1. Respondent, Basic Grain Products, Inc. ("Basic Grain") is an Ohio corporation with its principal place of business in Coldwater, Ohio.

2. Basic Grain is and was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act.

3. On February 15, 2013, a Citation and Notification of Penalty ("Citation") was issued to Basic Grain, and it timely filed a written notice of contest.

4. A Partial Settlement Agreement was approved and entered by Order dated January 25, 2013, vacating Citation 3, Items 1 through 4.

5. Prior to the beginning of the trial on May 21, 2013 in Columbus, Ohio, the parties, on the record, settled Citation 1, Items 1, 2(a), 2(b), 3, 5, 6, and 7 as follows:

   a. Citation 1, Item 1 is reclassified as "other-than-serious" with a penalty of $3,000.00.

   b. Citation 1, Items 2(a), 2(b), and 3 are grouped together as a single "serious" violation with a penalty of $4,000.00.

2. The parties' stipulations can be found in their respective post-trial briefs, as well as in the transcript. *See* Secretary's Post-Hearing Br. at 1; Respondent's Post-Hearing Br. at vii; Tr. at 15–16.

c. Citation 1, Items 5 and 6 are grouped together as a single "serious" violation with a penalty of $7,000.00.

d. Citation 1, Item 7 is reclassified as "other-than-serious" with a penalty of $2,000.00.

Jurisdiction

Jurisdiction over this action is conferred upon the Commission pursuant to section 10(c) of the Act. The parties have stipulated and the record establishes that at all times relevant to this action, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Complaint and Answer*; *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

Background

Seven witnesses testified at trial: (1) Corrine Majoros, OSHA Compliance Safety and Health Officer ("CSHO"); (2) Sharon "Sherrie" Altenbach, a Supervisor at Respondent's facility; (3) Abigail Huston, a packer at Respondent's facility; (4) Russell Jay, a packer and seasoner at Respondent's facility; (5) Raymond May, Respondent's Maintenance Manager; (6) Dana Nash, Respondent's Human Resources Manager; and (7) Amy Day, Respondent's Operations Manager.

Respondent produces snack products such as pop chips, pita chips, rice cakes, mini rice crisps, and other products that come in a variety of sizes and flavors. (Tr. 33). Depending on the type, size, and flavor, the product would be sent through one of Respondent's four active[3] sectors, or lines. (Tr. 30, 36–37). Each sector contains a number of different machines, including conveyors, seasoning augers, drums, puffers, ovens, and packaging equipment, and the equipment in each sector may be used differently depending on the product being made. (Tr. 31,

3. The current active lines are A, D, E, and F. (Tr. 40–41). A fifth sector, B, is currently under construction. (Tr. 81).

39–40, 81–82, 181). For example, according to Respondent, each sector uses ovens; however, depending on the product made, the ovens operate differently, which, in turn, affects how employees interact with a particular oven. (Tr. 82).

Employees and supervisors are assigned to a particular sector when they arrive at the facility at the beginning of their shift. (Tr. 28). The supervisor of a particular sector oversees approximately five to fifteen production employees, who are either packers or seasoners. (Tr. 28–32). Packers are tasked with bagging and packaging products, whereas seasoners apply seasoning to the snacks and ensure that it is being properly applied. (Tr. 178–180). Several different machines are utilized to apply oil, dry, or wet seasoning, and an oven is used to complete the seasoning process. (Tr. 181).

In addition to its production employees, Respondent employs a thirteen-person maintenance crew. (Tr. 201). The crew has a lead man on first and second shifts, each of whom reports to Respondent's Maintenance Manager, Raymond May. (Tr. 202).

Mr. May's supervisor and Respondent's Operations Manager, Amy Day, began working for Respondent in 2005 as its Human Resources Manager. (Tr. 440). Shortly thereafter, in 2006, Respondent was inspected and cited for violations related to lockout, tagout ("LOTO").[4] At that time, Respondent did not have a written LOTO policy. (Tr. 442). Following the investigation, as part of the required abatement, Respondent was directed to create and institute a LOTO policy. (Tr. 442). Ms. Day, who had no prior training in LOTO, created a policy based on information she found on the OSHA website. (Tr. 447; Ex. C-1, C-2, C-3). Ms. Day reviewed the policy with OSHA On-Site, which is a consultation service provided by Complainant. (Tr.

4. In particular, Respondent was cited pursuant to 29 C.F.R. § 1910.333, which addresses LOTO in the context of exposure to electrical shock. (Tr. 444, 477). At that time, Respondent was not cited pursuant to 29 C.F.R. § 1910.147.

442–47). Based on her meeting with OSHA On-Site, Ms. Day made revisions to the LOTO policy. (Tr. 207, 446, 500; Ex. C-1, C-2, C-3).

The inspection that led to the Citation at issue occurred on September 2, 2011 and November 4, 2011. (Tr. 244, 492). These inspections were conducted by CSHO Majoros in response to an injury complaint. (Tr. 512).[5] As a result of the 2011 inspection, Complainant issued the Citation, which included the violations that are discussed below.

Applicable Law

To establish a *prima facie* violation of an OSHA standard, the Complainant must prove by a preponderance of the evidence that: (1) the cited standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) (citations omitted), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Commission precedent requires a finding that "a serious injury is the likely result if an accident does occur." *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Complainant does not need to show there was a substantial probability that an accident would occur; he need only show that if an accident did occur, serious physical harm could result. *Id.*

"A willful violation is one committed with either intentional disregard of or plain indifference to the requirements of the Act or a standard." *J.A. Jones Constr. Co.*, 15 BNA

5. CSHO Majoros had previously inspected Respondent's facility in 2007 in response to a report of a mercury spill. (Tr. 510).

OSHC 2201 (No. 87-2059, 1993). "[I]t is not enough for the Secretary to show than an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *Hern Iron Works*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). In other words, Complainant must show that, at the time of the violative act, the employer was either actually aware that the act was unlawful or "that it possessed a state of mind such that if it were informed of the standard, it would not care." *Propellex Corp.*, 18 BNA OSHC 1677 (No. 96-0265, 1999). Thus, it is not enough to show that Respondent was merely careless or displayed a lack of diligence. *Beta Constr. Co.*, 16 BNA OSHC 1435 (No. 91-102, 1993). The Commission has found such heightened awareness where an employer has been previously cited for a violation of the standard in question, is aware of the standard's requirements, and is on notice that a violative condition exists. *See J.A. Jones*, 15 BNA OSHC 2201; *D.A. & L Caruso, Inc.*, 11 BNA OSHC 2138, 2142 (No. 79-5676, 1984).

Discussion

Citation 1, Item 4

Complainant alleged a serious violation of the Act in Citation 1, Item 4 as follows:

> 29 C.F.R. 1910.147(c)(7)(i): The employer did not provide 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:
>
> a) Basic Grain Products, Inc. – Coldwater, Ohio: On or about August 31, 2011, the employer did not assure that employees who perform maintenance and cleaning operations on the conveyor located on the mezzanine level located in the D Packing area were trained in the skills required for the safe application, usage, and removal of the energy controls. Employees that service the conveyor equipment were not trained to lockout the machine to protect against caught-by hazards.

> b) Basic Grain Products, Inc. – Coldwater, Ohio: On or about November 2, 2011, the employer did not assure that employees who perform maintenance and cleaning operations on the topical auger located in the D Seasoning area were trained in the skills required for the safe application, usage, and removal of energy controls. Employees that service the auger equipment were not trained to lockout the machines to protect against amputation hazards.

The cited standard provides:

> The employer shall provide 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. The training shall include the following:
>
> (A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.
>
> (B) Each affected employee shall be instructed in the purpose and use of the energy control procedure.
>
> (C) All other employees whose work operations are or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out.

29 C.F.R. § 1910.147(c)(7)(i).

When an employee begins his/her tenure at Respondent's facility, they go through orientation. (Tr. 83). As part of their orientation, employees watch a number of videos, fill out paperwork, and do a walk-through tour of the plant. (Tr. 142–43). A large part of Respondent's training regime, however, relies on on-the-job, hands-on training. (Tr. 27, 30, 83). New employees are paired with an experienced worker, who introduces the new employee to the various areas of the facility and different job responsibilities. (Tr. 27, 34, 146, 193, 236). According to Respondent, a supervisor oversees the training process and will review the new employees' training to evaluate their progress and determine if additional training is needed. (Tr.

34, 389). While all employees are trained in roughly the same manner, the content of their training is different. In particular, prior to 2011, production employees were not provided with LOTO training. (Tr. 131–32, 179, 312). Maintenance employees, on the other hand, were shown a video that addressed LOTO, and were provided on-the-job training from experienced maintenance workers. (Tr. 234–36). This difference in training is due, in part, to the fact that maintenance workers were designated by Respondent to be in charge of LOTO. (Tr. 205, 312; Ex. C-1 at 4).

In addition to seasoning and packaging, production employees clean equipment, such as conveyors and augers, between different product runs. (Tr. 43–45). Depending on the particular snack being made, as well as the seasonings being used, production employees will clean the conveyors with either a dry or chemical wipe. (Tr. 41–42). In some instances, the belt is completely removed by maintenance, and both the belt and frame are cleaned by production employees. (Tr. 45–46). In other instances, the belt is simply "dry-wiped" while it is still on the conveyor. Ms. Huston, Ms. Altenbach, and Mr. May all testified that, prior to the inspection in 2011, it was common practice to dry- or chemical-wipe the conveyor, not only with the belt on it, but while the conveyor was running. (Tr. 42–43, 51, 116–17, 212). Likewise, Russell Jay, another production employee, testified that, although he would power down the rotating drum and auger during cleaning, it was not locked out. (Tr. 187–89).

A. Does the Cited Standard Apply?

The cited standard "covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injuries to employees." 29 C.F.R. § 1910.147(a)(1)(i). The standard "applies to the control of energy during servicing and/or maintenance of machines and equipment." *Id.* §

1910.147(a)(2). According to § 1910.147(b), "servicing and/or maintenance" specifically includes, amongst other activities, lubrication, cleaning, and unjamming of machines. *Id.* § 1910.147(b). The Court finds the cited standard applies.[6] Ms. Huston and Mr. Jay performed servicing and/or maintenance on machines/equipment in which unexpected energization or start-up could (or did) cause injury.

B. Was the Cited Standard Violated?

The Court finds the terms of the standard were violated. The cited standard requires Respondent to ensure that all of its employees, regardless of position, receive at least some measure of training on LOTO. *Id.* § 1910.147(c)(7)(i). It is incumbent upon Respondent to ensure that each employee receives LOTO training that is commensurate with his/her job duties and exposure. *See id.* § 1910.147(c)(7)(i)(A)–(C). In that regard, the standard distinguishes between "authorized" employees, "affected" employees, and everyone else. An "affected employee" is one 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.* § 1910.147(b). 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.*

Respondent clearly designated their maintenance employees as "authorized employees", as they were expected to perform LOTO on the machines and equipment they were servicing.

6. Furthermore, considering that the scope and application paragraphs are applicable to each of the cited items, the Court also finds that the standards cited in Citation 2, Items 1(a) and 1(b) apply to Respondent.

(Ex. C-1). Maintenance employees, in addition to the training previously discussed, were provided with the proper tools, i.e., locks and tags, to perform LOTO. (Tr. 205–206).

Production employees, on the other hand, were not provided with LOTO tools, nor were they given training to perform LOTO. (Tr. 312). Production employees were, at the very least, "affected employees" pursuant to the standard because they clearly operated or used machines on which servicing was performed under LOTO (or was supposed to be) and worked in areas in which servicing or maintenance was being performed. Ms. Altenbach and Mr. May testified that, prior to the 2011 inspection, they were aware that it was common practice to wipe down conveyors as they were running, even though such an activity falls squarely within the definition of servicing and/or maintenance, which requires LOTO under the standard. (Tr. 42–43, 51, 212). That type of exposure means Respondent's production employees were, at the least, "affected employees". Some of the "affected employees" at Respondent's facility were also "authorized employees" to the extent that they cleaned the equipment, which is defined as servicing and/or maintenance activity. (Tr. 210; Ex. C-1, C-2).

To prove Respondent's employees were not properly trained, Complainant "must show that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000). If the employer rebuts the allegation of a training violation "by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided." *Id.* (citing *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997)). Both Ms. Huston and Mr. Jay testified that they did not receive LOTO training at orientation. (Tr. 130, 179). To the extent that both Ms. Huston and Mr. Jay

cleaned the machines/equipment, these "affected employees" became "authorized employees", which required training consistent with 29 C.F.R. § 1910.147(c)(7)(i)(A).

Regardless of whether production employees were properly characterized as "affected employees" or "authorized employees", Complainant established that Respondent failed to provide the type of training that a reasonably prudent employer would have given under the circumstances. The record clearly established that production employees were not provided with LOTO tools, nor were they given training to perform LOTO. (Tr. 312).

Respondent attempts to rebut that allegation by stating that Complainant did not prove whether such training was/was not provided during the hands-on, on-the-job training. The Court finds this argument is without merit and confuses the parties' respective burdens. First, without question, Respondent failed to provide "authorized employee" training to its production employees, who perform servicing/maintenance under the standard.[7] Second, once Complainant established that Respondent did not provide its production employees with formal LOTO training, it was incumbent upon Respondent to show that it did, in fact, provide such training. Respondent has done nothing more than suggest that it was possible that such training occurred during the on-the-job training sessions with experienced employees. This is not sufficient to rebut Complainant's evidence. In addition, such argument ignores the testimony of both Ms. Huston and Mr. Jay who testified that they did not receive LOTO training at orientation. (Tr. 130, 179). That argument also disregards the testimony of Dana Nash, Respondent's Human Resources Manager, that the 2006 LOTO policy was not covered with production employees until after the inspection in 2011. (Tr. 312). The Court finds the testimony of Mr. Jay, Ms. Nash and Ms. Huston credible on this point. Any knowledge of LOTO exhibited by Respondent's

7. The Court would note, however, that it does not find that maintenance employees were not given training.

production employees clearly came after the 2011 inspection. (Tr. 133, 192–93, 312). Respondent violated the standard.

C. Were Respondent's Employees Exposed to a Hazard?

The Court also finds that Respondent's failure to properly train its employees caused those employees to be exposed to hazards associated with the unexpected energization or start up of equipment and machinery, such as pinch points and rotating shafts and sprockets that can cause broken bones and the possibility of amputation. (Tr. 586–87, 594–95). As noted above, both Ms. Huston and Mr. Jay were exposed to these types of injuries while cleaning equipment that was not locked out. Further, as testified to by Mr. May and Ms. Altenbach, it appears that many, if not all, of Respondent's production employees engaged in cleaning activities while equipment was still running or improperly locked out.

D. Was Respondent Aware of the Violative Condition?

It is well-established that members of Respondent's management team—Ms. Altenbach and Mr. May—knew that production employees were cleaning while equipment was energized even though those employees were not trained as either authorized or affected employees. (Tr. 42–43, 212). *See Revoli Const. Co.*, 19 OSHC 1682 (No. 00-0315, 2001) (holding that knowledge and actions of supervisory personnel is generally imputed to the employer).

D. Was the Violation Properly Classified as Serious?

The violation was also serious. The Court finds the evidence supports that a serious injury is the likely result if an accident were to occur. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010) (citation omitted); *see Omaha Paper Stock Co. v. Sec'y of Labor*, 304 F.3d 779, 784 (8th Cir. 2002). Contrary to Respondent's assertion, CSHO Majoros credibly testified, based on her experience and education in the field of LOTO, that exposure to

moving machine parts without adequate training on LOTO, can result in amputations and potentially fatalities. Her testimony is further bolstered by the incident that caused Ms. Huston's injuries. (Tr. 129–30).

Based on the foregoing, Citation 1, Item 4 will be AFFIRMED.

Citation 2, Item 1(a)

Complainant alleged a willful[8] violation of the Act in Citation 2, Item 1(a) as follows:

> 29 CFR 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:
>
> a) Basic Grain Products, Inc. – Coldwater, Ohio: On or about August 31, 2011, the employer failed to develop machine specific energy control procedures to control hazardous energy when employees cleaned the conveyor system located on the mezzanine level in the D Packaging Area. Employees were exposed to caught-by hazards when maintaining the equipment.
>
> b) Basic Grain Products, Inc. – Coldwater, Ohio: On or about November 2, 2011, the employer failed to develop machine specific energy control procedures to control hazardous energy when employees cleaned the topical auger located in the D Seasoning Area during cleaning activities. Employees were exposed to caught-by and amputation injuries in [sic] when maintaining the equipment.

The cited standard provides:

> Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.
>
> Note: *Exception:* The employer need not document the required procedure for a particular machine or equipment, when all of the following elements exist: (1) The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which could endanger employees; (2) the machine or equipment has a single energy source which can be readily identified and isolated; (3) the isolation and locking out of that energy source will completely deenergize and deactivate the machine or equipment; (4) the machine or equipment is

8. Complainant alleged, in the alternative, that Citation 2, Item 1(a) was serious. (Tr. 659).

> isolated from that energy source and locked out during servicing or maintenance; (5) a single lockout device will achieve a locked-out condition; (6) the lockout device is under the exclusive control of the authorized employee performing the servicing or maintenance; (7) the servicing or maintenance does not create hazards for other employees; and (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or reenergization of the machine or equipment during servicing or maintenance.[9]

29 C.F.R. § 1910.147(c)(4)(i).

The LOTO policy at issue in this case was drafted by Ms. Day in 2006 after an OSHA inspection found LOTO violations on its puffer machines. (Tr. 442; Ex. C-1, C-2, C-3, R-2). After reviewing the OSHA website, Ms. Day, who had no previous LOTO training, began drafting a LOTO policy. (Tr. 447; Ex. C-2). At the request of Ms. Day, OSHA On-Site visited Respondent's facility and provided input on abatement of the citations issued in the 2006 inspection, including issues related to LOTO. (Tr. 442). Around that time, Ms. Day created a revised version of the LOTO procedures, stemming from the input of both her research on the OSHA website, as well as the visit from OSHA On-Site. (Tr. 448, 487). According to Ms. Day, she submitted the revised LOTO policy to Complainant as part of the abatement required for Citation 1, Item 4(b) from the 2006 inspection. (Tr. 442, 478–79; Ex. R-2). Complainant, and more specifically, CSHO Majoros, conducted another inspection of Respondent's facility in 2007; however, as noted above, that inspection was unrelated to LOTO issues. In 2011, CSHO Majoros returned to Respondent's facility and found that its LOTO procedures were either deficient or non-existent for the first time.

A. Does the Cited Standard Apply?

Respondent's facility has multiple types of machinery and equipment, such as puffers, conveyors, ovens, and packaging equipment, that facilitate the making of its products. (Tr. 31,

9. Respondent in its Post Trial brief did not argue any of the stated exceptions applied.

39–40, 81–82, 181). Mr. May testified that, even within the group of machines known as "puffers", the machines may run on electrical power, hydraulics, pneumatics, or a combination thereof. (Tr. 209). In other words, not only are there different types of equipment at the facility, but even equipment of the same type has different sources of stored and potentially hazardous energy. The Court finds the cited standard applies.

B. Was the Cited Standard Violated?

Notwithstanding the different types of machinery at Respondent's facility, Respondent only had a machine-specific lockout procedure for its puffer machines. (Tr. 453–54; Ex. C-2). Complainant contends that the foregoing, coupled with the fact that Respondent's LOTO procedure is largely an unmodified copy of the sample LOTO procedure in Appendix A to 29 C.F.R. § 1910.147, establishes that Respondent failed to comply with 29 C.F.R. § 1910.147(c)(4)(i).

Section 1910.147(c)(4)(ii) requires that LOTO procedures "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 . . . ." This includes, but is not limited to:

> (A) A specific statement of the intended use of the procedure:
>
> (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
>
> (C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them;
>
> (D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

29 C.F.R. § 1910.147(c)(4)(ii). In the context of the sample LOTO procedures found in Appendix A of § 1910.147, Respondent is required to include information such as: (1) the

names of affected employees; (2) the types and magnitudes of energy; (3) the hazards; (4) the methods to control the energy; (5) the types and locations of machines or equipment operating controls; (6) the types and locations of energy isolating devices; (7) the types of stored energy and methods to dissipate or restrain energy; and (8) the method of verifying the isolation of the equipment. *See Drexel Chem. Co.*, 17 BNA OSHC 1908 (No. 94-1460, 1997).

Notwithstanding the specifics addressed by the Commission in *Drexel*, "the standard is written in performance-oriented language, providing considerable flexibility for employers to tailor their energy control programs and procedures to their particular circumstances and working conditions." Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,656 (1989). This explains why the sample procedures in Appendix A of the standard are written in such broad language: employers can literally fill in the blanks to accommodate the varying types of machinery, energy sources, and working conditions that are present at their workplace. *See id.* at 36,659 (discussing the distinction between a simple conveyor and a long assembly line). Although the standard requires that the procedure be written in detail, this does not mean that each and every machine must have a separate procedure; rather, a single procedure may be sufficient if it applies to a group of machines with similar types of energy and tasks. *Id.* at 36,670. However, to the extent that the standard is written in performance-oriented language, employers must be wary of overgeneralization, which "can result in a document which has little or no utility to the employee who must follow the procedure." *Id.*

As was the case in *Drexel*, Respondent's LOTO policy is an overgeneralized document with little to no practical utility for the end user. *See Drexel*, 17 BNA OSHC 1908. This is particularly evident under the section entitled "Specific Procedures". (Ex. C-1). Respondent's "Specific Procedures" are almost a verbatim reproduction of Appendix A without any of the

specific information regarding, for example, the types and magnitudes of energy, the types and locations of machines or equipment operating controls, or the types and locations of energy isolating devices. (Ex. C-1). Instead, the procedures use catch-all, generic language, such as: "Operate the switch, valve, or other energy isolating device(s) so that equipment is isolated from it [sic] energy source(s). Stored energy (such as that in springs, elevated machine members, rotating flywheels, hydraulic system, and air, gas, stream [sic], or water pressure, etc.) must be dissipated or restrained by methods such as repositioning, blocking, bleeding down, etc." (C-1). Such generalized instructions are insufficient to provide guidance to an employee attempting to perform LOTO procedures on a particular piece of machinery. As indicated in the narrative of this citation item, there are no references to the conveyor system or topical auger, nor any indication of the energy isolating devices associated therewith. Although Respondent drafted somewhat specific procedures for the puffers (as represented by C-2), there is no evidence to suggest that any of the other machines could be treated in a similar manner. This is underscored by the fact that Mr. May discussed three separate types of stored energy associated with the puffers—electric, hydraulic, and pneumatic. (Tr. 209, 216). The policy did not include specifics as to how to address hydraulic and pneumatic stored energy on Respondent's machines. These omissions establish that Respondent violated the standard.

C. Were Employees Exposed to a Hazard?

For the same reasons mentioned above with respect to Citation 1, Item 4, the Court finds that Respondent's employees were exposed to the hazards associated with unexpected energization or start up of machinery and equipment. The overgeneralized procedures utilized by Respondent were insufficient to adequately apprise Respondent's employees of the types of

energy associated with a particular machine and, consequently, did not inform them how to safely and properly perform lockout or tagout.

D. Was Respondent Aware of the Violative Condition?

The Court finds Respondent was aware of the violative condition. As to knowledge, Ms. Day was responsible for drafting and implementing the LOTO policy, which constitutes direct knowledge of the violation. Furthermore, Respondent had constructive knowledge of the condition in that, with the exercise of reasonable diligence, it should have been aware that its policy was deficient. During the period between 2006 and 2011, Ms. Day could have performed a more diligent search of OSHA's website, including the applicable regulations, interpretations, and policy documents, which would have placed her on notice that Respondent's LOTO policy was not in compliance with the standard.

E. Was the Violation of the Standard Properly Classified as Willful?

Complainant contends the violation of the standard was willful. In particular, Complainant relies upon four key points: (1) Basic Grain consulted with OSHA On-Site to discuss LOTO issues;[10] (2) Ms. Day obtained information regarding LOTO from OSHA's website;[11] (3) Ms. Day drafted the LOTO policy only for puffers, even though she knew that the

10. Respondent consulted with OSHA Onsite and made the adjustments recommended by OSHA Onsite. Such actions, however, do not warrant the conclusion that Respondent possessed heightened awareness of the illegality of its conduct. Complainant has cited to no case to this effect. This type of conduct is what the law should expect of an employer. To permit such consultation and subsequent revisions to form the basis of heightened awareness would result in a chilling effect on employers to use this service and subject them to a willful violation for exercising that right. The Court is convinced this is not a result it wants to sanction. Respondent's actions in this case differ from instances where a CSHO specifically issued prior warnings to a supervisor of the requirements of the standard to have those warnings ignored. *See MJP Construction Co.*, 19 BNA OSHC 1647-48 (No. 98-0502, 2001) (CSHO issued prior warnings to a supervisor to establish heightened knowledge); *Pentecost Contracting Group*, 17 BNA 1953, 1955 (No. 92-3788, 1997) (same).

11. The Court does not find that merely consulting a website on a standard constitutes heightened awareness. It is analogous to an employer reading a standard in hardcopy. Complainant has cited no case where this activity has been used to find heightened awareness for a willful violation. Again, to sanction this argument would serve as a deterrent for an employer to consult authoritative sources to assist them in implementing policies to make a workplace safe.

facility had other machines and could not explain why she did not draft procedures for other machines; and (4) Ms. Nash, who was responsible for Respondent's OSHA 300 logs, accident reports, and disciplinary records, failed to properly evaluate the root cause of multiple injuries suffered by employees. While the Court finds that the foregoing points illustrate negligence on behalf of Respondent, it does not find that Respondent exhibited heightened awareness of or plain indifference to the requirements of the standard.

With respect to the question of heightened awareness, the Court would note that during the period of time between the inspection in 2006 until the most recent inspection in 2011, Respondent was never cited for a violation of any subsection of 29 C.F.R. § 1910.147.[12] In response to the inspection in 2006, Ms. Day drafted a LOTO policy that was discussed with OSHA On-Site and revised in light of those discussions. (Tr. 446–47). That policy (C-1) was, according to Ms. Day, submitted to Complainant in order to illustrate abatement of Citation 1, Item 4(b) from Inspection Number 309442366 (2006 Inspection). (Ex. R-2 at 7 of 8 & 3 of 3). Though CSHO Majoros contended that such action was not required for abatement, the Court would point out that the parties were, in fact, discussing a different citation that did not require abatement. (Tr. 511–12; Ex. R-2 at 6 of 8).[13] Complainant did not present evidence suggesting that Ms. Day had not submitted the LOTO policy to satisfy its abatement obligations. In that regard, to the extent that Ms. Day may have been informed of the need to develop a LOTO policy (thereby according to the Complainant placing her on heightened awareness) and then did

12. The Court finds this curious considering Respondent did not have a LOTO policy at all in 2006 and was required, as part of the abatement, to draft and implement a LOTO policy. (Ex. R-2).

13. To undermine Ms. Day's testimony that she developed the LOTO policy and submitted it for review, Complainant focused on Citation 1, Item 3 in the 2006 inspection, which did not require the submission of a LOTO policy as part of abatement. However, the Court notes that in Citation 1, Item 4(b) of the 2006 Inspection, Complainant alleges that Respondent did not have a written procedure in place for employees to follow to perform LOTO on puffer press 53. (Ex. R-2, p.3). Citation 1, Item 4(b) required abatement in the form of the development of a written LOTO policy for puffer machines. Therefore, this evidence supports the testimony of Ms. Day as to the reason for Respondent's development of a LOTO policy, its revision, and its submission to Complainant.

not hear anything further from Complainant regarding the adequacy of Respondent's LOTO policy, it is reasonable to conclude that she honestly believed Respondent's policy was sufficient. (Tr. 485–86). It is also worth mentioning that the citation that prompted the writing of the LOTO policy specifically referenced the puffer machines, which, to some extent, explains the narrow focus of the LOTO policy. (Ex. C-2). Although Ms. Day, who had no prior LOTO training, was likely in over her head in attempting to draft the policy, the Court cannot conclude that Respondent, by consulting the OSHA website on LOTO, gained a heightened awareness of the illegality of its conduct based upon the evidence in its totality.

Along those same lines, the Court does not find that Respondent exhibited conscious disregard or plain indifference such that "it possessed a state of mind that if it were informed of the standard, it would not care." *Propellex Corp.*, 18 BNA OSHC 1677. First, Ms. Day reviewed information regarding LOTO on the OSHA website and responded to the suggestions of OSHA On-Site by modifying Respondent's LOTO policy. Even if her efforts were insufficient for the purposes of the standard, she made an effort to comply. *See Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1255 (D.C. Cir. 2012) ("A 'good faith reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness.'" (quoting *A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002))). The fact that revisions were made and authoritative resources were consulted reflects a good faith effort on behalf of Respondent and does not support a finding of conscious disregard or plain indifference.

Likewise, the Court does not believe that the injuries suffered by Respondent's employees during the period between 2008 and 2011, taken alone or in combination with the above, establish heightened awareness or plain indifference to the insufficiency of the LOTO policy. Clearly, a more searching review of the injury data would have disclosed a problem with

the *enforcement* of the LOTO policy itself; however, such a review would not uncover Respondent's failure to conform its LOTO policy to the requirements of the standard. Rather, it would uncover the fact that supervisors and the maintenance team failed to enforce even the most basic tenant of its flawed policy—a policy that required shut down and lockout of energy sources. Just because Complainant reached that conclusion on the basis of the facts presented does not establish that Respondent's failure to do so constituted plain indifference or heightened awareness. *See id.* (citing *C.N. Flag & Co., Inc.*, 2 BNA OSHC 1539 (No. 1409, 1975) ("[S]uch conduct should not be construed as constituting a willful violation of the [OSH] Act merely because Labor holds a contrary opinion on the facts and advises the employer of that opinion."). The Court finds that Complainant failed to establish that Respondent's violation of the cited standard was willful.

F. If the Cited Violation is not Willful, in the Alternative, is it Serious?

Though the Court does not find Respondent's violation of § 1910.147(c)(4)(i) was willful, it does find that the violation was serious for the same reasons stated above with respect to Citation 1, Item 4. Respondent's employees were not given adequate instructions to perform LOTO on the multitude of machines present at the facility. The failure to do so can, and in some instances did, cause injuries that result in serious physical harm. Citation 2, Item 1(a) will be AFFIRMED as a serious violation.

Citation 2, Item 1(b)

Complainant alleged a willful[14] violation of the Act in Citation 2, Item 1(a) as follows:

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

14. Complainant alleged, in the alternative, that Citation 2, Item 1(b) was serious. (Tr. 659).

> a) Basic Grain Products, Inc. – Coldwater, Ohio: On or about August 31, 2011, the conveyor located on the mezzanine level of the D Packaging Area was not locked out when employees were engaged in cleaning operations. An employee received serious injuries from the rotating parts of the conveyor while performing cleaning operations.
>
> b) Basic Grain Products, Inc. – Coldwater, Ohio: On or about November 2, 2011, the topical auger located in the D Seasoning Area was not locked out when employees were engaged in cleaning operations. Employees cleaning the auger were exposed to amputation hazards.

The cited standard provides:

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

29 C.F.R. § 1910.147(d)(4)(i).

A. Does the Cited Standard Apply?

Ms. Huston was assigned to clean the frame of the conveyor in the Sector D Packaging Area by her supervisor, Sherrie Altenbach. (Tr. 53, 120–21; Ex. C-12). Maintenance removed the belt to accommodate the cleaning process. (Tr. 122, 128–29). Ms. Huston started cleaning the conveyor frame at the end opposite the sprockets. (Ex. C-12). At some point during the process, Ms. Altenbach told Ms. Huston to take lunch. (Tr. 64–65). When Ms. Huston returned, she started cleaning the conveyor where Ms. Altenbach had left off. (Tr. 65, 126). As she rounded the end of the conveyor frame, Ms. Huston was caught in the moving sprockets of the conveyor and suffered severe injuries. (Tr. 128–30). At trial, Ms. Altenbach stated that she did not remember whether the sprockets were in operation while she was cleaning;[15] however, CSHO Majoros credibly testified that Ms. Altenbach had told her that she observed the conveyor was running prior to Ms. Huston returning from lunch and that she did not turn it off before

15. In response to numerous questions about the incident, Ms. Altenbach repeatedly stated, "I don't remember", lending further credence to Ms. Huston's and CSHO Majoros' testimony. (Tr. 64–68).

instructing Ms. Huston to work on it. (Tr. 558–59). The Court finds that the cited standard applies to the work activity in the Sector D Packaging Area.

Mr. Jay, on the other hand, testified that he worked as a seasoner on the Sector D Line. As a part of his responsibilities, he would clean and maintain the auger and rotating drum that applied seasoning to the various snack products. (Tr. 180–81, 185–86). As noted above, Mr. Jay testified that, prior to the inspection in 2011, he was trained to merely shut down the auger and drum in order to clean it out; however, neither he nor a member of maintenance actually locked out the equipment.

Respondent argues that, insofar as the auger is concerned,[16] Complaint did not prove that the standard applies because there was no evidence establishing that employees were required to place their body into an area on a machine where work is actually performed. *See* 29 C.F.R. § 1910.147(a)(2)(ii)(B). This is incorrect. Although Mr. Jay testified that the picture did not adequately show the auger, he did state that both the auger and drum rotated during operation. (Tr. 185–86). The moving parts created a pinch point hazard in the event that the machine was unexpectedly energized during cleaning. (Tr. 594–95). This potential for unexpected energization, as well as the failure to lock or tag it out, exposed Mr. Jay and Ms. Huston to the potential for serious injuries. Thus, the standard applies to the cleaning of the auger on the Section D Line.

B. Was the Cited Standard Violated?

The failure to lockout/tagout the topical auger in Sector D or the conveyor system in Sector D Packaging Area is a clear violation of the cited standard. Although it is a small step to conclude that Complainant proved a violation of 29 C.F.R. § 1910.147(d)(4)(i), some additional

16. Complainant did not need to prove this fact to uphold the violation, as it was clear that Ms. Huston was required to place her body in an area on the conveyor where work was actually performed.

discussion is warranted in light of the fact that Complainant characterized this violation as willful.

C. Were Any Employees Exposed to a Hazard?

The Court previously found that Ms. Huston and Mr. Jay were exposed to hazards associated with the failure to lockout/tagout the conveyor on the mezzanine level of the Sector D Packaging Area and the topical auger in the Sector D Seasoning Area, respectively. Admittedly, the previously discussed violations addressed LOTO training and procedures; however, it is because of those violations that the machines in question were not locked-out or tagged-out while Ms. Huston and Mr. Jay were working on them.

D. Was Respondent Aware of the Violative Conditions?

In both instances, Respondent either knew or, with the exercise of reasonable diligence, could have known of the violative condition. With respect to the accident involving Ms. Huston, Ms. Altenbach saw the conveyor was operating and failed to turn it off, let alone lock or tag it out, before Ms. Huston resumed her cleaning activities after lunch. Ms. Altenbach was a supervisor. The actions and knowledge of supervisory personnel are generally imputed to their employers. *See Revoli Const. Co*., 19 OSHC 1682, *supra*.

Although Mr. Jay was not directly observed by a supervisor, his work occurred in the open on a regular basis and should have been observed by a member of Respondent's management team. (Tr. 190, Ex. C-15). To establish knowledge, the Complainant must prove "that the 'employer knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation.'" *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007) (citation omitted). *See N & N Contractors, Inc. v. OSHRC*, 255 F.3d 122, 127 (4th Cir. 2001) (employer has constructive knowledge of a violation if employer

fails to use reasonable diligence to discern the presence of a violative condition);*Gen. Motors Corp.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007) ("In assessing reasonable diligence, the Commission has considered 'several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.'") (citations omitted).

Mr. Jay's experience illustrates a larger problem regarding employee training and LOTO procedures at Respondent's facility—everyone is trained by an experienced employee, but it does not appear as if supervisors perform meaningful and effective follow-up with new employees to ensure that they were being properly trained. For example, two supervisors, Ms. Altenbach and Mr. May, were aware that conveyors were cleaned without powering them down, but they apparently did not prevent the practice. Although the Plant Manager and Human Resources Manager stated that they were not aware that conveyors were being cleaned this way, there is no evidence to suggest that, until late 2010, they took positive steps to uncover and address such activities. (Tr. 383, 459–60; Ex. C-4).

Further, there are virtually no specific, written work safety rules that govern employee conduct at Respondent's facility. The section regarding safety rules in Respondent's Employee Handbook is comprised of roughly two, two-sentence paragraphs, neither of which provides the kind of explicit direction necessary to foster good working practices or prevent unsafe conduct. (Ex. C-5 at 15).

The two cited instances reflect a failure of oversight, a failure of inspection, a lack of adequate work safety rules, and a failure to enforce what work rules were in place. Accordingly, the Court finds that Respondent knew or could have known of the violative conditions.

E. Was the Violation of the Standard Properly Classified as Willful?

The state of knowledge as previously discussed and the overall lack of oversight at Respondent's facility leads the Court to find that this violation was willful. In particular, there are three factors the Court considered in making this determination.

First, Ms. Altenbach knew that the conveyor was operating when she directed Ms. Huston to clean it. Ms. Altenbach also knew that cleaning a conveyor with the belt removed also required LOTO. (Tr. 72). Even though the record is not clear about whether Ms. Altenbach had the authority to lock out the conveyor (Tr. 72), she nonetheless was aware of her obligation to ensure that the conveyor was locked. (Tr. 87–88). This failure, coupled with her repeated failure to prevent employees from wiping moving conveyor belts illustrates a conscious disregard of the standard and Respondent's LOTO policy, both of which characterize cleaning as "servicing and/or maintenance" that requires LOTO. (C-1).

Second, the Court is particularly troubled by the actions of Mr. May, the Maintenance Supervisor. Due to the structure of Respondent's LOTO policy, Mr. May, as the head of maintenance, had overall control and supervision for LOTO training and compliance. (Ex C-1). The problem, however, is that from 2006 to 2010, there were no records that his maintenance crew was trained in LOTO procedures. Although lack of training records does not, in and of itself, indicate that the maintenance crew was not trained, Mr. May's attitude towards training and discipline reflect a conscious disregard of the LOTO requirement. As to training, Mr. May stated that new hires would work with an experienced maintenance employee to learn how to lock out a particular machine; however, he also indicated that the generalized LOTO procedures were sufficient because the control of energy sources "would be common sense to somebody who is a maintenance mechanic . . . ." (Tr. 236, 239). The lack of specific procedures and

presumption of competency is only made worse by the fact that, of the LOTO-related injuries that were reported between 2008 and the 2011, two of the injured employees were part of the maintenance crew, one of whom was injured twice. (Ex. C-6 at 1, 9, and 13).

Further complicating matters is the fact that Mr. May failed to adhere to Respondent's disciplinary policy, which requires progressive discipline based upon the nature of the infraction and the number infractions committed. (Ex. C-5). The policy requires that all disciplinary actions be documented, whether verbal or otherwise. (*Id.*). Mr. May, however, rarely, if ever, issued a written disciplinary notice, relying instead on talking and/or yelling at the employee. (Tr. 242, 604–606). Further, Mr. May did not communicate such verbal disciplinary actions to the human resources department so individuals in that department could track LOTO infractions and implement any needed corrections. (Tr. 288).

Third, although the injury/accident reports did not necessarily compel the conclusion of willfulness with respect to the sufficiency of the LOTO policy, the Court finds that the injury/accident reports do compel such a conclusion with respect to the overall failure to lockout or tagout as required by Respondent's own policy. Put simply, there was a policy in place that directed employees to use LOTO. Unfortunately, however, the evidence shows that neither Mr. May, who was in charge of the LOTO program, nor Ms. Day, the plant manager, ever took proper action to ensure that the LOTO policy was ever followed. Over the course of three years, Respondent documented thirteen accidents, almost all of which refer to the need to shut off, power down, or lock out the piece of equipment that was being worked on. (C-6). One of the reports involved a supervisor. (Ex. C-6 at 3). In lieu of taking steps to ensure that its LOTO

policy was being adhered to, Respondent responded by disciplining individuals on the basis of violating work safety rules that do not appear in any written document.[17]

Even more curious is the fact that, in response to the rash of LOTO-related incidents, neither Ms. Day nor Ms. Nash discussed the matter with Mr. May, who was in charge of implementing the LOTO policy. Production employees were not authorized to perform LOTO; rather, it was the maintenance crew's responsibility to do so. However, as has been shown, not only was Mr. May aware that certain cleaning operations were being performed by production employees without LOTO—to whom he issued no discipline nor brought this activity to the attention of those who could discipline the production employees—he failed to properly discipline his own employees for violations of that policy. The fact that Respondent possessed this information illustrates heightened awareness of the violation, and the failure to respond to that information illustrates a conscious disregard.

Respondent proffers three main arguments against a finding of willfulness: (1) accidents that occurred more than 6 months prior to the issuance of the Citation cannot be considered, because they are outside the statute of limitations; (2) those accidents occurred on a number of different machines and cannot be used to established heightened awareness of LOTO not being used on the conveyor or topical auger; and (3) Respondent properly responded to the information that it had.

First, although the six-month statute of limitations limits Complainant's ability to cite Respondent for individual violations of the standard, it does not prevent Complainant from using prior incidents to establish Respondent's state of mind. The following passage is instructive:

17. This is particularly peculiar in the case of Ms. Huston, who was cited for failing to ensure that equipment was turned off before cleaning, since it was not her duty to do so and because it was Ms. Altenbach who directed her to clean the conveyor while it was in operation.

> Although we agree with the judge that the incidents themselves would not support a violation of § 1926.852(a) because they occurred outside the limitations period, evidence establishing these "near-misses" could show that CWC had "actual knowledge that [additional or different protection] was necessary under the circumstances." *S&H Riggers*, 659 F.2d at 1285. Additionally, evidence of prior exposure to falling object hazards would be relevant to whether the company had a willful state of mind. *See, e.g., Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1868, 2004-09 CCH OSHD ¶ 32,877, p. 53,198 (No. 02-0865, 2007) ("Willful violations are characterized [in part] by ... a heightened awareness that ... the conditions at [an employer's] workplace present a hazard.") (internal quotation marks and citation omitted), *aff'd*, 296 F. App'x 211 (2d Cir. 2008).

Cleveland Wrecking Co., 2010 WL 9438598 at * 9 (No. 07-0437, 2010). In other words, although the individual instances are outside of the statute of limitations and cannot be cited in and of themselves, such instances are perfectly acceptable as evidence of Respondent's state of mind relative to the two violations indicated in Citation 2, Item 2(b).

Second, although the past accidents occurred on pieces of machinery different than those cited by Complainant, that does not negate heightened awareness. All that the law requires is heightened awareness of a particular hazard or condition—in this case, unexpected release of energy—which is the same regardless of the type of machine. *See id.* (citing *Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1868). If anything, the fact that the same types of injuries occurred as a result of employees failing to turn off/power down different types of machinery indicate a systemic, rather than machine-specific, problem. At bottom, Respondent was confronted with thirteen injuries over the course of a three-year period, almost all of which are attributable to the failure to power down or lock out equipment. Respondent's argument that it was not aware of a LOTO problem when faced with these facts is simply not believable.

Third, along those same lines, Respondent contends that its situation is akin to that of the respondent in *Dayton Tire*, wherein the employer was charged with failing to respond to five incidents that indicated a problem with its LOTO program. *See Dayton Tire v. Sec'y of Labor*,

671 F.3d 1249 (D.C. Cir. 2012). Four of those incidents involved employees and inspectors that expressed their concerns regarding the company's LOTO practices. *Id.* at 1256–57. The other incident involved the death of an employee. *Id.* at 1257. The D.C. Circuit found that Dayton's failure to act in the face of these incidents "evidence[d] negligence at most" because Dayton's manager acted on a good faith belief that the LOTO exemption for production processes applied to Dayton's employees (service and maintenance was the responsibility of an independent company). *Id.* While, on the face of it, the facts of *Dayton Tire* appear analogous to the present case, there are three main areas where the analogy breaks down.

First, Respondent was not merely provided with complaints or concerns about its safety process; rather, it was confronted with thirteen separate injury-producing accidents that stemmed from a failure to properly lockout or tagout. Second, this is not a simple matter of whether Respondent had a good faith belief that a legal exception to the standard applied to its conduct. Although Respondent created a division between its production employees and its maintenance employees by allocating LOTO responsibilities to its maintenance crew, Respondent's production employees were still injured in LOTO-related accidents on 10 separate occasions between 2008 and 2011. (Ex. C-6). And finally, Respondent had actual knowledge that production employees performed work on machines that were not shut down and locked out and refused to cease such activity.

Respondent claims that it addressed this problem by disciplining and coaching employees and by holding discussions during pre-shift meetings. The Commission has held that good faith efforts to correct a particular hazard can negate a claim of willfulness; however, the Commission applies a test of objective reasonableness to determine whether those efforts were in good faith. *See J.A. Jones*, 15 BNA OSHC 2201 (citing *A.P. O'Horo*, 14 BNA OSHC 2004, 2013 (No. 85-

369, 1991); *Calang Corp.*, 14 BNA OSHC 1789 (No. 85-319, 1990)). If this case was about Respondent's failure to ensure proper LOTO in response to a couple of injuries, then perhaps written discipline and coaching would likely be sufficient. This is not a case involving a couple of injuries. Respondent ignored the fact that the most of the injured employees were never trained, let alone authorized, to perform LOTO. In fact, many of those employees were disciplined for violating work rules that only exist in materials that are provided to the maintenance crew; namely, the LOTO policy. (Tr. 133, 312; Ex. C-1). Notwithstanding the discipline and "coaching" sessions, a supervisor, production employees, and even a few maintenance employees, continued to be injured. The inadequacy of Respondent's response to the injuries is highlighted by the actions of Ms. Altenbach and Mr. May, who, although responsible for ensuring compliance with company safety rules, were aware of violative behavior (i.e., dry and chemical wiping of moving conveyors) and, in Ms. Altenbach's case, directed an employee to violate those rules. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (No. 86-360, 1992) (holding employer responsible for plain indifference to employee safety that leadermen showed by their reckless practices). Even if Respondent's discipline and coaching program as outlined in the evidence was deemed by the Court to be a "good safety program" (which the Court does not find) such program is insufficient to negate willfulness where there is an absence of any evidence the employer enforced its safety rules. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1082 (No. 99-0018, 2003). From top to bottom, Respondent consciously disregarded a systemic problem with the implementation of its own LOTO policy (even though deficient) and failed to respond in an objectively reasonable manner. Accordingly, with respect to both instances, Citation 2, Item 1(b) shall be AFFIRMED as willful.

Penalty

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp*., 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd,* 73 F.3d 1466 (8th Cir. 1995).

Respondent is a medium-sized employer, employing approximately 160 employees at any given time. (Tr. 309). CSHO Majoros stated that she had recommended a ten-percent reduction in penalty on the basis of Respondent's size; however, the Toledo Area Director declined to apply that reduction. (Tr. 562). With the exception of the decision not to apply the ten-percent reduction on the basis of size, the Court agrees with CSHO Majoros' conclusions regarding the gravity of Citation 1, Item 4. (Tr. 560–62). Accordingly, the Court shall assess a penalty of $6,300.00 for Citation 1, Item 4.

For penalty purposes, the Court shall group Citation 2, Items 1(a) and 1(b) as Complainant has done. As with Citation 1, Item 4, the Court concurs with CSHO Majoros' assessments regarding gravity and likelihood and her initial determination to apply a ten-percent reduction. (Tr. 595–611). The repeated injuries and Respondent's meager response thereto

justify the willful characterization and a significant penalty. Accordingly, the Court shall assess a grouped penalty of $63,000.00 for Citation 2, Items (a) and 1(b).

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is MODIFIED to an "other-than-serious" violation, AFFIRMED as modified, and a penalty of $3,000.00 is ASSESSED.
2. Citation 1, Items 2(a), 2(b), and 3 are AFFIRMED as a single "serious" violation, and a penalty of $4,000.00 is ASSESSED.
3. Citation 1, Items 5 and 6 are AFFIRMED as a single "serious" violation, and a penalty of $7,000.00 is ASSESSED.
4. Citation 1, Item 7 is MODIFIED to "other-than-serious", AFFIRMED as modified, and a penalty of $2,000.00 is ASSESSED.
5. Citation 1, Item 4 is AFFIRMED, and a penalty of $6,300.00 is ASSESSED.
6. Citation 2, Item 1(a) is MODIFIED to a "serious" violation and AFFIRMED as modified. Citation 2, Item 1(b) is AFFIRMED as a willful violation. A grouped penalty of $63,000.00 is ASSESSED for Citation 2, Items 1(a) and 1(b).

SO ORDERED

/s/
Patrick B. Augustine
Judge, OSHRC

Date: November 5, 2013
Denver, Colorado