

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW



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

SECRETARY OF LABOR,

Complainant,

v.

MIDVALE PAPER BOX COMPANY, INC.,

Respondent.

OSHRC Docket No. 18-0701

DECISION AND ORDER

APPEARANCES:

For the Complainant:

M. del Pilar Castillo, Esq.
U.S. Department of Labor
New York, New York

For the Respondent:

Michael H. Rosenthal, Esq.
RLB Law Group LLC
Philadelphia, Pennsylvania

BEFORE: William S. Coleman
Administrative Law Judge

INTRODUCTION

The Respondent, Midvale Paper Box Company, Inc. (Midvale), operates a plant in Plains Township, Pennsylvania, where it manufactures paper boxes for retail use, such as department store boxes, car part boxes, pizza boxes, and the like. Midvale uses a variety of machines that print, cut, fold, and glue paperboard to form the paper boxes. Most of these machines were originally manufactured in the 1970's or before. (T. 736).

The president and owner of Midvale is Mr. David Frank, who around 1999 acquired the then-shuttered plant and the machinery within. The plant had been used for manufacturing paper boxes for about twenty years before it had been shut down and then acquired by Frank. Upon reopening the plant, Midvale used the same production machinery that the prior plant operator had used for making paper boxes. (T. 512).

Between October 18 and December 14, 2017, a Compliance Safety and Health Officer (CO) from the Occupational Safety and Health Administration (OSHA) went to Midvale's plant on nine separate occasions to conduct an inspection and investigation of Midvale's plant and operations. (T. 37). The reason OSHA originally scheduled this inspection was to assess whether Midvale had abated prior violations that had been resolved by a settlement agreement that was effective in June 2017. (T. 34-37). Before OSHA commenced the inspection, however, it received a complaint about Midvale, and so the scope of the planned inspection expanded to investigate the complaint as well. This was OSHA's fifth inspection of Midvale over a period of about four years. (T. 545-46). The prior four inspections had resulted in the issuance of citations to Midvale, each of which Midvale resolved by entering into settlement agreements. (Exs. C-1, C-20, C-71 & C-77).

The inspection here resulted in the issuance of three citations on April 17, 2018—one serious, one willful, and one repeat—with proposed penalties totaling \$201,212.

The serious citation alleged three grouped violations of design safety standards for electric utilization systems (29 C.F.R. §§ 1910.303–.305) and proposed penalties totaling \$4,065.

The willful citation alleged two grouped violations of the “control of hazardous energy (lockout/tagout)” (LOTO) standard (§ 1910.147) and one violation of the machine guarding

standard for mechanical power-transmission apparatus (§ 1910.219), with proposed penalties totaling \$132,106.

The repeat citation alleged one violation of the eye and face protection standard (§ 1910.133), one violation of the powered industrial truck standard (§ 1910.178), three grouped violations and a fourth separate violation of the machine guarding standard for mechanical power-transmission apparatus (§ 1910.219), three grouped violations of design safety standards for electric utilization systems (§§ 1910.303 & 1910.305), and three grouped violations of the hazard communication standard (§ 1910.1200), with proposed penalties totaling \$65,041.

Midvale timely contested the citations and proposed penalties, bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (Act). The matter was assigned to the undersigned administrative law judge in October 2018. A four-day evidentiary hearing was conducted in Wilkes-Barre, Pennsylvania, from April 29 to May 2, 2019. Post-hearing briefing was completed on December 19, 2019.

As described below, certain citation items are vacated, certain citation items are affirmed (though two with different classifications than alleged), and penalties totaling \$77,901 are assessed.

DISCUSSION

As stipulated by the parties and as supported and confirmed by the record evidence, the Commission has jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (Act), and Midvale is an employer within the meaning of sections 3(3) and 3(5) of the Act. (Joint Preh'g Statement, § VI).

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was noncompliance with its terms; (3)

employees had access to the violative condition; and (4) the cited employer had actual or constructive knowledge of the violative condition. *Donahue Indus. Inc.*, 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003).

**A. Control of Hazardous Energy (LOTO)–
§ 1910.147(c)(4)(i) & 1910.147(c)(7)(i)
 (“Willful/Serious” Citation 2, Items 1a and 1b)**

1. *Prior Inspections and Settlement Agreements*

Before addressing the alleged willful LOTO violations, some background into Midvale’s prior inspection, citation, and settlement history provides important context for the citation items at issue here.

*Mr. Frank’s Erroneous Understanding
of LOTO Standard Requirements*

Midvale defends its lockout ¹ practices at the time of the October 2017 inspection in large part based upon what Mr. David Frank, Midvale’s president, testified the OSHA area director (AD), Mark Stelmack, said to him in December 2015 in a meeting at the OSHA area office. The purpose of that meeting was to discuss settlement of a citation that the area office had issued to Midvale in November 2015, and which included an alleged willful violation of the LOTO standard. ² (T. 475; Ex. C-1 at 13). Mr. Frank testified that his discussion with AD Stelmack led him to believe the following: (1) that only “major” service and maintenance activities required lockout; (2) that “adjustments or minor repairs” on Midvale machinery did not require lockout;

¹ The terms “lockout” or “locked out” as used in this Discussion carry the meaning assigned to the term “lockout” in § 1910.147(b), which is as follows: “*Lockout*. The placement of a lockout device on an energy isolating device, in accordance with an established procedure, ensuring that the energy isolating device and the equipment being controlled cannot be operated until the lockout device is removed.”

² Midvale contested that citation but ultimately accepted the willful LOTO violation in a formal settlement agreement that became a final order on June 19, 2017, about four months before the commencement of the inspection here. (Ex. C-1 at 23-24; T. 11).

and (3) that lockout was not required to clear frequently occurring paper jams in Midvale's machinery, but rather that Midvale's practice of simply engaging an "e-stop" to shut down a machine to resolve a paper jam was compliant with the LOTO standard. (T. 515-16, 551-52).

After that meeting, Mr. Frank sent an email on December 18, 2015, to Midvale's plant manager and plant engineer, Mr. John Northwood. In the email, Mr. Frank told Mr. Northwood about the meeting with AD Stelmack, stating in part the following:

I wanted to follow up with one aspect of the conversation I had with Mark (area director) as it pertains to Lock out Tag out. Based on the information you and I discussed and the subjective nature of the OSHA regulation not only for lock [out] tag out but most of their regulation, I asked the director point blank to what extent do we have to de-energize the equipment relative to Lock Out Tag Out.

I said to him, that my understanding as it pertains to the regulation is that the equipment has to be de-energized electrically, hydraulically and Pneumatically if the machine jams up making production an impossibility not only in our factory but factories throughout the country. I explained that we have kill switches through the production line on all our equipment in all departments and that the kill switch has to be manually re-set by the operator. Only [then] can the operator re-start the machine. Obviously if a jam up takes 2 minutes to unjam, and hours to de-energize and re-energize as the regulation reads, manufacturing would be impossible.

He said and I paraphrase, "we understand jam ups occur and de-energizing is not practical, but if the machine under goes major repair, the machine has to be completely de-energized". Which makes complete sense to me. I explained to Mark [that] you are the only one authorized to lock out tag out the equipment in all [departments]....

As far as I can tell, Lock Out Tagout is for major repairs and regular jam up are covered by the kill switch.

(Ex. R-36). Mr. Frank did not send a similar communication to AD Stelmack to validate the accuracy of either his stated understanding or his "paraphrase" of what AD Stelmack said to him.

Mr. Frank's understanding of what AD Stelmack said during their meeting in December 2015, as he summarized in his email to Northwood, embodied Midvale's touchstone principles for determining when to lockout machinery from the time of that meeting in December 2015 through the conduct of the inspection here in late 2017. (T. 519).

AD Stelmack testified to the matters he discussed with Mr. Frank in their December 2015 meeting with greater specificity than did Mr. Frank. AD Stelmack's recollection of what he said in the meeting was consonant with the performance-oriented nature of the LOTO standard. *See* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, 36656 (Sept. 1, 1989) (to be codified at 29 C.F.R. pt. 1910) (noting that the LOTO 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.) AD Stelmack's recollection also reflected his well-grounded knowledge and years of experience in addressing LOTO issues with employers. (T. 468-70, 484-85).

AD Stelmack had never visited Midvale's plant, so he had never observed the machines that Midvale operates. (T. 477-78). His responses to Mr. Frank's questions about the LOTO standard were couched in broad terms, which was consistent with his lack of familiarity with Midvale's machines. AD Stelmack recalled Mr. Frank complaining that the LOTO standard was burdensome. (T. 478). He recalled further that in response to Mr. Frank's questions about whether using only e-stops (which Frank referred to as "kill switches" in his email to Northwood) to stop a machine to clear paper jams would conform to the LOTO standard, that he responded generally in the negative, but that he also described how machine guarding measures could potentially suffice under the LOTO standard's so-called "minor servicing exception" set forth in

§ 1910.147(a)(2)(ii), note.³ (T. 485-90). Mr. Stelmack recalled that Mr. Frank declared that he believed clearing paper jams at Midvale would indeed fit within the “minor servicing exception.” In response to this assertion Mr. Stelmack remarked that “all paper jams ... are not the same,” although he did not rule out the possibility that clearing some paper jams could fall within the minor servicing exception if the requirements of that exception were present. (T. 485-90).

The undersigned finds AD Stelmack’s account of his discussion with Mr. Frank in December 2015 to be far more reliable than Mr. Frank’s recollection. The greater weight of the evidence establishes that AD Stelmack did not advise Mr. Frank that the sole use of e-stops to stop a machine to clear a paper jam would categorically comply with the LOTO standard. The undersigned finds further that AD Stelmack did not communicate to Mr. Frank, either expressly or implicitly, that the LOTO standard applied only to “major” service and maintenance activities. AD Stelmack’s remarks to Mr. Frank were necessarily nuanced and consonant with the performance-oriented nature of the LOTO standard, particularly considering that AD Stelmack had no first-hand knowledge of the exact equipment and operations at the Midvale plant. Contrary to Mr. Frank’s understanding of what AD Stelmack said to him, it is highly unlikely that AD Stelmack communicated a view that is incongruent with the requirements of the LOTO standard. Contrary to Mr. Frank’s recollection, the greater weight of the evidence is that AD Stelmack did

³ A “note” to subparagraph (a)(2)(ii) of the LOTO standard contains what is often referred to as the “minor servicing exception,” and it 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).

The reference in the exception to “subpart O” is an express reference to the machine guarding standard codified at 29 C.F.R. §§ 1910.211 to 1900.219.

not communicate to him objectively erroneous information on when lockout is required and not required.

Mr. Frank seemingly misinterpreted what Mr. Stelmack said to him in their meeting. It is apparent that Mr. Frank was seeking some bright-line rule from AD Stelmack on when to lockout machinery. (*See* T. 556-57). But the performance-oriented LOTO standard is not generally susceptible to simplistic rules. Rather, whether the LOTO standard applies depends on the equipment and operations present in any given workplace, and whether any given service or maintenance activity would expose employees to injury if a machine were not locked out for that activity. *See* 54 Fed. Reg. at 36666 (“If an energy source does not have the capability of causing injury to employees, it is not ‘hazardous energy’ within the scope of this standard”). AD Stelmack’s necessarily non-categorical responses to many of Mr. Frank’s questions appear to have resulted in Mr. Frank believing that the LOTO standard’s requirements were “subjective” (as he described in his email to Northwood) and apparently resulted in his erroneously distilling from his discussion with AD Stelmack a simplistic bright-line rule that AD Stelmack never articulated or implied—that lockout was required only for “major” repairs.

Mr. Frank’s flawed understanding of the requirements of the LOTO standard persisted to the time of the inspection here, which was conducted nearly two years after his December 2015 meeting with AD Stelmack. That Mr. Frank held this flawed understanding for so long was substantially due to his own inaction in failing to retain a qualified safety consultant to perform a comprehensive safety audit of the Midvale plant in early 2015, which Midvale had committed to do, as is described next.

*Midvale's Failure to Retain Safety Consultant to Conduct Audit
From 2015 thru 2017*

On December 8, 2014, a year before his December 2015 meeting with AD Stelmack, Mr. Frank signed an informal settlement agreement (ISA) on behalf of Midvale that resolved a citation that OSHA had issued on November 7, 2014. (Ex. C-20). Among other of the ISA's provisions, Midvale committed to (1) engaging a "qualified third party safety consultant to conduct a comprehensive safety audit" by February 8, 2015, and (2) implementing the consultant's "reasonable recommendations" no later than June 8, 2015 (unless Midvale requested and OSHA granted an extension of that deadline).⁴ As part of the discussions leading up to the execution of

⁴ The provision pertaining to engaging a safety consultant was set forth in paragraph 5 of the ISA, which provided as follows:

Employer agrees to engage a qualified third party safety consultant to conduct a comprehensive safety audit at the cited facility, and to address any reasonable safety and/or health hazards identified during the audit. This action will be accomplished pursuant to the following schedule:

- a. Employer shall engage a qualified third party safety consultant or firm ("Safety Consultant") to conduct a comprehensive safety audit at the cited facility within sixty (60) calendar days of the signing of this Agreement.
- b. The Safety Consultant shall produce a final report with recommendations to Employer within sixty (60) calendar days of when the audit was conducted.
- c. Employer shall address the reasonable recommendations in the Safety Consultant's final report within sixty (60) calendar days of receipt of the final audit report.
- d. Employer shall provide a copy of the Safety Consultant's final audit report and certification/documentation of the actions Employer will have taken to address the Safety Consultant's reasonable recommendations within fifteen (15) calendar days of addressing the recommendations.
- e. If Employer chooses to address a recommendation in a manner different than that [prescribed] by the Safety Consultant, or decides to not implement a recommendation made by the Safety Consultant, it shall notify OSHA and provide the basis for its decision, within fifteen (15) calendar days of addressing the remaining recommendations from the audits.
- f. OSHA will consider reasonable requests by Employer for extensions of time related to addressing recommendations in the event a recommendation requires a significant capital project or for other extenuating circumstances.

the ISA, OSHA informed Midvale that a publicly funded state consultation service that was operated by Indiana University of Pennsylvania (IUP) was available to Pennsylvania employers to perform safety audits at no cost to the employer. *See* 29 U.S.C. § 670(d); 29 C.F.R. § 1908.1. Midvale intended to use the IUP consultation service to meet its commitment. (T. 359-60, 365). However, Midvale's obligation under the ISA to engage a safety consultant was not contingent on IUP agreeing to conduct the audit or on the audit being conducted without cost to Midvale. (T. 359-60, 370).

Midvale did not retain IUP (or any other safety consultation service) within the timeframe specified in the ISA. (T. 362). On May 29, 2015, more than six months after Midvale signed the ISA, OSHA conducted a follow-up inspection of the Midvale plant for the purpose of assessing whether Midvale had corrected the violative conditions that had been addressed in the ISA. (T. 373-74). That inspection resulted in OSHA issuing another citation to Midvale on November 25, 2015. That citation alleged that Midvale had failed to abate two machine guarding violations that Midvale had accepted in the ISA, and it also alleged eleven new violations. (Ex. C-1 at 23). The purpose of Mr. Frank's meeting with the area director in December 2015 described above was to discuss this new citation. (T. 475).

In February 2016, about two months after Mr. Frank's December 2015 meeting with the area director, Mr. Frank first attempted to arrange for IUP to conduct the safety audit that Midvale had agreed fourteen months earlier (in December 2014) to have conducted by February 2015. (Ex. R-37; Ex. C-68 at 68-70). However, because Midvale had contested the citation that had been issued in November 2015, the violations alleged in that citation had not become a final order, and so by regulation IUP was not permitted to perform the requested safety audit. 29 C.F.R. § 1908.7(b)(3) ("An onsite consultative visit shall not take place subsequent to an OSHA

enforcement inspection until a determination has been made that no citation will be issued, or if a citation is issued, onsite consultation shall only take place with regard to those citation items which have become final orders.”). (T. 369; Ex. C-68 at 72-73).

In May 2017, Midvale and OSHA entered into a formal settlement agreement (FSA) that resolved the citation that had been issued in November 2015. One provision of that FSA required Midvale to retain a consultant to conduct *two* audits of the Midvale facility over the following two years. (Ex. C-1 at 25).

Four months after the FSA was executed, AD Stelmack sent Midvale a letter dated September 22, 2017, informing Midvale that OSHA had not received Midvale’s notification that it had abated the violative conditions identified in the FSA and requesting that this abatement information be submitted within five business days. (Ex. C-2). The letter stated further that Midvale’s failure to submit the abatement information could result in OSHA conducting a follow-up inspection to confirm that the violative conditions had been abated. (Ex. C-2).

Midvale did not respond to that letter. Consequently, on October 5, 2017, AD Stelmack’s area office dispatched the CO to Midvale’s plant to conduct a follow-up inspection to assess whether the violative conditions addressed in the FSA had been corrected and to investigate as well a recently received complaint. (T. 34-37, 375, 383). When the CO arrived on October 5, 2017, to commence the inspection, he was turned away because Midvale would not consent to the inspection. (Ex. C-3; T. 375). The CO returned to the Midvale plant about two weeks later, on October 18, 2017, accompanied by the assistant area director, and the inspection that the CO had intended to start on October 5 was formally opened that day. (T. 38-39, 347, 383; Ex. C-6).

After Midvale learned on October 5, 2017, of OSHA’s intent to conduct the follow-up and the complaint inspections, Midvale again contacted the consultative service at IUP to seek

assistance, but IUP informed Midvale the next day (October 6, 2017) that in view of the inspection that OSHA had attempted to initiate the day before, that IUP would not schedule an audit until that intended inspection was concluded. (T. 369-70; Exs. C-3 & R-37).

Midvale could have certainly retained a qualified safety consultant to conduct the safety audit that it had committed in the ISA to have done, even though Midvale would likely have had to pay for it. But Midvale never did so. Had Midvale retained a safety consultant as it had committed to do in December 2014, the consultant almost certainly would have evaluated Midvale's plant for compliance with the LOTO standard and likely would have made reasonable recommendations that Midvale would have been obliged to implement under the terms of the ISA of December 2014. If Midvale had implemented the reasonable recommendations of a qualified safety consultant, it is likely that Midvale would have developed, documented, and implemented a LOTO program that conformed to the LOTO standard, and that Midvale would have avoided the violations for which it was cited in the citation that was issued in November 2015, which precipitated Mr. Frank's meeting with AD Stelmack in December 2015. Midvale's continuing failure to retain a safety consultant to conduct a comprehensive safety audit from December 2014 through time of the inspection here in late 2017 likely prolonged non-compliant workplace safety and health practices and conditions at Midvale's plant.

2. Citation 2, Item 1a -- § 1910.147(c)(4)(i)

The Secretary alleges Midvale violated subparagraph (c)(4)(i) of the LOTO standard (§ 1910.147), which provides as follows: "(4) *Energy control procedure.* (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section." The Secretary alleges that Midvale violated this provision with respect to nine of its machines: three printing, stripping and die-cutting machines (identified by the brand name Zerand, and known also as "printers/die

cutters”); five gluer machines (originally manufactured by International Paper Box Machine Company); and one window-box machine (also originally manufactured by International Paper Box Machine Company).

The bulk of the production at the plant involves the Zerand and the gluer machines, with the window-box machine used intermittently. (T. 232-33). The manufacturing process generally involves feeding large rolls of paper in the Zerand machines where it is printed with multiple colors at multiple print stations and then cut into flat “blanks.” The blanks are then fed through the gluer machines, folded, and glued to make a complete box. (T. 662-65). The Zerand machines and the gluers are large complex machines. The Zerand machines were estimated to be over 100 feet long (T. 699) and the gluers about 70 feet long. (T. 699, 716).

Item 1a describes the manner that Midvale is alleged to have violated the standard as follows:

The employer does not ensure procedures are developed, documented, and utilized for the control of potentially hazardous energy. This violation was most recently observed on or about October 18, 2017 ... when the employer did not develop, document and utilize energy control procedures while employees performed servicing and maintenance activities including but not limited to adjusting, cleaning, replacing parts, and clearing jams on the following equipment:

1. International Paper Box Machine Company Swifty Right Angle Model FZ Gluers (Serial Nos. 397, 602, 639)
2. International Paper Box Machine Company Swifty Right Angle Model KB Gluers (Serial Nos. 101, 102)
3. International Paper Box Machine Company Window Machine Model 5A (Serial No. 146)
4. Zerand Printing, Stripping, and Die Cutting Machines (#1, #2, #3)

The Secretary argues that Midvale did not comply with § 1910.147(c)(4)(i) in multiple ways with respect to all nine identified machines.

Adequacy of Written LOTO Procedures

The Secretary first argues that Midvale’s written energy control procedures were deficient in that the content of the procedures did not meet the requirements of § 1910.147(c)(4)(ii). (Sec’y Br. 18-19). Subparagraph (c)(4)(ii) of the LOTO standard requires in part that an employer’s written LOTO procedures “clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy.”

Midvale first developed and documented written energy control procedures in early 2016. Midvale did this in response to a prior willful violation of § 1910.147(c)(1) that the Secretary originally alleged in November 2015. Midvale contested that violation, and it did not become a final order until June 2017 after Midvale had accepted the violation in a formal settlement agreement. There is substantial evidence that the content of Midvale’s written procedures failed to meet the requirements of subparagraph (c)(4)(ii). (T. 151). However, the citation item here does not allege a violation of subparagraph (c)(4)(ii). For the Secretary to prove that Midvale did not comply with the requirements of the provision that the Secretary has alleged that Midvale violated (subparagraph (c)(4)(i)) the Secretary was required to show that Midvale failed to either “develop,” or “document,” and/or “utilize” procedures for the control of potentially hazardous energy. The Secretary did not prove that Midvale failed to “develop” or “document” LOTO procedures because Midvale did just that, notwithstanding that the *content* of those procedures was deficient. (Ex. R-40 at 60-69; T. 149-50, 798-801, 816). See OSHA Directive CPL-02-00-147, *The Control of Hazardous Energy — Enforcement Policy and Inspection Procedures*, p. 2-9 (Feb. 11, 2008) (LOTO Directive)⁵ (“[S]ection (c)(4)(i) may be cited for procedural development,

⁵ The LOTO Directive was not presented in evidence, but the Secretary referenced it in his Reply Brief, which is regarded as a request for the Commission to take official notice of the LOTO

documentation and use issues; whereas, section (c)(4)(ii) shall be cited for procedural content and quality problems – e.g., for the failure to have clear and specific steps to be followed in order to control hazardous energy”); *Gen. Motors Corp., CPCG Okla. Plant (GM-CPCG Okla.)*, 22 BNA OSHC 1019, 1025-27 (No. 91-2834E, 2007) (discussing and finding violations of § 1910.147(c)(4)(i) where employees failed to utilize established energy control procedures and of § 1910.147(c)(4)(ii) where those procedures were inadequate). The parties did not consent to trying the unpleaded issue of the conformance of Midvale’s developed and documented energy control procedures with the requirements of subparagraph (c)(4)(ii), and so that issue is not adjudicated herein. *See McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129-30 (No. 80-5868, 1984) (“Trial by consent [under Fed. R. Civ. P. 15(b)] may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue.”)

Thus, for the Secretary to establish the violation that he has alleged in Item 1a requires proving that Midvale failed to “utilize” LOTO procedures as the cited provision also requires. The Secretary argues that he “introduced evidence of several instances in which ... employees performed servicing and maintenance activities while a covered machine was not locked out.” (Sec’y Br. 20). The instances that the Secretary argues establishes noncompliance are addressed next.

Cleaning Under Gluer #3 on November 21, 2017

A video that the CO recorded on November 21, 2017, shows Mr. Vincent Dellaperuto, who is a floor manager at the plant, kneeling or stooping toward the floor to gather and remove some granular absorbent material that had been put down on the floor next to Gluer #3 to absorb gear oil that had leaked from the machine. (*See* video at Ex. C-82; Ex. C-11 at Bates 90; T. 98-99).

Directive pursuant to Fed. R. Evid. 201(c)(2). (Sec’y Reply Br. 2 & 5). The LOTO Directive is posted on OSHA’s public website.

This oil leak had been a longstanding condition and oil regularly had to be cleaned from the floor in this area. (T. 102). When Dellaperuto was cleaning up the material, Gluer #3 was in operation and a horizontal shaft that was located about seven inches above floor level was rotating. (T. 98-100; C-81). A machine guard existed for this shaft, but that guard had been removed and was not in place at the time. (*See infra* for the Discussion of the machine guarding violation involving this missing machine guard that is alleged in Citation 3, Item 2, instance 3). Dellaperuto's right hand came within one foot of the rotating shaft while he cleaned the material off the floor. (T. 98-99).

Midvale's president, Mr. Frank, testified that Dellaperuto was not required to lockout Gluer #3 for the cleaning activity depicted in the video because this was a "minor activity." (T. 562-63). He testified further that he believed that Dellaperuto was not exposed to a hazard while cleaning the material. (T. 562-63). Similarly, the plant manager and plant engineer, John Northwood, testified that employees at Midvale were not required to lockout machines when engaged in the type of cleaning activity that Dellaperuto is shown doing in the video. (T. 758-59). However, Mr. Northwood acknowledged that if Dellaperuto had contacted the rotating shaft he could have been injured. (T. 761-62).

The cleaning activity that Dellaperuto was doing constituted "servicing and/or maintenance" as defined by the LOTO standard.⁶ *See Burkes Mech., Inc.*, 21 BNA OSHC 2136,

⁶ The LOTO standard defines the term "servicing and/or maintenance" in § 1910.147(b) as follows:

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

2138-40 (No. 04-475, 2005) (concluding that workers who were cleaning underneath an operating machine were “engaged in a covered servicing or maintenance activity”).

If the guard for the rotating shaft had been in place when Dellaperuto was cleaning the material from the floor near the exposed rotating shaft, the Secretary would not have established that the machine was required to have been locked out for that activity, because there was otherwise no evidence that the rotating shaft, if it had been guarded as the machine guarding standard requires, could have caused Dellaperuto injury. *See* § 1910.147(a)(1)(i) (providing that the standard covers servicing and maintenance in which hazardous energy “could cause injury to employees”). But because the guard was not present when Dellaperuto was engaged in this cleaning activity, the machine was required to be locked out when he encroached on the zone of danger presented by the unguarded rotating shaft. *Cf.* § 1910.147(a)(2)(ii)(A) (providing that the LOTO standard applies to normal production operations when an “employee is required to remove or bypass a guard”).

A preponderance of the evidence thus showed that the LOTO standard applied to Dellaperuto’s cleaning activity, that Midvale failed to comply with the standard by failing to lockout the machine during the cleaning activity, and that Dellaperuto was exposed to the hazardous energy of the rotating shaft while cleaning. Midvale had constructive knowledge of the violative condition in that both Midvale’s president and its plant manager did not require the machine to be locked out for the cleaning activity depicted in the video. Midvale had actual knowledge because Dellaperuto is a supervisor whose actual knowledge of a violative condition is imputable to Midvale. Midvale violated the LOTO standard in the manner alleged in Item 1a with respect to Dellaperuto’s cleaning activity on November 21, 2017.

However, as discussed *infra* in connection with the alleged machine guarding violation that focuses on the same unguarded rotating shaft on Gluer #3 (Citation 2, Item 2, Instance 3), this same activity of Mr. Dellaperuto establishes the “employee access” element of that alleged violation. The exposed shaft was supposed to have been guarded, but as the video reflects the guard was not present on November 21, 2017, when Dellaperuto encroached on the zone of danger. For reasons described *infra*, the LOTO violation and the machine guarding violation that involved the same unguarded rotating shaft are duplicative of one another, so one of the two must be vacated. Because the LOTO standard would not have been applicable to Dellaperuto’s servicing activity if the guard for the rotating shaft had been in place, between the two violations the LOTO violation shall be vacated. (This proven but vacated LOTO violation is not considered *infra* in connection with the penalty determination for grouped Items 1a and 1b of Citation 2.)

Removal and Replacement of Belts

The Secretary argues that all the machines identified in the citation item “have belts which can break” and that the evidence established that Midvale “employees do not use LOTO when replacing and/or removing belts on these machines.” (Sec’y Br. 20). Midvale employees testified that machines were not necessarily locked out for the removal and replacement of every belt on the various machines at Midvale, but that machines would be locked out for the removal and replacement of some. (E.g., T. 588, 643-44, 768, 774).

The evidence on which the Secretary relies in arguing that the belt removal and replacement done on the Midvale machines required lockout is inexact as to the time and circumstances of that service and maintenance activity. That evidence is insufficient to establish that any specific instances of belt removal and replacement requiring lockout occurred on or after October 17, 2017, which is the earliest date within the six-month limitations period of section 9(c) of the Act. 29

U.S.C. § 658(c). There is no evidence of *specific* instances of employees engaging in belt removal and replacement that occurred on or after October 17, 2017.⁷ (E.g., T. 391-93, 633-34, 640-42).

The *nonspecific* evidence of instances of belt removal and replacement is insufficient to establish that Midvale failed to lockout the machine when required by the standard during removal or replacement of any of the various belts on the varied machines in the timeframe alleged in the Citation.⁸ See *Gen. Motors Corp., Delco Chassis Div. (GM-Delco)*, 17 BNA OSHC 1217, 1218 & 1220 (No. 91-2973, 1995) (consolidated) (stating the standard “applies only where the Secretary shows that unexpected energizing, start up or release of stored energy could occur and cause

⁷ The Secretary argues that evidence of four employees who in the years before the inspection here had suffered hand injuries while working on some of the machines shows that Midvale employees sustained injuries because the machines were not locked out when required by the LOTO standard. (Sec’y Br. 10-12 & 17; Ex. C-12). Two of the injuries documented on Midvale’s OSHA Form 301’s suggest that the injuries were sustained during servicing done during normal production operations and could have been the result of the failure of the employees to utilize required procedures. (See Ex. C-12 at Bates 399 [injury to employee J.C. on 1.20.16] & Bates 404 [injury to employee H.D. on 1.3.17]; T. 640-42, 763-66). Neither of those injured employees testified, however, and while the evidence of the circumstances of their injuries establishes that the machines present a risk of injury if serviced while the machines are in operation, that evidence is not dispositive as to whether the belt replacement and machine adjustments that employees are permitted to perform without locking out and with only an e-stop engaged exposed employees to unexpected energization or risk of injury therefrom. There is also evidence that an independent cause of at least one of the documented injuries was that the injured employee had improperly removed a machine guard. (T. 598-600).

⁸ The testimonial references to “belts” were often unspecific as to the type, location, and function of any belt referred to. (E.g., T. 767-69). Video evidence shows that some conveyor belts on the machines move at an extremely slow pace, perhaps no faster than one inch per second. (See e.g., Ex. R-24 video at 0’49” to 1’08”). Cf. *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1097-98 (No. 12470, 1980) (concluding that the machine’s point of operation did not expose workers to injury in part because of its extremely slow rate of movement, so that leaving the point of operation unguarded did not fail to conform with a machine guarding standard that required a point of operation be guarded only where the machine’s operation exposed an employee to injury from that point of operation), *overruled in part on other grounds by George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436 (No. 76-647, 1982).

injury” and that the “terms of the standard clearly place the burden on the Secretary to *show* that there is such a hazard as to the cited machines and equipment”), *aff’d*, 89 F.3d 313 (6th Cir. 1996).

The plant manager, John Northwood, testified that employees would change unspecified belts on gluers by using an Allen wrench, and that this would be done about twice weekly without utilizing LOTO procedures. (T. 777). There was no evidence, however, bearing on whether while performing that task any unexpected energization of the gluers could cause injury to employees, so the evidence is insufficient to establish that the LOTO standard applies to that activity that occurred within the timeframe alleged in the Citation. *See* § 1910.147(a)(1)(i) (providing that the standard covers servicing and maintenance in which energization “could cause injury to employees”); 54 Fed. Reg. at 36666 (“If an energy source does not have the capability of causing injury to employees, it is not ‘hazardous energy’ within the scope of this standard”).

Adjustments of Belts and Rollers

Reliable evidence established that some *unspecified* belts on the various machines at the plant become misaligned and require adjusting. Midvale does not require lockout for such adjustments because Midvale does not regard these adjustments to constitute a “major” maintenance activity. (*See* T. 561; Ex. C-68 at 28 & 83.)

The CO testified that on November 7, 2017, while Gluer #3 was running he observed one of Midvale’s floor managers, Mr. Dellaperuto, adjust a narrow green belt on it that has both a horizontal and vertical run. (T. 90-93). (This belt is depicted in operation in the video at Exhibit C-80, but the incident to which the CO testified was not captured in any video or photographic evidence.) The CO believed Dellaperuto was exposed to the risk of injury while doing so. (T. 90-93). The CO’s testimony is insufficiently concrete and precise to establish that Dellaperuto’s hands were in a danger zone associated with the machine’s operation and is thus insufficient to establish that the LOTO standard applied to the work he observed Mr. Dellaperuto doing on Gluer

#3 while the machine was running. *See* § 1910.147(a)(2)(ii)(B), (providing that the standard applies during normal production operations if an “employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or where an associated danger zone exists during a machine operating cycle”).

The CO testified that on November 9, 2017, he observed an unidentified employee making some kind of adjustment while his hands were near (but not on) some moving belt on Gluer #5, but that the CO did not see exactly what the employee was doing. (T. 96, 282-83). This testimony is insufficiently weighty to establish that the employee was engaged in a service or maintenance activity during normal production operations that required LOTO procedures to be utilized, in that it is insufficient to establish that the employee could have sustained injury from the moving belt, which he was not contacting. *See* § 1910.147(a)(1)(i) (providing that the standard covers servicing and maintenance in which energization “could cause injury to employees”).

The CO testified that on November 21, 2017, he observed two unidentified employees making some unspecified type of adjustment to some unspecified rollers on the Zerand #1 machine while the machine was operating. (T. 96-97). There is no evidence whether the rollers involved were “energized,” in contrast to non-energized or “idler” rollers. (See T. 286). This testimony is insufficiently weighty to establish that the employees were at risk of injury from the rollers while making the unspecified adjustment. *See* 54 Fed. Reg. at 36666 (“If an energy source does not have the capability of causing injury to employees, it is not ‘hazardous energy’ within the scope of this standard”).

Clearing Paper Jams

All nine machines identified in the citation item have mechanisms that Midvale calls “jam stops” that are designed to stop the machine upon detecting a paper jam. The jam stops do not

cause a machine to stop automatically for all paper jams, however. (T. 516-18, 581-83, 613-14, 629). Whether a paper jam is detected first by a “jam stop” or by an employee, in both circumstances Midvale instructs employees to engage an e-stop on the machine so that the machine remains stopped while the employee clears the jam, and then after the jam is cleared to disengage the e-stop and restart the machine by depressing the machine’s start button. Midvale does not require employees to lockout machines to resolve frequently occurring paper jams. (T. 665-70).

Each of the machines identified in the citation item has multiple e-stop buttons: the Zerand machines have about eight to ten; the gluers have about ten; and the “window box” machine has about three. (T. 666, 744). The plant engineer (and the plant manager), John Northwood, testified that the e-stops on the machines have a fail-safe redundancy, so that if an e-stop were to fail, it would fail into “safe mode by design.” (T. 667-68, 738-39).

Northwood testified further about a method of clearing some paper jams that requires an employee to remove a machine guard, but that a safety interlock for that guard prevents unexpected energization of the machine. (T. 808-13). That safety interlock is among “hundreds” of safety interlocks on Midvale’s machines, some of which were part of the original designs of the machines, and others that were added later. (T. 725-27, 322-23).

Northwood has been involved in the repair and maintenance of Midvale’s machines for fifteen years and for nearly twenty years before that he worked on the same type of equipment working elsewhere. (T. 659). Northwood has received formal training at the Rochester Institute of Technology on printing subjects, at Penn State University on microprocessor controls, electrical controls, and motor drives and systems, and at various trade schools on other subjects. (T. 659-60).

The Secretary presented no technical evidence, whether from the manufacturers of the machines or otherwise, to controvert Northwood’s testimony on the technical aspects of the e-stops and safety interlocks on Midvale’s machines. There is insufficient evidence to establish by a preponderance that the use of e-stops to stop the machines while an employee cleared a jam on the machine (or the safety interlock feature of some machine guards on the machines) would expose employees to injury from unexpected energization. *See Consol. Constr., Inc.*, 16 BNA OSHC 1001, 1006 n. 6 (No. 89-2839, 1993) (noting that the Secretary was not required to present expert testimony to prove his case, but that “when the Secretary chooses not to produce an expert witness, he risks the possibility, as here, of not being able to refute the employer’s evidence”); *Gen. Motors Corp., Delco Prod. Div.*, 11 BNA OSHC 1482, 1484 (No. 78-5476, 1983) (observing that “had the Secretary met his *prima facie* burden, it is questionable whether, without expert testimony, the Secretary’s case would have been capable of withstanding rebuttal” from the respondent).

The Commission has decided that control circuit type devices such as e-stops and safety interlocks may operate in such a manner that eliminates the potential of hazardous energy for certain servicing or maintenance activities, so that the LOTO standard does not apply to those activities. *See GM-Delco*, 17 BNA OSHC at 1220 (rejecting the argument that the LOTO standard “presumes that there always is a hazard of unexpected energization, etc., on every industrial machine and piece of equipment during servicing and maintenance,” and determining LOTO standard not applicable where employer relied on control circuit type devices, including electronically interlocked gates and e-stop buttons, to eliminate the potential for injury from hazardous energy); *see also Alro Steel Corp.*, 25 BNA OSHC 1839, 1854 (No. 13-2115, 2015) (ALJ) (relying on *GM-Delco* in determining LOTO standard was not applicable where control circuit devices were relied upon to prevent unexpected energization or start up or release of stored

energy during a particular servicing activity). With respect to clearing paper jams, there is insufficient concrete evidence that if an employee were to engage an e-stop to clear the paper jam that there was a reasonable possibility that some other employee would disengage that e-stop and restart the machine unbeknownst to employees involved in servicing the machine. (*Cf.* CO testimony T. 319-20) (CO testifying that he did not consider whether other employees had unobstructed views of the servicing employee from the controls of the various machines).

While there exists hydraulic and pneumatic energy in some of the machines, the Secretary did not present sufficient evidence to establish that during the conduct of any given service and maintenance activity on any of them that employees are exposed to injury from those energy sources.⁹ The only energy source for any of the machines that was established by a preponderance of the evidence to present a risk of injury to employees during service and maintenance activities is electrical energy, which can be controlled by locking out at each machine's power source. (T. 605, 694-95).

Clearing Paper Jam in the Window Machine on November 21, 2017

On November 21, 2017, the CO recorded the video at Exhibit C-13, which is 3 minutes and 21 seconds in duration. (Ex. C-11 at Bates 89). Mr. Northwood, the plant manager, was accompanying the CO when the CO recorded the video. (T. 72). The video shows three employees

⁹ Pneumatic energy is present in the glue tanks on the gluers. There are "caution" stickers on some gluer machines that warn employees to lock out the machine when "cleaning, making adjustments, servicing, clearing jams, maintaining glue pots and glue bottles." (Ex. C-22, video of Gluer #2 at 1'19"; Ex. C-23 video of Gluer # 3 at 1'23" and 1'49"). Other than testimony on behalf of Midvale that those are "not our sticker[s]" (T. 559), there is no evidence regarding the provenance of those stickers. Nor is there evidence that failing to lock out the machine to isolate both electrical and pneumatic energy to the glue pots during refilling exposes employees to potential injury from the electrical or pneumatic energy. There is evidence, however, that the "glue pot" and "glue bottle" technology described on the stickers is a remnant of old technology, suggesting that the stickers' cautions directed at that technology could be an anachronism. (T. 584-85, 671-73, 813-15).

operating the “window box” machine. The machine jammed, and two employees put their hands in the machine’s point of operation to clear the jam without locking out the machine and without an e-stop being engaged.¹⁰ (T. 70-80; Ex. C-11 at Bates 89).

This service activity of clearing the paper jam depicted in the video constituted a service activity “where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.” § 1910.147(b)¹¹; *Otis Elevator Co. v. Sec’y of Labor*, 762 F.3d 116, 123 (D.C. Cir. 2014) (determining the text of the LOTO standard contemplates its application to “unjamming” work, and also “comports with the standard’s preventative purpose”). The employees clearing the jam were exposed to the “unexpected” energization of the machine because with the e-stop (which is purportedly fail-safe) disengaged, the machine could be restarted by simply depressing the start button. If the machine were restarted without warning to the servicing employees, the restart would be unexpected as to those employees and could cause them injury. (T. 86-87). *Id.*, 762 F.3d at 121 (indicating that whether an energy source presents the potential for hazardous energy involves a two-pronged test: (1) whether unexpected energization, start up or release of stored energy could occur, and (2) if it can occur, whether it could cause injury to employees). This is precisely the kind of industrial accident the LOTO standard is designed to prevent. *See GM-CPCG Okla.* 22 BNA OSHC at 1022 (“The LOTO standard ... was

¹⁰ The video shows that after the employees detected the paper jam, the employee who was feeding paper to the machine depressed an e-stop button to stop the machine, but that immediately after depressing the button to stop the machine he lifted it back up and thereby disengaged it. (Ex. C-13 at 1'04"). Then he and the machine operator moved to and stood on opposite sides of the machine, where each put his hands in the point of operation to clear the jam. (Ex. C-13 at 1'04"–2'28"; T. 75-76, 83-84). After they cleared the jam, the operator made eye contact with the other two employees running the machine, asked if they were “good,” and upon receiving affirmative responses he restarted the machine by depressing the start button. (Ex. C-13 at 2'30"–2'37"; T. 80-81).

¹¹ *See supra* footnote 6 for the standard’s complete definition of “servicing and/or maintenance.”

promulgated to prevent industrial accidents during servicing of machines that (1) remain in an operational mode, (2) are turned off but connected to a power source, (3) retain stored energy, or (4) are reactivated by another worker unaware that servicing is in progress.”)

Midvale argues that energization of the window box machine when employees are engaged in clearing a paper jam could never be *unexpected* to those servicing employees, and thus lockout was not required. Midvale argues that the members of the three-employee crew that runs the window box machine have “complete visibility” of each other while running the machine and that it is unnecessary to lockout a machine to protect against the possibility of another employee deliberately endangering the servicing employees by restarting the machine while they had their hands in the point of operation. (Resp’t Br. 23).

This argument is rejected. The conditions that Midvale argues renders any energization of the window box machine *not* “unexpected” to servicing employees overlook “common human errors such as ‘neglect, distraction, inattention or inadvertence.’” *S. Hens, Inc. v. OSHRC*, 930 F.3d 667, 677 (5th Cir. 2019), quoting *Matsu Ala., Inc.*, 25 BNA OSHC 1952, 1970 (No. 13-1713, 2015) (ALJ). “Occupational safety regulations exist because people are distractible.” *Id.* “Functioning with less than perfect focus and control is our ordinary condition.” *Id.* The noise and activity on the busy floor of Midvale’s plant depicted in the video reflects an environment rich in conditions for worker distraction, inadvertence, and inattentiveness. Under such typical working conditions, it is reasonably possible that the window box machine could be started without the prior knowledge of the servicing employees and expose them to the risk of injury.¹²

¹² Another factor that makes worker distraction a reasonable possibility is Midvale’s practice of *not* disciplining employees for safety violations, but instead responding to safety violations by simply making on-the-spot corrections and admonishing the offending employee to comply. This practice is discussed *infra* in greater detail.

Machine Set-Up and Cleaning

Midvale does not require employees to lockout when setting up or cleaning any of the nine machines identified in the citation item. (Ex. C-67; T. 632, 731-33, 759). Both setting up and cleaning machines and equipment constitutes “service and/or maintenance” as defined in the LOTO standard *if* during that activity “the employee may be exposed to the unexpected energization or startup of the equipment or release of hazardous energy,” § 1910.147(b), *and if* such exposure to the hazardous energy could cause injury to employees. *Otis Elevator*, 762 F.3d at 121.

The only evidence presented establishing the reasonable possibility of unexpected energization during setting up or cleaning pertains to an unguarded power transmission belt and pulleys on the non-operator side of Zerand #2, which is discussed in detail *infra* in connection with the machine guarding violations alleged in Citation 3, Items 3a and 3b. As discussed in connection with those citation items, a preponderance of the evidence establishes that employees engage in both setting up and cleaning underneath the Zerand #2 while in proximity to the unguarded belt and pulleys and are at risk of injury from the unexpected energization of the machine. The Zerand #2 is a complex machine about 100 feet long, but the only hazardous energy present is electrical energy, which can be isolated and locked out in minutes at its main disconnect.¹³ (T. 615, 694-95, 699). An employee in proximity of the unguarded belt and pulleys on the non-operator side of the machine would not necessarily be visible to an employee located on the operator side of the machine because of the machine’s size and height, so an employee in that area would be exposed to the risk of injury by the inadvertent or premature activation of the machine. (Ex. R-26; T. 692).

¹³ While the Zerand machines have hydraulic energy too (T. 745), as noted *supra* in the text associated with footnote 9, that energy was not shown to constitute hazardous energy required to be controlled under the LOTO standard.

See 54 Fed. Reg. at 36648 (“The generally accepted best means to minimize the potential for inadvertent activation is to ensure that all power to the machine or equipment is isolated, locked or blocked and dissipated at points of control, using a method that cannot readily be removed, bypassed, overridden or otherwise defeated.”).¹⁴

This LOTO violation and the machine guarding violations that are adjudicated *infra* in connection with Citation 3, Items 3a and 3b involve exposure to the same unguarded belt and pulleys. As described in connection with those machine guarding violations, this LOTO violation and those machine guarding violations are duplicative of one another, so one of the two must be vacated. Because the LOTO standard would not have been applicable to the servicing activity done in proximity to the unguarded belt and pulleys if a guard that conformed to machine guarding standard had been in place, between the two violations the LOTO violation shall be vacated. (The proven but vacated LOTO violation is not considered *infra* in connection with the penalty determination for the LOTO violation.)

With regard to other aspects of setting up and cleaning the nine machines identified in Item 1a of Citation 2, it is entirely possible, and perhaps even probable, that the unexpected energization of the machines during the setting-up and cleaning the machines could cause injury, but there is

¹⁴ Midvale argues that locking out the Zerand machines during machine set up is technically infeasible because power is required to “jog” the machine into place for some steps in the set up. (T. 532, 661-666, 675, 723-24) (Resp’t Br. 31). There is no evidence that the machine must be operational during whatever set up activity the employees perform while in proximity to the unguarded belt and pulleys. And in any event, Midvale did not develop or utilize any procedure for the temporary removal of lockout devices for testing or positioning the machine as prescribed by § 1910.147(f)(1). (*See* T. 725-26; Ex. R-40 at 60-69). Moreover, there is no plausible reason that the Zerand machine could not be locked out for employees who are within the zone of danger of the unguarded belt and pulleys when removing scrap paper that collects on the floor immediately below and beyond the unguarded belt and pulleys. (*See* Ex. C-38; T. 218-20). Midvale’s infeasibility defense to the LOTO violation as to the servicing and maintenance activity of employees in proximity of the unguarded belt and pulleys on Zerand #2 is not proven.

no concrete evidence that those activities present an actual risk of injury from hazardous energy.¹⁵ The existence of such a risk cannot be presumed, but rather there must be substantial evidence that at least supports the reasonable inference that such a risk exists. Alleged violations are not proven when based on surmise, conjecture, or even an “educated guess.” *Keystone Body Works*, 4 BNA OSHC 1523, 1524 (No. 6606, 1976).

“Fair Notice” Defense

Midvale argues that it was deprived of fair notice of the requirements of the LOTO standard based upon Mr. Frank’s recollection that in December 2015 AD Stelmack told him that lockout was required only for “major” service and maintenance activities. (Resp’t Br. 35-37, citing *Miami Indus., Inc.*, 15 BNA OSHC 1258, 1264 (No. 88-671, 1991), *aff’d. in relevant part and set aside in part*, 983 F.2d 1067 (6th Cir. 1992) (unpublished). As previously discussed, Mr. Frank’s understanding of what AD Stelmack said to him is objectively unreasonable. A preponderance of the evidence fails to support the factual predicate for Midvale’s “fair notice” argument.

Violation of Non-delegation Doctrine

Midvale argues that the D.C. Circuit’s holding in *UAW v. OSHA*, 37 F.3d 665, 667 (D.C. Cir. 1994), that the LOTO standard does not run afoul of the non-delegation doctrine is infirm in light of the Supreme Court’s subsequent decision in *Whitman v. Am. Trucking Assn’s, Inc.*, 531 U.S. 457 (2001), and so asks that the Act be declared unconstitutional as violative of the non-delegation doctrine. (Resp’t Br. 49-51). Inasmuch as the Commission lacks authority to adjudicate the constitutionality of a statute, the merits of that argument are not addressed. *See S.A. Healy Co.*, 17 BNA OSHC 1145, 1147 (No. 89-1508, 1995), *aff’d on other grounds*, 138 F.3d 686

¹⁵ While in some instances guards must be removed during set up of the Zerand machines, the record does not indicate what guards are removed and whether those guards have safety interlock mechanisms that would prevent unexpected energization. (T. 726-29).

(7th Cir. 1998) (noting that “[a]rguably, the Commission would not be competent to decide ... whether the Act would be unconstitutional”); *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (noting the principle that “adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies”).

Classification of § 1910.147(c)(4)(i) Violation

The Secretary alleges that the violation should be classified as both “willful” and “serious.” (Complaint, ¶6).

Whether a violation is “willful” presents a question of fact. *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3d Cir. 2005); *Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012) (determining that the Commission’s finding of willfulness lacked “substantial supporting evidence”).

“The hallmark of a willful violation is the employer's state of mind at the time of the violation.” *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001). A violation is willful if the employer acted with an intentional, knowing, or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *Stark Excavating, Inc.*, 24 BNA OSHC 2215, 2222 (No. 09-0004, 2014) *aff’d*, 811 F.3d 922 (7th Cir. 2016); *A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002) (observing that “conscious disregard” and “plain indifference” are alternative means of proving willfulness). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1891, n.3 (No. 92-3684, 1997), *aff’d* 131 F.3d 1254 (8th Cir. 1997). But in proving willfulness it is “not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation.” *Williams Enters. Inc.*, 13 BNA OSHC 1249, 1257 (No. 85-355, 1987). “[A] willful violation may be found where the employer knows of the legal duty to act, and knowing an

employee is exposed to a hazard, nonetheless fails to correct or eliminate the hazardous exposure.” *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1685 (No. 00-1315, 2001); *see also Dukane Precast, Inc. v. Perez*, 785 F.3d 252, 256 (7th Cir. 2015) (concluding that proof of willfulness under section 17(a) of the Act “requires proof only that the defendant was aware of the risk, knew that it was serious, and knew that he could take effective measures to avoid it, but did not—in short, that he was reckless in the most commonly understood sense of the word”).

The Secretary’s arguments that Midvale’s failure to develop clear and specific machine specific LOTO procedures was willful conduct is rejected for the reasons stated earlier—Item 1a of Citation 2 does not allege the *content* of Midvale’s documented program was deficient.

The Secretary justifies the willful classification in part based on two prior violations of a different provision of the LOTO standard, § 1910.147(c)(1), which requires employers to “establish a program consisting of energy control procedures, employee training and periodic inspections.” Midvale’s first violation of subparagraph (c)(1) was based on Midvale’s failure to have any program and became a final order on February 20, 2014. (Ex. C-71; T. 459). Midvale apparently failed to develop any LOTO program to abate that first violation. Midvale’s second established violation of § 1910.147(c)(1) and was likewise based on Midvale’s failure to establish any LOTO program and was classified as willful. This second violation became a final order on June 19, 2017. (Ex. C-1 at 13 & 24; T. 350-51). After the second violation became a final order, Midvale did not submit information showing it had abated that violation (or any other violations established by that final order) until sometime after the inspection here had commenced. (*See* Ex. R-40). Indeed, the inspection here was originally scheduled because Midvale had failed to timely submit any abatement information relating to the final order of June 19, 2017. (Ex. C-2; T. 373-75). Midvale eventually did provide abatement material for the violations established by the final

order of June 19, 2017, which included a written energy control program that Midvale had adopted in 2016 in an apparent effort to correct the second alleged violation of § 1910.147(c)(1). (Midvale does not explain why it did not provide this abatement material earlier. [Ex. R-40 at Bates 336-346; T. 521].)

The two prior violations for failing to have an energy control program do not establish that the violation established here for failing to *utilize* LOTO procedures was willful. To be sure, Midvale failed to exercise reasonable diligence in implementing the LOTO program that it did develop, and its documented energy control procedures were seriously flawed in their content, but the evidence is insufficient to establish that its carelessness and failure to exercise reasonable diligence rose to the level of willfulness within the meaning of the Act.

The violation is properly classified as “serious.” A violation is “serious” if there was a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k); *Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). “This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur.” *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1330-31, (No. 97-0469, 2003) (consolidated) (citation omitted). Serious physical harm could result from the failure to utilize LOTO procedures when required to protect employees from injury from hazardous energy. *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522) (No. 90-2066, 1993) (likelihood of severe lacerations to hand support classification of serious).

3. Citation 2, Item 1b -- § 1910.147(c)(7)(i)

In Citation 2, Item 1b, the Secretary alleges that Midvale violated § 1910.147(c)(7)(i), which requires employers to provide certain training to employees as part of an energy control

program that is required under subparagraph (c)(1).¹⁶ Item 1b alleges that Midvale violated the standard with respect to each of the nine machines that were identified in Item 1a of the Citation in the following manner:

The employer does not provide training to ensure that the purpose and function of the energy control program is 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. This violation was most recently observed on or

¹⁶ Section 1910.147(c)(7)(i) provides as follows:

(7) *Training and communication.* (i) 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.

The terms “affected employee” and “authorized employee” are defined in § 1910.147(b) as follows:

Affected employee. An 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.

Authorized employee. 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.

about October 18, 2017 ... when employees performed servicing and maintenance on machinery with multiple sources of energy

After Midvale had been cited in November 2015 for an alleged willful violation of § 1910.147(c)(1), Midvale established a LOTO program and in implementing that program it provided LOTO training in February 2016 to most employees as “affected employees.” (T. 128, 775, 779, 793, 817; Ex. R-40 at Bates 347). Only three supervisory employees (Northwood, Dellaperuto, and Thorne) are trained as “authorized employees,” and they are the only employees that Midvale permits to lockout machines. (T. 586, 591-93, 630-31, 769-70). No evidence of the precise content of the LOTO training that was provided in February 2016 was presented, so there is no basis for finding that its content did not reasonably address the matters on which authorized and affected employees must be trained as specified in § 1910.147(c)(7)(i)(A) & (B).

From the time of the initial LOTO training in February 2016 through the commencement of the inspection here in October 2017, Midvale did not provide LOTO training to any newly hired employees who were required to receive LOTO training. (T. 129-30, 133; *e.g.*, Ex. C-56 [Accomando, started on 6.24.2017; Siglin, started on 10.2.2017], Ex. C-57 [Bowers, started in May 2017], T. 803 [Kivler, start date not identified but not trained in February 2016]).

The cited standard applies. Employee training is an essential component of any energy control program that is required to be established by the LOTO standard. § 1910.147(c)(1) (providing that energy control programs consist of, *inter alia*, “employee training”).

Midvale failed to comply with the training provision because it did not provide training to all employees who are required to be trained. Moreover, Nate Siglin was the operator of the window box machine on November 21, 2017, as described above in connection with the violation of § 1910.147(c)(4)(i), when he and another employee cleared a paper jam without locking out or

having an e-stop engaged, and he had not received LOTO training as of that date. (Ex. C-14; T. 233-34; Ex. C-40 at Bates 169).

The presence of untrained employees on the production floor establishes employee access to the violative condition. Likewise, the servicing of a machine that was required to be locked out by an employee who had not received any LOTO training (Siglin) establishes employee access to the violative condition.

Midvale had actual knowledge of its failure to train employees that the standard's training provision requires to be trained. *See Compass Env'tl, Inc. v. OSHRC*, 663 F.3d 1164, 1168 (10th Cir. 2011) (“[E]mployer knowledge of the violative condition ... will almost invariably be present where the alleged violative condition is inadequate training of employees.”).

A preponderance of the evidence establishes the violation of § 1910.147(c)(7)(i) alleged in Item 1b.

Classification of § 1910.147(c)(7)(i) Violation

As with Item 1a of this citation, the Secretary alleges that the violation for Item 1b should be classified as both “willful” and “serious.” (Complaint dated 7.2.2018, ¶ 6).

Midvale's failure to train some employees who were required to be trained reflects carelessness and a failure to exercise reasonable diligence, but the evidence is insufficient to establish that its failure rose beyond that level of culpability to willfulness. *See Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1257 (D.C. Cir. 2012) (finding that the employer's safety manager having made “some effort” to comply with the LOTO standard was “enough to save [the employer] from a willfulness determination”).

The violation is properly characterized as serious. Providing employees proper training is a critical component of an effective LOTO program to prevent injury from hazardous energy. *See* 54 Fed. Reg. at 36673 (stating the performance-oriented training requirements of subparagraph

(c)(7) are “of critical importance in helping to ensure that the applicable provisions of the hazardous energy control procedure(s) are known, understood and strictly adhered to by employees”).

4. *Penalty for Grouped Serious Violations of § 1910.147*

The maximum penalty for a serious violation proven in connection with the inspection here is \$12,934. 29 C.F.R. § 1903.15(d)(3) (2018) (setting forth maximum amounts for penalties that are proposed from 1.3.2018 to 1.23.2019).

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) (“The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission’s authority to raise or lower penalties within those limits”), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). “[T]he Commission has the authority to ensure that a penalty is not unduly burdensome or excessive by evaluating the penalty assessment criteria set forth in the Act and determining a reasonable and appropriate penalty based on that evaluation.” *S.A. Healy Co.*, 17 BNA OSHC 1145, 1151 (No. 89-1508, 1995), *aff'd on other grounds*, 138 F.3d 686 (7th Cir. 1998).

Section 17(j) of the Act requires the Commission, in assessing an appropriate penalty, to give due consideration to the gravity of the violation, the “size of the business of the employer,” and to the employer’s history of previous violations and good faith. 29 U.S.C. § 666(j). Of these factors, gravity is the principal factor “and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The undersigned concurs with the Secretary’s determination to group the two LOTO violations and assess a single penalty for both. *See Miniature Nut and Screw Corp.*, 17 BNA

OSHC 1557, 1559-60 (No. 93-2535, 1996) (combining penalties for items involving violations of separate components of a hearing conservation program). The undersigned concurs further in the Secretary's assessment that the gravity of the two violations is "high," so that the gravity-based penalty for the grouped serious violations would be the maximum penalty of \$12,934. (Ex. C-11 at Bates 85; Ex. C-15 at Bates 93). The undersigned concurs further in reducing the maximum penalty to account for Midvale's small size, but instead of reducing the penalty by 50% as the Secretary proposed for the alleged willful violations, the reduction for size should be 60%, as the Secretary has done with respect to the other serious violations, as is described *infra*. This reduction for size includes consideration of Midvale's financial wherewithal. (Exs. R. 41 & R-42; T. 530-31). *See Colonial Craft Reprod.*, 1 BNA OSHC 1063, 1064 (No. 881, 1972) ("the size of the business of an employer" factor in section 17(j) of the Act encompasses an employer's financial condition). An increase of that resulting figure by 33% for the "history of previous violations" factor, rather than the 10% proposed by the Secretary, is in order in consideration of Midvale's two prior violations of § 1910.147(c)(1), one serious and one willful. (*See* Exs. C-1 & C-71). The undersigned concurs with the Secretary's assessment that no penalty reduction is appropriate for the "good faith" factor in view of its two prior violations for failing to have established any energy control program. Accordingly, a penalty of \$6,881 is assessed for the two grouped LOTO violations proven in Items 1a and 1b of Citation 2.

B. Machine Guarding for Horizontal Power Transmission Shaft–
§ 1910.219(c)(2)(i)
(“Willful/Serious” Citation 2, Item 2)

The Secretary alleges Midvale violated § 1910.219, a machine guarding standard titled “Mechanical power transmission apparatus.” Item 2 of Citation 2 alleges Midvale violated subparagraph (c)(2)(i) of that standard, which provides in pertinent part as follows:

(2) *Guarding horizontal shafting.* (i) All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform ... shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

The citation item alleges that Midvale violated the standard with respect to each of its five gluer machines in the following manner:

The employer does not ensure all exposed parts of horizontal shafting seven (7) feet or less from floor are protected by stationary casing(s) enclosing shafting completely or by trough(s) enclosing sides and top or sides and bottom of shafting. This violation was most recently observed on or about October 18, 2017 ... when employees operated the following:

1. The International Paper Box Machine Company Swifty Right-Angle Model FZ Gluer #1 (Serial No. 602) with an unguarded rotating shaft two (2) foot, six (6) inches above floor level

2. The International Paper Box Machine Company Swifty Right-Angle Model FZ Gluer #2 (Serial No. 397) with an unguarded rotating shaft two (2) foot, six (6) inches above floor level

3. The International Paper Box Machine Company Speed Queen Model KH Gluer #3 (Serial No. 102) with an unguarded rotating shaft seven (7) inches above floor level

4. The International Paper Box Machine Company Speed Queen Model KH Gluer #3 (Serial No. 101) with three (3) unguarded rotating shafts seven (7) inches above floor level ¹⁷

5. The International Paper Box Machine Company Swifty Right-Angle Model FZ Gluer #5 (Serial No. 639) with an unguarded rotating shaft two (2) foot, six (6) inches above floor level

A preponderance of the evidence establishes that the standard applied to all five machines identified and that each of the five machines were non-compliant in the manner alleged (as the

¹⁷ Instance 4 erroneously identifies the gluer with serial number 101 as Gluer #3. In actuality, Midvale has designated the gluer with that serial number as Gluer #4. (T 158-59; C-11 at Bates 90 and C-18 at Bates 105). The complaint is deemed amended to correct this error. Also, the evidence establishes the presence of two unguarded shafts seven inches above floor level on Gluer #4, not three as alleged. (Ex. C-26; Ex. R-24 at 1'43"; T. 174-75, 298-99). The complaint is deemed amended further to accurately reflect the number of unguarded shafts on Gluer #4.

complaint is deemed amended as reflected in footnote 17).¹⁸ (T. 157; T. 159-61 & Ex. C-19 [Gluer #1]; T. 158, 164-65, Ex. C-22 video at 1:54, Ex. C-25 [Gluer #2]; T. 169, 171-72, 175, Exs. C-23 & C-24 [Gluer #3]; T. 176-78, 333, Exs. C-26 & R-24 [Gluer #4]; T. 158, 179-83, Exs. C-18, C-79 at 3 & C-78 video at 0:38 [Gluer #5]). Midvale does not contend otherwise. (*See Resp't Br. 14-15, 39-41*). Each of the unguarded shaft segments are less than one foot in length. (*See Exs. C-26, C-19, C-24, C-22 at 1'54", C-79*).

A preponderance of the evidence establishes that guards existed for most if not all the identified unguarded shafts, but that employees had removed them and had not put them back into place. (*E.g.*, T. 162, 164-65, 176-77, 180, 182-83, 298-99, Ex. C-26). A preponderance of the evidence establishes further that Midvale supervisors had actual knowledge of the unguarded rotating shafts on each of the five gluer machines. A preponderance of the evidence establishes further that Midvale supervisors had constructive knowledge of the violative conditions in view of the duration that some of the shafts remained unguarded (months in at least one instance) and also because supervisors knew that employees regularly removed and failed to replace the guards. (T. 100, 162, 191, 600, 679, 695-98) (Ex. C-19, Ex. C-18 at Bates 106, T. 160-62 [Gluer #1]) (T. 165, 176, Ex. C-25, Ex. C-22 video at 1'53" [Gluer #2]) (Ex. C-82, T. 757, 761-62 [Gluer #3]) (T. 65, 134, 176, Ex. C-26, Ex. C-56 at 4 [Gluer #4]) (Ex. C-78, T. 180, 182-85 [Gluer #5]). Midvale again does not contend otherwise. (*See Resp't Br. 14-15, 39-41*).

Midvale contends the Secretary failed to establish the "employee access" element of the Secretary's burden of proof as to any of the unguarded shafts. (*See Resp't Br. 14-15, 39-41*).

¹⁸ The cited standard, § 1910.219(c)(2)(i), is a specification standard, and thus proof of noncompliance establishes the existence of a hazard. *Fabricated Metal Prods. Inc.*, 18 BNA OSHC 1072, 1073 n. 4 (No. 93-1853, 1997) (identifying § 1910.219(c)(2)(i) to be a specification standard).

The test for assessing the “employee access” element is described in *Fabricated Metal Prods. Inc. (Fabricated Metal)*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997), as follows (footnotes omitted):

[I]n order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that ... the inquiry is not simply into whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable.

The “zone of danger” referred to in *Fabricated Metal* is the “area surrounding the violative condition that presents the danger to employees [that] the standard is intended to prevent.” *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995). “The scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue.” *Fabricated Metal*, 18 BNA OSHC at 1074 n.7. The “zone of danger” respecting a horizontal shaft that is required to be guarded by § 1910.219(c)(2)(i) is defined by the unguarded horizontal shaft itself. *See id.* (describing the unguarded shaft as the zone of danger respecting non-compliant guarding under § 1910.219(c)(2)(i)). Inasmuch as there is no operational reason for Midvale employees intentionally to contact any of the unguarded shafts when they are rotating, the “inquiry then is whether the employees’ proximity to the machines makes it reasonably predictable that they will enter these zones of danger” inadvertently or accidentally, such as by slipping or falling. *Id.*

Employee Access to Unguarded Shaft on Gluer #1

Gluer #1 is configured in an L-shape, with each side of the “L” being about 30 to 35 feet in length. (T. 716). The unguarded shaft on Gluer #1 is about 30 inches above floor level and is located inches from the outside corner of the “L”, as reflected in the photo at Exhibit C-19. (T. 159-60, 168-69). The unguarded shaft is adjacent to a 40-inch-wide passageway on the plant floor.

Machine operators pass by this outside corner of Gluer #1 during machine operations in making a ninety-degree turn at the corner where the unguarded shaft is situated, and other plant employees traverse this passageway to and from the plant's warehouse. (T. 161, 196; Ex. C-18 at Bates 105). There is nothing to impede an employee who is passing by the unguarded shaft from contacting it, whether by inattention or as the result of stumbling or tripping into it. (Ex. C-19). Tripping, falling, and slipping hazards are present on the plant's floor and have resulted in employee injuries. (See Ex. C-12 at Bates 402 & 408). At least one machine persistently leaks oil onto the floor, so slipping hazards arise on the plant floor from time to time. (T. 102). This evidence establishes by a preponderance "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger" presented by the unguarded shaft on Gluer #1. *Fabricated Metal*, 18 BNA OSHC at 1074.

Employee Access to Unguarded Shaft on Gluer #2

Gluer #2 is substantially identical to Gluer #1, and the unguarded shaft on Gluer #2 is in the same location on the machine as the unguarded shaft on Gluer #1 described above. (T. 164-65). The video and photo evidence of the unguarded shaft on Gluer #2 depicts a "Gaylord box" on the floor beside the unguarded shaft, into which employees discard paperboard product. (T. 166; Ex. C-25, Ex. C-22 video at 1:53). There is no evidence whether this Gaylord box is ever removed from that location, and there is further no evidence from which it may be reasonably inferred that it would be absent from that location when the machine is running and the shaft rotating. The presence of the Gaylord box near this unguarded shaft renders inadvertent or accidental contact with the unguarded shaft a remote possibility, and not "reasonably predictable." See *Fabricated Metal* 18 BNA OSHC at 1075 (finding that exposure to unguarded shaft not reasonably predictable where barrels stored near the machine "made it impossible for an employee to contact" the shaft). Employee access to the unguarded shaft on Gluer #2 is not proven.

Employee Access to Unguarded Shaft on Gluer #5

Gluer #5 is substantially identical to Gluers #1 and #2 but is in a different room of the plant. (T. 168-69; Ex. C-56 at 1). The unguarded shaft on Gluer #5 is in the same location on the machine as the unguarded shafts for Gluers #1 and #2. (Exs. C-78 video at 0'38"-0'46" & 2'05"-2'11"; C-79 photos). The only evidence that employees would encroach the zone of danger of this unguarded shaft by operational necessity or otherwise is the CO's testimony that employees would have to pass by the unguarded shaft going to and from the machine's glue tank to refill it. (T. 186). The glue tank for Gluer #5 is located around the ninety-degree corner (i.e., the outside corner of the L-shaped machine) from the unguarded shaft, appearing to be approximately three feet from the corner itself. (Ex. C-78 video at 0'46"-0'54"). The CO never observed an employee refilling any glue tank, however, so he never observed whether the gluer was running and the shaft rotating when employees filled the glue tank. (T. 186).

The one-gallon capacity glue tank is "topped-off" each morning before the machine is started up. If the tank requires refilling during the day, the greater weight of the evidence establishes that the machine is turned off while the glue tank is being refilled, because when the tank is opened to be refilled the tank has no air pressure, which is necessary for a gluer machine to dispense glue onto the paperboard. (T. 671-74, 814). Because the machine would be off when the glue tank is refilled, an employee performing this task would walk past the then non-rotating unguarded shaft on the way to, and then returning from, the glue tank. (T. 186). There is insufficient evidence to establish by a preponderance that the machine operators or other employees are required, or have occasion, to walk past the unguarded shaft while the machine is running and the shaft rotating. *See Home Rubber Co. LP*, No. 17-0138, 2021 WL 3929735, at *9 (OSHRC Aug. 26, 2021) (employee access not shown where there was no evidence that a hazardous shaft would be rotating when employees used a bucket that was located near the

violative condition). The evidence respecting employee access to the zone of danger presented by the unguarded rotating shaft on Gluer #5 is insufficiently weighty to establish the employee access element of the Secretary's burden of proof as to that machine.

Employee Access to Two Unguarded Shafts on Gluer #4

The photo at Exhibit C-26 depicts an unguarded shaft on Gluer #4 that is about seven inches above the floor level and about four feet from the machine's glue tank. The only evidence respecting employee access to the zone of danger of the unguarded shaft is the plant manager's testimony that this location is against the wall and that employees do not have reason to pass by it while the machine is operating. (T. 749). The evidence is insufficient to establish the employee access element of the Secretary's burden of proof as to this unguarded shaft on Gluer #4.

A video shows another unguarded shaft on Gluer #4 that is also about seven inches above the floor level. (Ex. R-24 at 1'41"-1'45"; T. 572-73). There is no evidence respecting whether any employees would have occasion to traverse along this pathway that adjoins the rotating shaft when the machine is in operation and the shaft rotating. The evidence is insufficient to establish the employee access element of the Secretary's burden of proof as to this unguarded shaft on Gluer #4. *See Home Rubber Co. LP*, 2021 WL 3929735, at *9.

Employee Access to Unguarded Shafts on Gluer #3

The unguarded shaft on Gluer #3 is the same shaft to which Mr. Dellaperuto was exposed in connection with the LOTO violation that occurred in connection with his cleaning gear oil that had leaked onto the floor. The plant manager testified that a Gaylord box is maintained adjacent to the rotating shaft and is in place whenever the machine is operating. (T. 749-50; Ex. C-23 video 2:02-2:20 & 2:35-3:07; Ex. C-24 at 1-3). The CO testified he had seen this area of the machine when the Gaylord box was not present, but he did not testify whether the machine was operating at the time. (T. 173-74). The video of Mr. Dellaperuto cleaning up the oil shows him situated in

a narrow space in between a wood box to his left and a stack of collapsed packing boxes to his right while accessing the area of the floor near the rotating shaft and the oil leak. (Ex. C-82).

This evidence establishes that while under ordinary operations employees do not have reason to enter the zone of danger for this rotating shaft, at least in this instance of cleaning up the oil leak, Mr. Dellaperuto was working in the zone of danger. Midvale acknowledges that Dellaperuto was working “relatively close to the unguarded shaft,” but contends that with Dellaperuto’s decades of experience with these machines, he was not within the zone of danger of the rotating shaft. (Resp’t Br. 40). This argument is rejected. Dellaperuto had to maneuver in between a wooden box to his left and a stack of collapsed cardboard shipping boxes to his right to get to the area to be cleaned, and then he had to somewhat awkwardly stoop or kneel to do the cleaning. His hand came within inches of the rotating shaft, and particularly considering his awkward stance he could have contacted the shaft through inadvertence, carelessness, or accident. (Ex. C-82). Any employee, regardless of knowledge and experience, would be deemed exposed to the hazard of the rotating shaft while performing the task depicted in the video at Exhibit C-82. *See Fabricated Metal*, 18 BNA OSHC at 1073 n. 4 (noting that the cited standard here is a specification standard, so that “non-compliance ... establishes the existence of a hazard”). A preponderance of the evidence establishes Dellaperuto working within the zone of danger of the hazardous unguarded shaft on Gluer #3.

The machine guarding violation as to Gluer #3 and the LOTO violation that is grounded in Dellaperuto’s exposure to the same unguarded shaft are duplicative, because the abatement of one would necessarily result in the abatement of the other. *N.E. Precast LLC*, 26 BNA OSHC 2275, 2279 (No. 13-1169 & 13-1170, 2018) (“Violations are duplicative where the abatement of one violation necessarily results in the abatement of the other”), *aff’d*, 773 F. App’x 70 (2d Cir. 2019)

(unpublished).¹⁹ This is consistent with the “dovetailing” of the LOTO standard and the machine guarding standards set forth in subpart O of 29 C.F.R. Part 1910. *GM-CPCG Okla.*, 22 BNA OSHC at 1022 (noting that the LOTO standard “dovetails with the requirements for the safe operation of machines during production, as prescribed by 29 C.F.R. Part 1910, subpart O”).

Since the LOTO standard would not have been applicable to Dellaperuto’s cleaning the oil if the guard for the exposed shaft on Gluer #3 had been in place at the time, as between the two violations the LOTO violation as to Dellaperuto’s conduct alone is deemed vacated, and the machine guarding violation is maintained.

Classification of § 1910.219(c)(2)(i) Violations

The Secretary alleges that the violations of § 1910.219(c)(2)(i) should be classified as both “willful” and “serious.” (Complaint dated 7.2.2018, ¶ 6). Because violations were established as to Gluers #1 and #3, the evidence respecting those violative conditions is discussed below.

¹⁹ In *Northeast Precast*, the Commission held that violations of different standards involving conduct on different days were duplicative because a single act could have abated both. The dissenting commissioner in *Northeast Precast* characterized Commission precedent for determining whether violations are duplicative as “confusing and conflicting.” *N.E. Precast LLC*, 26 BNA OSHC at 2285 (dissent). In affirming the Commission’s decision in *Northeast Precast*, the Second Circuit recognized that “the Commission has applied several different standards in determining whether violations are duplicative.” 773 F. App’x at 72.

The Secretary has not posited any argument in reply to Midvale’s contention that the violations are duplicative under *Northeast Precast*, and the undersigned discerns no grounds on which to distinguish *Northeast Precast* from the circumstances present here. Accordingly, the separate LOTO and machine guarding violations as they pertain to Dellaperuto’s cleaning activity on November 21, 2017, are duplicative because the abatement of one necessarily would have abated the other and vice versa. The remedy for duplicative violations is to vacate one of them. *N.E. Precast LLC*, 26 BNA OSHC at 2281-82.

Gluer #1

With respect to Gluer #1, the unguarded shaft on Gluer #1 is aptly characterized as a serious violation in that there was a substantial probability that serious physical harm could result from contact with the unguarded rotating shaft. (T. 760-61).

In prior inspections, Midvale had violated the same standard for failing to have the very same shaft on Gluer #1 unguarded. (T. 178). That violative condition was first identified on September 8, 2014, during OSHA inspection number 994212, and that violation became a final order on December 8, 2014, the day that Midvale executed an informal settlement agreement resolving the citation. (Ex. C-20 at 4 & 15; T. 356-57). About six months later, on May 25, 2015, OSHA determined during OSHA inspection 1066769 that Midvale had not abated that violative condition, and on November 25, 2015, OSHA issued to Midvale a citation for failure to abate. That citation for failure to abate became a final order on June 19, 2017, after Midvale resolved that citation by executing a formal settlement agreement. (T. 11; Ex. C-1 at 23; Ex. C-27 at 3).

On October 18, 2017, the first day of the inspection here, the CO was accompanied by the plant manager, Mr. Northwood, when the CO spotted the unguarded shaft on Gluer #1 and directed Northwood's attention to it. (T. 159, 697-98; Ex. C-18 at 6; Ex. C-19). Northwood pointed out to the CO that the guard for that shaft was lying on the floor below the shaft, and he remarked that the machine operator must have removed it and failed to reinstall it. (T. 162). Northwood then told the CO that he had fabricated that guard, apparently to abate the violation that was first identified in September 2014 and that had remained unabated as of May 2015. (T. 162; Ex. R-40 at Bates 282 & 284-85). Even though during the inspection on October 18, 2017, the guard was located on the floor beneath the rotating shaft, Northwood did not thereafter reinstall the guard, nor apparently did he direct an employee to do so, and the shaft remained unguarded for the duration of the CO's inspection, which continued for nearly another two months. (Ex. C-18 at

Bates 106). And even though Northwood testified that when he observes that a machine guard has been removed and not replaced that he “[a]ddress[es] it with the operator of the machine” by “talk[ing] to them about leaving it in an unsafe condition” (T. 698), it is evident that he did not do so with respect to the missing guard on Gluer #1.

Another time during the CO’s inspection, after the CO brought to Northwood’s attention an unguarded shaft on another machine whose guard had been removed, Northwood remarked to the CO: “I tell these people all the time: You make sure it’s guarded and everything.” (T. 184).

A floor manager, Mr. Dellaperuto, testified that employees at the plant “have a tendency of taking covers off and not putting them back on.” (T. 600). It is not surprising that Midvale employees have demonstrated this “tendency” not to replace guards, because Midvale has never disciplined an employee for a safety violation. (Ex. C-68 at 108-110). When Midvale employees engage in unsafe acts like removing and not replacing machine guards, Midvale has never imposed any discipline on the employee, not even a written warning or reprimand. (Ex. C-68 at 108-110). Rather than discipline employees for violating safety rules, Midvale’s practice has been to alert the employee to the unsafe condition and instruct the employee to correct it. There is no evidence of any Midvale employee suffering any adverse consequence for a safety violation, other than to be told to correct the unsafe condition or practice.

Given the conspicuous location of the unguarded shaft on Gluer #1, plainly visible along a frequently traveled passageway, it is highly unlikely that neither the floor manager Dellaperuto nor the plant manager Northwood, each of whom spend hours every day on the floor of the plant, did not have continuing actual knowledge of the unguarded shaft on Gluer #1. And given that both were employed in their same supervisory positions the first two times Midvale was cited for having that very same shaft unguarded, and that Northwood had actually fabricated and installed

a guard for that shaft, their apparent failure to take action to correct this violative condition is even more notable.

This evidence establishes that with respect to the unguarded shaft on Gluer #1, Midvale at various times both consciously disregarded the requirements of the Act, and was plainly indifferent to employee safety, justifying a willful classification. Midvale had a heightened awareness of the cited standard by dint of the two prior citations and Northwood's own efforts to abate those violations by personally fabricating a guard for the shaft involved. *See Revoli Constr. Co., Inc.*, 19 BNA OSHC 1682, 1685-86 (No. 00-0315, 2001) (finding employer had a heightened awareness of the standard based on four previous citations of the same standard in the prior four years). Midvale demonstrated plain indifference to employee safety by failing to take any effective steps to eliminate the demonstrated tendency of employees not to replace guards after the employee has removed it. *See id.* at 1686 (employer was aware that its employee "had ignored the safety rule before and felt free to ignore the orders of his supervisor" but nevertheless "took no effective steps to remedy the known deficiencies in its practices and thus was plainly indifferent to employee safety"). "When an employer has clear warnings that unsafe practices or conditions persist, and decides to do little or nothing in response, ... it is strong evidence of willfulness." *Id.*

Gluer #3

Mr. Dellaperuto, who is a floor manager, had actual knowledge that he was exposed to the hazard of the unguarded shaft of Gluer #3 that was rotating near his hand while he was stooped or kneeling to clean oil that had leaked on the floor. Midvale had been cited twice for not guarding the corresponding shaft on Gluer #4. (Ex. C-18, Ex. C-27). Dellaperuto, who held the same position as floor manager at the times of the prior inspections and citations, must have had actual knowledge that the corresponding unguarded shaft on Gluer #3 was non-compliant with the cited standard, and that he was exposed to that hazardous condition while cleaning the oil. His decision

to work within the zone of danger of the hazardous condition reflects both a conscious disregard to the requirements of the Act, and plain indifference to his own safety. This willful conduct is imputed to Midvale by virtue of his supervisory status. *See Cont'l Roof Sys., Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997) (“Where the requisite state of mind is manifested through the actions of supervisory employees, it is imputed to the employer to the same extent as would be a supervisor's knowledge of violative conditions.”).

Penalty for Willful Violation of § 1910.219(c)(2)(i)

The maximum and minimum penalties for the willful violation here are respectively \$129,336 and \$9,239. 29 C.F.R. § 1903.15(d)(1) (2018). The Secretary proposed a penalty of \$60,971 upon a determination that the gravity of the violation was “moderate” upon assessments that the severity of the injury that could result from the violation was “high,” and the probability that an injury or illness could occur as a result was “lesser,” with a 50% reduction to account for Midvale’s small size, and a 10% increase to account for history of violations. (T. 196-97; Ex. C-18 at Bates 102).

Upon consideration that only two of the five alleged instances were proven, the probability of injury from the proven violations would be diminished, and so the unadjusted gravity-based penalty of \$110,856 that the Secretary reckoned shall be set at \$60,000. And upon further consideration that the two prior violations of the cited standard were a significant factor in determining the violation was willful, enhancing the penalty for history of violations is somewhat duplicative, and so that figure is not increased by 10% to account for history of prior violations as the Secretary had proposed. The undersigned concurs in the reduction of 50% to account for

Midvale's small size, including its financial wherewithal.²⁰ The resulting assessed penalty of \$30,000 penalty remains substantial, and it is appropriate and necessary to impress upon Midvale the importance of adequately enforcing the work rule that employees ensure guards are in place when machines are operating and of promoting a culture of safety at its plant.

C. Machine Guarding for Zerand #2—
§§ 1910.219(d)(1), 1910.219(e)(1)(i)
(Repeat Citation 3, Items 3a and 3b)²¹

Items 3a and 3b of repeat Citation 3 pertain to a system of pulleys that are powered by a horizontal power transmission belt on the Zerand #2 machine. The pulleys and the transmission belt are situated between 26 inches and 42 inches above floor level. (Ex. C-38). The video at Exhibit C-36 depicts the pulleys and belt in operation. Item 3a alleges a violation of § 1910.219(d)(1) because the pulleys are unguarded, and Item 3b alleges a violation of § 1910.219(e)(1)(i) because the horizontal power transmission belt is unguarded.²²

²⁰ The undersigned concurs in the Secretary's approach of reducing a penalty to account for an employer's small size for a willful violation to a lesser extent than a penalty would be reduced for a serious violation (60%).

²¹ The Secretary has withdrawn Item 3c of Citation 3, so that citation item will be vacated in the "Order" section *infra*. (Sec'y Br. 52).

²² Subparagraphs (d)(1) and (e)(1)(i) of § 1910.219 provide in relevant part as follows:

(d) *Pulleys—(1) Guarding.* Pulley, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. ...

(e) *Belt, rope, and chain drives—(1) Horizontal belts and ropes.*
(i) Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at least fifteen (15) inches above the belt or to a standard height, except that where both runs of a horizontal belt are 42 inches or less from the floor, the belt shall be fully enclosed in accordance with paragraphs (m) and (o) of this section.

The pulleys and belt were not fully enclosed as required by the standard, except for the left-most pulley which was enclosed. (T. 220; Ex. C-38). The record does not contain a precise measurement of the horizontal distance of the unguarded portions of the belt and pulleys but the photos at Exhibits C-38 and R-26 suggest that this horizontal distance is about five feet based on the relative scale of the five-gallon plastic pail depicted in the photographs.

The pulleys and belt are located on the “non-operator” or “gear” side of the approximately 100-foot-long machine, along a pathway that is 42 inches wide. (T. 324, 692, 699; Ex. C-35 at Bates 155). On the other side of the 42-inch pathway is the Zerand #3 machine. (T. 208-09; Ex. C-36). The plant manager, Mr. Northwood, testified that employees access that area of the machine “only ... during the setup process” and that “[w]hen the machine is running and in production, no one is in that area of the machine.” (T. 691). The CO did not observe employees present near the unguarded belt and pulleys on Zerand #2 at any time over the course of his inspection. (T. 218).

A preponderance of the evidence establishes that the cited standards apply, that the belts and pulleys were not fully enclosed and thus not compliant with the standards, and that Midvale had actual knowledge of the violative conditions. (Sec’y Br. 52-53). Midvale does not contend otherwise. Rather, Midvale contends that the Secretary did not establish employee access to the violative conditions, i.e., that it was “reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Fabricated Metal*, 18 BNA OSHC at 1074. (Resp’t Br. 15-16, 42).

The photograph at Exhibit C-38 depicts scraps of paperboard that had collected on the floor, both underneath the belt and pulleys and further beyond them, underneath the machine. Accessing that scrap to clean it would necessitate reaching underneath and beyond the belt and

pulleys with an arm or possibly some instrument such as a broom or a raking instrument. (T. 218-19).

The evidence is insufficient to establish by a preponderance that *while the machine is operating* employee access to the zone of danger associated with the unguarded pulleys and belt is reasonably predictable. *See Home Rubber Co. LP*, 2021 WL 3929735, at *9 (employee access not shown where there was no evidence that the machine would be running and the unguarded machine part moving when employees would be near the unguarded part). However, the greater weight of the evidence establishes that employees encroach on the zone of danger while cleaning the paperboard scraps that collect under and beyond the belt and pulleys, as well as during setting up of the machine, when the machine is powered off but is not de-energized and locked out at its main disconnect using LOTO procedures. Employees within the zone of danger during cleaning underneath and beyond the belt and pulleys and while setting up the machine are exposed to injury from the unguarded belt and pulleys in the event of the unexpected energization of the machine during those activities. A preponderance of the evidence establishes that employees had access to the violative condition of the unguarded belt and pulleys. The alleged violations of subparagraphs (d)(1) and (e)(1)(i) are proven.

As described *supra* in connection with the separate LOTO and machine guarding violations that arose out Mr. Dellaperuto's cleaning oil from underneath Gluer #3, the separate LOTO and machine guarding violations respecting Zerand #2 are duplicative, so one must be vacated. Because the LOTO standard would not have been applicable to either setting up or cleaning around the belt and pulleys if Midvale had guarded them as the machine guarding standard requires, the violative conduct relating to the LOTO standard shall be vacated as duplicative.

Classification of § 1910.219(d)(1) and 1910.219(e)(1)(i) Violations

The Secretary alleges these are repeat violations. A violation may be deemed 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.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary can prove substantial similarity by showing the employer failed to comply with the same standard as in the prior citation. *Id.* This prima facie showing of substantial similarity may be rebutted “by evidence of the disparate conditions and hazards associated with these violations of the same standard.” *Id.*

The predicate violations that support the repeat classifications are based on Midvale’s violations of the same standards that occurred on January 14, 2014, in connection with OSHA inspection 954509, which became a final order on February 20, 2014, upon the execution of an informal settlement agreement. (Ex. C-71; T. 459). In that prior inspection, OSHA cited Midvale for not having guards on all three of the Zerand machines in the location of the exposed belt and pulleys identified on the Zerand #2 machine in the inspection here. (Exs. C-71 & C-74). After that inspection, Midvale guarded the belts and pulleys on Zerands #1 and #3, and those two machines had guards in place at the time of the inspection here. (T. 216). The evidentiary record is unclear on whether Midvale ever installed a similar guard on Zerand #2, but in any event, the belt and pulleys were unguarded at the time of the inspection here. (T. 216-17). In other words, the violative conditions identified here on Zerand #2 are identical to the violative conditions that had been identified on that same machine identified in connection with the 2014 violations. (*See* Ex. C-74 at 2-3 for photos of Zerand #2’s unguarded belt and pulleys from prior inspection; T. 227-28). The violations are properly characterized as repeated violations.

*Penalty for Grouped Repeat Violations of
§§ 1910.219(d)(1) & 1910.219(e)(1)(i)*

The maximum penalty for a repeat violation in connection with the inspection here is \$129,336. 29 C.F.R. § 1903.15(d)(2) (2018). The violations are properly grouped for a single penalty because both violations are abated by the same corrective action of enclosing the belt and pulleys mechanism. (T. 213). *See H.H. Hall Constr. Co.*, 10 BNA OSHC 1042, 1046 (No. 76-4765, 1981) (assessing a single penalty for distinct but overlapping violations).

In addition to classifying the violations as “repeated,” the Secretary regarded the violations to be “serious” in nature for purposes of formulating a proposed gravity-based penalty. (Ex. C-35 at Bates 157 & 162; T. 217). The undersigned concurs in the Secretary’s assessment that the gravity of the two violations is “moderate,” so that the gravity-based penalty prior to applying a multiplier for a repeated violation and other adjustments based on statutory factors would be \$9,239. (Ex. C-35 at Bates 153 & 158; T. 224-25). The undersigned concurs in doubling that sum to account for the repeated nature of the violations and concurs further in reducing that resulting sum by 60% to account for Midvale’s small size, which includes consideration of Midvale’s financial wherewithal. The undersigned does not concur in increasing that resulting sum by 10% to account for history of the violations, because the doubling of the gravity-based penalty to account for its repeated nature sufficiently addresses this statutory factor. The undersigned concurs with the Secretary’s assessment that no penalty reduction is appropriate for the “good faith” factor. The resulting sum is *not* reduced by one-third due to the Secretary having withdrawn the third grouped Item 3c of Citation 3, which pertained to an unguarded sprocket wheel and chain that was co-located with the unguarded belt and pulleys. The hazard that the Secretary had alleged as associated with the unguarded sprocket and wheel was substantially the same hazard as the Secretary established for the unguarded belt and pulleys. (Ex. C-35 at Bates 162-66).

Accordingly, a penalty of \$7,391 is assessed for the two grouped violations of § 1910.219 in Items 3a and 3b of Citation 3.

D. Machine Guarding for “Window Box” Machine–
§ 1910.219(f)(1)
(Repeat Citation 3, Item 4)

Item 4 of Citation 3 alleges a repeat violation of § 1910.219(f)(1), which requires that power transmission gears be guarded.²³ Midvale is alleged to have violated this standard on or about October 18, 2017, “when employees worked and were exposed to an unguarded or non-enclosed gear that was forty five (45) inches above the floor level on the Window Machine - Model 5A.”

Photographs in Exhibit C-14 show the unguarded gear (marked by a superimposed arrow), and the video at Exhibit C-13 shows the gear rotating during machine operations. (T. 231-32). The gear is 4.5 inches in diameter and is situated about 45 inches above floor level. (Ex. C-40 at Bates 169). Nearly all of it is situated on the outer margin of the machine, although at levels below the gear the outer margin of the machine appears to extend about one foot beyond the outside margin of the gear. (Ex. C-14). The gear is situated 38 inches from the machine’s main control panel. (Ex. C-40 at Bates 169). When the machine is running the gear turns at roughly 20 RPM.

²³ Section 1910.219(f)(1) provides:

(1) *Gears*. Gears shall be guarded in accordance with one of the following methods:

- (i) By a complete enclosure; or
- (ii) By a standard guard as described in paragraph (o) of this section, at least seven (7) feet high extending six (6) inches above the mesh point of the gears; or
- (iii) By a band guard covering the face of gear and having flanges extended inward beyond the root of the teeth on the exposed side or sides. Where any portion of the train of gears guarded by a band guard is less than six (6) feet from the floor a disk guard or a complete enclosure to the height of six (6) feet shall be required.

(See Ex. C-13).

As described in connection with the LOTO violation, the video at Exhibit C-13 depicts employees attempting to clear a jam in the machine without the e-stop engaged and without utilizing LOTO procedures, in violation of the LOTO standard. During this effort, the machine's operator stood to the right of the unguarded gear and appears to have been within two feet or closer to it. (Ex. C-13; T. 321-22).

A preponderance of the evidence establishes that the cited standard applies, that the gear was not guarded as the standard requires, and that Midvale had actual knowledge of the violative condition. (Sec'y Br. 52-53). Again, Midvale does not contend otherwise. Rather, Midvale contends that the Secretary did not establish employee access to the violative condition, i.e., that it was "reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal*, 18 BNA OSHC at 1074. (Resp't Br. 16 & 43).

As discussed above in connection with the LOTO violation that was established with respect to the unjamming effort depicted in the video at Exhibit C-13, the employee near the gear during that activity was exposed to the risk of injury from the unexpected energization of the machine and the movement of the exposed gear.²⁴ This is so notwithstanding that the gear itself is relatively slow moving when in operation, revolving at about 20 RPM. Section 1910.219(f)(1)

²⁴ Unlike the two instances described above where abatement of the machine guarding violations would have abated LOTO violations associated with the same unguarded part, the abatement of the machine guarding violation here would not have abated the corresponding LOTO violation, because the employee would have still been exposed to risk of injury from the unexpected energization of the point of operation in which the employees had their hands. Thus, the machine guarding violation here that corresponds to the LOTO violation involving the window machine is not duplicative under the Commission's test in *Northeast Precast*. Nor is it duplicative under any other tests articulated in Commission precedent for determining whether violations are duplicative. See *N.E. Precast LLC*, 26 BNA OSHC at 2279 (summarizing other tests).

is a specification standard, so non-compliance with it establishes the existence of a hazard. *Fabricated Metal*, 18 BNA OSHC at 1073 n. 4.

Apart from the employee's exposure to the unguarded gear while clearing the paper jam when the gear was not moving, the proximity of the unguarded gear to any person standing at or moving alongside the machine while it is in operation makes it reasonably predictable that "employees have been, are, or will be in the zone of danger" associated with the gear when the machine is in operation. *Fabricated Metal*, 18 BNA OSHC at 1074.

A preponderance of the evidence establishes that Midvale violated the cited standard in the manner alleged in Item 4 of Citation 3.

Classification of § 1910.219(f)(1) Violation

The Secretary alleges this is a repeat violation based on Midvale's violation of the same standard that occurred on January 14, 2014, in connection with OSHA inspection 954509, and which became a final order on February 20, 2014, upon the execution of an informal settlement agreement. (Ex. C-71; T. 459). In that prior inspection, OSHA cited Midvale for violating the same standard because employees had removed and not replaced the guard for a slow-moving gear on the Zerand #2 that rotated only when employees were staging a roll of paperboard on the machine. (Ex. C-75 at Bates 221).

Proof of Midvale's violation of the same standard constitutes prima facie showing of substantial similarity. The fact the prior violation pertained to an unguarded gear on a different machine does not establish disparate conditions or hazards associated with the predicate violation of the same standard and the violation here. Rather, both violations present a "caught-in" hazard that could result in crushing or amputation, laceration, or fracture. (T. 235). The evidence supports the Secretary's classification of the violation as repeated.

Penalty for Repeat Violation of § 1910.219(f)(1)

In addition to classifying the violation as “repeated,” the Secretary regarded the violation to be “serious” in nature for purposes of formulating a gravity-based penalty. (Ex. C-40 at Bates 167; T. 231). The undersigned concurs in the Secretary’s assessment that the gravity of the violation is “moderate,” so that the gravity-based penalty prior to applying a multiplier for a repeat violation and other adjustments based on statutory factors would be \$9,239. (Ex. C-40 at Bates 168; T. 235-36). The undersigned concurs in doubling that sum to account for the repeated nature of the violation and concurs further in reducing that resulting sum by 60% to account for Midvale’s small size, which includes consideration of Midvale’s financial wherewithal. The undersigned does not concur in increasing that resulting sum by 10% to account for history of the violations, because the doubling of the gravity-based penalty to account for its repeated nature sufficiently addresses this statutory factor. The undersigned concurs with the Secretary’s assessment that no penalty reduction is appropriate for the “good faith” factor. Accordingly, a penalty of \$7,391 will be assessed for the repeated violation of § 1910.219(f)(1) in Item 4 of Citation 3.

D. Powered Industrial Truck Training

§ 1910.178(l)(1)(i)

(Repeat Citation 3, Item 2)

Item 2 of Citation 3 alleges a repeat violation of the training requirements specified by the powered industrial truck standard codified at 29 C.F.R. § 1910.178. The citation item alleges that Midvale violated subparagraph (l)(1)(i) of that standard, which requires that employers “ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (l).” The training provided must “consist of a combination of formal instruction (e.g., lecture, discussion, interactive computer learning, video tape, written material), practical training (demonstrations performed by the trainer and practical exercises performed by the

trainee), and evaluation of the operator's performance in the workplace." § 1910.178(l)(2)(ii). The topics that "initial training" must address are prescribed in subparagraph (l)(3) and include thirteen specific "truck-related topics" and nine specific "workplace-related" topics. § 1910.178(l)(3). Employers are permitted to avoid providing "duplicative training" to an employee who has received training elsewhere if the employer determines that such prior training is "appropriate" to the employer's "truck and working conditions" and the employee "has been evaluated and found competent to operate the truck safely." § 1910.178(l)(5). Employers are required to maintain a certification record "that each operator has been trained and evaluated as required by this paragraph (l)." § 1910.178(l)(6).

The CO testified that while inspecting the Midvale plant on October 18, 2017, he observed employees operating two powered industrial trucks, but he did not testify to the identities of those employees. (T. 201-02). The CO asked the plant manager Northwood about powered industrial truck training and Northwood showed him a training DVD, a training log that had names of employees reflected (but not a date of training or the identity of the trainer), and an incomplete "Performance Test for Forklift Operators" evaluation form. (Ex. C-32 at Bates 151).

An employee named Vincent Bowers started working at Midvale in May 2017, and Midvale provided him with forklift operator training on November 7, 2017. (Ex. C-67). There is no evidence that Bowers, who was a Zerand operator, had ever operated a forklift at Midvale before or after receiving this training. (Ex. C- 67; T. 108-11, 210).

The CO testified that on November 9, 2017, he spoke to an employee named Harvey Dawson who told the CO that he been trained on forklift operation sometime before the current inspection, although the CO did not testify to whether Dawson provided any details regarding when Dawson had received that training or the content of that training. (T. 202).

The CO served Midvale with a subpoena duces tecum on November 9, 2017, that required Midvale to provide on November 13, 2017, the following material: “Copies of any and all documents containing Midvale’s Powered Industrial Truck (Forklift) Program to include formal instruction, practical training, evaluation, and employee training records, including those stored electronically.” (Ex. C-33; T. 198). In response to the subpoena, Midvale produced a training attendance log indicating that fourteen named employees had received “Forklift Operator Safety Training” on November 7, 2017, a one-page blank 20-question quiz, and a one-page blank 25-item “Performance Checklist for Forklift Operators.” (Ex. C-34; T. 203-04).

The only documentation presented in evidence that reflects any forklift training prior to the training provided on November 7, 2017, was forklift training that Midvale provided to nine employees about 21 months earlier on January 27, 2016. (Ex. R-40 at 81; Ex. R-12).

The plant manager, Northwood, testified that Midvale hires only experienced forklift drivers and tests them during a prospective employee’s interview. Northwood testified that if the interviewed applicant is ultimately hired, then on their first day at work “we’ll spend more lengthy time with them, familiarizing them with the machine,” and “then normally we’ll have one of the other drivers spend some time with them, an hour or so after we’ve done the initial ... training of the person.” (T. 685-86). Northwood testified further that Midvale has training videos and associated written tests that it administers “when time permits.” (T. 686).

The Secretary alleges that Midvale violated § 1910.178(l)(1)(i) on or about October 18, 2017, because employees who were operating Midvale’s two forklifts “had not received equipment specific formal instruction, practical training, or an evaluation as to their ability to safely operate the equipment.” Midvale argues that it was exempted from providing the training required by

subparagraph (l) to its forklift operators by the “avoidance of duplicative training” provision of subparagraph (l)(5). (Resp’t Br. 47-48).

The whole of the evidence is insufficient to establish that Midvale’s process of assessing the adequacy of the prior training and operational competence of prospective forklift operators during the employee interview process, and then more fully evaluating their competence to operate Midvale’s forklifts safely at Midvale’s plant after such a prospective operator is hired, failed to meet the minimum requirements of the training standard. Northwood’s testimony permits the inference that as part of the interview process for a position that entails operating one of Midvale’s two forklifts, Midvale assesses whether prior training that the applicant has received “is appropriate to the truck and working conditions encountered” at the Midvale plant as subparagraph (l)(5) requires.²⁵ If that applicant is hired, then on their first day at work Midvale evaluates the employee’s competence to operate the forklift safely at the plant. Such an evaluation and determination of competence is required under subparagraph (l)(5) for the employee to be exempt from having to receive the formal instruction, practical training, and evaluation that would otherwise be required under paragraph (l).

As previously noted, subparagraph (l)(6) of the standard requires an employer to maintain a certification record that each forklift operator is trained and evaluated as the standard requires. That certification record must include the following information: “the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.” Midvale did not create any such certification record as to any of its forklift

²⁵ In operating a forklift as part of the interview process, the applicant would have the status of “trainee,” who under subparagraph (l)(2)(i) may operate a forklift under specified conditions as follows: “Trainees may operate a powered industrial truck only: (A) Under the direct supervision of persons who have the knowledge, training, and experience to train operators and evaluate their competence; and (B) Where such operation does not endanger the trainee or other employees.”

operators. However, the Secretary has not alleged that Midvale violated the certification record requirement of subparagraph (l)(6), and so that failure to comply with subparagraph (l)(6) is not adjudicated herein.

While the lack of the required certification records is somewhat probative on whether Midvale's assessment of the previous training that newly hired employees had received and Midvale's evaluation of those newly hired employees' competence to operate Midvale's forklifts at Midvale's plant safely met the requirements of subparagraph (l)(6), the absence of certification records does not conclusively establish that Midvale failed to conduct the assessments and evaluations in the manner that subparagraph (l)(5) requires. *Cf. N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126-27 (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"), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

The evidence is insufficiently weighty to establish by a preponderance that Midvale was non-compliant with the training requirements of § 1910.178(l)(1)(i) in the manner alleged, so Item 2 of Citation 3 is vacated.

E. Eye and Face Protective Equipment
§ 1910.133(a)(1)
(Repeat Citation 3, Item 1)

Item 1 of Citation 3 alleges a repeat violation of the eye and face protection standard codified at 29 C.F.R. § 1910.133(a), which requires employers to "ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from ... liquid chemicals." The Secretary alleges that Midvale violated this standard on or about October 18, 2017, when "employees used liquid chemicals such as but not limited to ... Denatured Alcohol and ... Acetone on a daily basis to perform activities including cleaning metal plates and rollers" on the printing and die-cutting machines (the Zerand machines).

“To establish the applicability of a PPE [personal protective equipment] standard that, by its terms, applies only where a hazard is present,” Secretary must demonstrate that “there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE.” *Wal-Mart Distrib. Ctr. No. 6016*, 25 BNA OSHC 1396, 1400-01 (No. 08-1292, 2015), *aff’d in part and vacated in part on other grounds*, 819 F.3d 200 (5th Cir. 2016).

The use of acetone and denatured alcohol at Midvale’s plant presents a significant risk of harm. The safety data sheets for these materials establish that both acetone and denatured alcohol are “liquid chemicals” within the meaning of the standard and that both present a significant risk of harm. Midvale employees use acetone and denatured alcohol to clean each of the three Zerand machines about two or three times each week for about five to ten minutes at a time, first by using acetone to remove adhesive from parts of the machine and then using denatured alcohol to remove the residual acetone. (T. 110; Ex. C-67). The manufacturer’s safety data sheet for acetone states that acute eye contact may cause “serious eye irritation” and “corneal injury” and identifies the “exposure control/personal protection” for eye protection to be the use of “splash goggles.” (Ex. C-48 at 7, 8 & 11). The manufacturer’s safety data sheet for the denatured alcohol includes the precautionary statement to wear “eye protection/face protection,” cautions that both acute skin contact and eye contact “may cause irritation,” and states that “chemical splash goggles should be worn to prevent eye contact.” (Ex. C-48 at 15, 16 & 19).²⁶

²⁶ Midvale had safety data sheets on hand for both the denatured alcohol and acetone, although they were dated in 2009 and did not conform to the specified current format for that information, so the CO obtained updated safety data sheets from the manufacturer, and those more current safety data sheets were offered and received in evidence without objection. (T. 257-59; Ex. C-48). Midvale was not cited for having on hand only the outdated data sheets. (T. 258).

Midvale had both actual and constructive knowledge of the need for the wear of eye or face protection when employees cleaned the Zerand machines using acetone and denatured alcohol. As to actual knowledge, a supervisory employee, Charles Thorne, testified that the prescribed procedure for cleaning the Zerand machines includes wearing “safety glasses as well as gloves in order to, you know, protect your hands and your eyes” from the acetone. (T. 625). As to constructive knowledge, the safety data sheets for those materials establish that a reasonable person familiar with the circumstances surrounding the use of acetone and denatured alcohol to clean the machines would recognize that a hazard requiring the use of eye or face protection exists. The cited standard applies to the activity of cleaning the Zerand machines using acetone and denatured alcohol.

Midvale did not comply with the cited standard. An employee named Jose Cordero had been employed by Midvale for twenty years, and his job is to operate a Zerand machine. Cordero told the CO that when cleaning the Zerand machine using acetone and denatured alcohol that he wears vinyl gloves but does not wear safety glasses or a face shield. (Ex. C-67). Another employee, Vincent Bowers, who started working at Midvale in May 2017 and who also operated a Zerand machine, told the CO he wears rubber gloves when cleaning the machine with acetone and denatured alcohol but does not wear safety glasses or a face shield. (Ex. C-67). There was no evidence controverting the signed statements of Cordero and Bowers, and they are sufficient to establish by a preponderance of the evidence that Midvale did not comply with the cited standard. Their statements similarly establish that Midvale employees were exposed to a hazard that compliance with the cited standard would have prevented.

Midvale had both actual and constructive knowledge of the violative condition. It is reasonably inferable that Midvale had actual knowledge that its twenty-year employee, Mr.

Cordero, habitually did not wear eye or face protection when cleaning the Zerand machine with acetone and denatured alcohol. The same reasonable inference arises from plant manager Northwood's response to the CO's question about whether goggles were available to employees who handled acetone. According to the CO, Northwood said to him: "[H]ow could it be my fault, my problem, if the manufacturer just put this label on the side of the can; that's just there only for liability purposes, so I don't see why we have to comply with such a thing because it's just there because some manufacturer wanted to just put that on the side of their can." (T. 398-99). Northwood's rejoinder to the CO's question supports the reasonable inference that Northwood had actual knowledge that employees did not use eye or face protection when cleaning with the acetone and denatured alcohol. His actual knowledge is imputable to Midvale. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (noting that knowledge may be imputed to the employer through its supervisory employee).

A preponderance of the evidence also establishes that Midvale had constructive knowledge that employees did not use eye or face protection while cleaning with acetone and denatured alcohol. *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2122 (No. 96-0606, 2000) (ruling that to establish constructive knowledge, the Secretary must show that the employer, with the exercise of reasonable diligence, could have known of the violative condition), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Midvale's owner and president, David Frank, testified that Midvale maintains "eye guards" at the plant and that employees are instructed "to wear them ... where applicable." (T. 527). He testified further that when an employee fails to wear PPE when required that "[w]e tell them to put it on," but that if an employee repeatedly fails to wear required PPE, Midvale does not discipline the employee further. Mr. Frank explained:

If we were to put in place a disciplinary action that led to dismissal, between our high absentee rate in the factory, we would

— we would probably have half our work force. On top of which, it takes time to train these people. So we cannot afford, from a production standpoint, to not work with these people and ask them, when we see them not wearing protective gear, to put it on. (T. 528).

This testimony of Midvale’s president is indicative of a company ethos that exalts production over safety requirements. This cannot be countenanced. *Worldwide Mfg., Inc.*, 19 BNA OSHC 1023, 1024-25 (No. 97-1381, 2000) (commenting that an “attitude of sacrificing employee safety for the sake of production is completely contrary to the intent of the Act”). Similarly, effectively shifting complete responsibility for complying with work rules to employees is an untenable approach to workplace safety. *See Brown & Root, Inc.*, 7 BNA OSHC 2074 (No. 16162, 1979) (“The Act ... places final responsibility for compliance on the employer,” and so an “employer cannot shift this responsibility to an employee by a work rule that is not effectively communicated and enforced.”). Midvale’s near non-existent efforts to enforce the work rule that employees wear eye or face protection when cleaning the machines with acetone and denatured alcohol reflect a failure to exercise reasonable diligence. *N&N Contractors, Inc.*, 18 BNA OSHC at 2124 (finding constructive knowledge where employer knew that employees routinely violated its work rule).

The great weight of the evidence establishes that Midvale violated the cited standard in the manner alleged.

The violation is properly classified as repeated. Midvale violated the same standard in connection with inspection number 1066769, which became a final order on June 19, 2017. (T. 11; Ex. C-1 at 7 & 23). This prima facie showing of substantial similarity and is not rebutted by evidence of disparate conditions and hazards between the two violations and establishes the violation as repeated. *Potlatch Corp.*, 7 BNA OSHC at 1063.

The maximum penalty for a repeat violation in connection with the inspection here is \$129,336. 29 C.F.R. § 1903.15(d)(2) (2018). In addition to classifying the violation as “repeated,”

the Secretary regarded the violation to be “serious” in nature for purposes of formulating a proposed gravity-based penalty. (Ex. C-30 at Bates 138; T. 400-01). The undersigned concurs in the Secretary’s assessment that the gravity of the violation is “moderate,” based on determinations that the severity of an injury resulting from the violation was “high”²⁷ and the probability of such an injury was “lesser.” Based on those assessments, the gravity-based penalty prior to applying a multiplier for a repeated violation and applying other adjustments based on statutory factors was \$9,239. (Ex. C-30 at Bates 138-39; T. 400-01). The undersigned concurs in doubling that sum to account for the repeated nature of the violations and concurs further in reducing that resulting sum

²⁷ Midvale’s argument that the violation should be regarded as other-than-serious rather than serious in nature for purposes of the penalty assessment is rejected. Midvale bases its argument largely on a 2015 other-than-serious citation that it accepted for having failed to develop, maintain, or implement a hazard communication program as required by § 1910.1200(e)(1) with respect to acetone and denatured alcohol. (Resp’t Br. 45-46). OSHA assessed the severity of that prior violation as “minimal” because the CO who conducted that 2015 inspection had concluded, whether accurately or not, that employees were wearing safety glasses when handling those materials, notwithstanding the absence of a hazard communication program. (Ex. C-73 at Bates 242; T. 453-54). Here, the great weight of the evidence is that non-supervisory employees did not wear eye or face protection when using the materials, and that Midvale did not enforce the work rule requiring that they do so. The employees’ proven exposure to actual contact with the hazardous liquid chemicals supports the “high” severity assessed for the violation of the PPE standard.

Midvale complains further about the characterization of the “severity” of an injury resulting from the violation to be “high” based on the justification that “employees with chronic exposure would suffer neurological and physiological damage.” (Resp’t Br. 17, 45-46). (See Violation Worksheet, Ex. C-30 at Bates 138). That stated justification may have been based on a misreading of the safety data sheets for acetone and denatured alcohol that conflated “acute” exposure by splashing into the eye with chronic and prolonged inhalation (a hazard that eye or face protection would not protect against). (Ex. C-48; T. 445-48). This apparent misreading notwithstanding, the risk of eye irritation and corneal damage from acute contact supports the assessment that the severity of injury from the violation was “high.” See *Stearns-Roger, Inc.*, 7 BNA OSHC 1919, 1921 (No. 76-2326, 1979) (noting “that the eye is an especially delicate organ and that any foreign material in the eye presents the potential for injury”); *Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1061-62 (No. 79-4945, 1982) (finding that “given the delicateness of the eye, serious physical harm would be substantially probable if an employee were struck in the eye by a particle or chip of concrete”) *aff’d*, 723 F.2d 410 (5th Cir. 1984).

by 60% to account for Midvale’s small size, which includes consideration of Midvale’s financial wherewithal. The undersigned does not concur in increasing that resulting sum by 10% to account for history of the violations, because the doubling of the gravity-based penalty to account for its repeated nature sufficiently addresses this statutory factor. The undersigned concurs with the Secretary’s assessment that no penalty reduction is appropriate for the “good faith” factor. Accordingly, a penalty of \$7,391 is assessed for the violation of § 1910.133(a)(1) for Item 1 of Citation 3.

**F. Hazard Communication Standard–
§§ 1910.1200(e)(1), 1910.1200(h)(1), & 1910.1200(f)(6)**

(Repeat Citation 3, Items 6a, 6b and 6c)

In repeat Citation 3, the Secretary alleges three violations, grouped for penalty purposes, of the hazard communication standard (HCS), codified at 29 C.F.R. § 1910.1200, “Hazard Communication.” Grouped items 6a, 6b, and 6c of the citation allege respectively violations of subparagraphs (e)(1), (h)(1), and (f)(6) of the HCS.

Item 6a alleges Midvale violated subparagraph (e)(1) on or about October 18, 2017, in that it had not implemented and maintained “at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met.”

Item 6b alleges Midvale violated subparagraph (h)(1) on or about October 18, 2017, in that it had not provided “effective information and training on hazardous chemicals to employees in their work area at the time of their initial assignment and whenever a new hazard that the employee had not been previously trained about was introduced into their work area.”

Item 6c alleges Midvale violated subparagraph (f)(6) on or about October 18, 2017, in that it had not ensured containers of a hazardous chemical identified as “SF Midvale Pizza 75 Red-CCNB,” which is an ink that is used to print on paperboard, “were labeled, tagged, or marked with the information specified under paragraphs (f)(6)(i) through (f)(6)(ii).”

The cited and other relevant provisions of the HCS at § 1910.1200 provide as follows:

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet ...

* * *

(f) *Labels and other forms of warning—(1) Labels on shipped containers.* The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked[,] ... [on which] the following information shall be provided:

- (i) Product identifier;
- (ii) Signal word;
- (iii) Hazard statement(s);
- (iv) Pictogram(s);
- (v) Precautionary statement(s);...

(6) *Workplace labeling.* Except as provided in paragraphs (f)(7) and (f)(8) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with either:

- (i) The information specified under paragraphs (f)(1)(i) through (v) of this section for labels on shipped containers; or,
- (ii) Product identifier and words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

* * *

(g) *Safety data sheets.* (1) ... Employers shall have a safety data sheet in the workplace for each hazardous chemical which they use....

(8) The employer shall maintain in the workplace copies of the required safety data sheets for each hazardous chemical, and shall

ensure that they are readily accessible during each work shift to employees when they are in their work area(s)...

* * *

(h) *Employee information and training.* (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

(2) *Information.* Employees shall be informed of:

- (i) The requirements of this section;
- (ii) Any operations in their work area where hazardous chemicals are present; and,
- (iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and safety data sheets required by this section.

(3) *Training.* Employee training shall include at least:

- (i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);
- (ii) The physical, health, simple asphyxiation, combustible dust, and pyrophoric gas hazards, as well as hazards not otherwise classified, of the chemicals in the work area;
- (iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,
- (iv) The details of the hazard communication program developed by the employer, including an explanation of the labels received on shipped containers and the workplace labeling system used by their employer; the safety data sheet, including the order of information and how employees can obtain and use the appropriate hazard information.

Midvale had previously been cited for violating each of the subparagraphs of the HCS cited here in connection with OSHA inspection number 1081074, which had been conducted in July

2015. Midvale accepted those three citation items in a formal settlement agreement, which became a final order on January 28, 2016. (T. 460; Exs. C-73 and C-77).

To abate the violation of subparagraph (e)(1) that had become a final order in January 2016, Midvale developed and implemented a written hazard communication program (HCP). The written HCP identified Mr. Frank, the president of Midvale, as the Program Administrator (Ex. R-40 at Bates 298), and assigned him the following program responsibilities:

- Compile and maintain an “inventory list” of hazardous chemicals used by Midvale employees as required by subparagraph (e)(1)(i) of the HCS. (Ex. R-40 at Bates 299-300).
- Ensure that “all program elements and training are carried out,” such training including “initial training on the [HCS] and [Midvale’s HCP] before starting work,” annual training for all employees, and training each new employee in a “health and safety orientation” on the HCS and Midvale’s HCP, with all such training to include the elements specified in subparagraph (h)(1) of the HCS, and providing further that all training “be documented and kept on file.” (Ex. R-40 at Bates 301 & 303).
- “[V]erify that all containers of classified hazardous chemicals in the workplace are clearly and prominently labeled” to reflect information required to be on the container labels by subparagraph (f)(6) of the HCS. (Ex. R-40 at Bates 299).

Midvale provided the specified training to sixteen employees on March 3 & 4, 2016. (Ex. R-40 at Bates 304-05; T. 316). Midvale did not provide training in the HCS or its HCP to any employees who were hired after that March 2016 training, most if not all of whom worked in areas of the plant where hazardous chemicals were present. (Ex. C-45 at Bates 191-92, 198-99; C-67 at Bates 459; Ex. C-56 at Bates 437 & 441; T. 423-24). Those employees who started working at Midvale after the training that was provided in March 2016 did not receive hazard communication

training until November 7, 2017. (T. 201; Ex. C-45 at Bates 191-92, 198-99; C-67 at Bates 459; Ex. C-56 at Bates 441; T. 423-24).

Midvale did not develop a list of hazardous chemicals that are present in Midvale's workplace as its HCP specified and as subparagraph (e)(1)(i) of the HCS requires. (T. 416, 419). Consequently, the training and information provided to the employees in March 2016 did not include information regarding "the location and availability of ... the required list(s) of hazardous chemicals" that subparagraph (h)(2)(iii) of the HCS requires to be provided to employees.

One of the hazardous chemicals in use at Midvale is an ink named "SF Midvale Pizza 75 Red-CCNB" that contains the hazardous chemical propylene glycol and that is manufactured and supplied to Midvale by J.M. Fry Company. (See safety data sheet, Ex. C-48 at 24-28). The ink came from the manufacturer in an appropriately labeled 55-gallon drum. Midvale employees dispensed the ink from the drum into unlabeled five-gallon plastic buckets and would then place those buckets containing the ink at various spots in the plant for eventual dispensing into the Zerand machines. (T. 425-27; Ex. C-45 at Bates 203; Ex. C-56 at Bates 441).

Three Grouped HCS Violations Proven

The HCS applies because Midvale employees are exposed to the following hazardous chemicals in performing their jobs at Midvale's plant: acetone, denatured alcohol, and the propylene glycol contained in the ink named "SF Midvale Pizza 75 Red-CCNB." (Exs. C-48, C-56 at Bates 441, C-67 at Bates 454 & 459).

Item 6a. Even though Midvale developed an HCP in 2016 as required by subparagraph (e)(1) of the HCS, the evidence established that it failed to fully "implement" and "maintain" that program as subparagraph (e)(1) also requires (and as citation item 6a alleges). Midvale never developed the "list of hazardous chemicals known to be present" in the workplace that subparagraph (e)(1)(i) requires. And while Midvale provided the training that subparagraph (e)(1)

requires when it developed the HCP in early 2016, Midvale did not thereafter provide required training to any employees who were hired after that training was provided until November 7, 2017. Midvale had actual knowledge of the violative condition in that Midvale's president was the Program Administrator and was responsible for managing the HCP and maintaining all records "including reviewing and updating [the HCP] as necessary and facilitate training." (Ex. R-40 at Bates 298). The alleged violation of subparagraph (e)(1) is proven.

Item 6b. As noted in the preceding paragraph, Midvale did not train newly hired employees that subparagraph (h)(1) requires to be trained before the employee began working in areas where hazardous chemicals were present. Midvale had actual knowledge of the violative condition because Midvale had designated its president to be the individual responsible for ensuring that required training was carried out. The alleged violation of subparagraph (h)(1) is proven.

Item 6c. The five-gallon plastic pails into which employees dispensed the ink containing the hazardous chemical propylene glycol and which employees set out in various locations in the plant for eventual dispensing into the three Zerand machines were not labeled as required by subparagraph (f)(6), and thus Midvale did not comply with the cited standard. Midvale employees who handled or worked in the vicinity of the unlabeled buckets were exposed to the violative condition. Midvale's plant manager, Mr. Northwood, had actual knowledge of the violative condition and his knowledge is imputable to Midvale. (T. 424). The alleged violation of subparagraph (f)(6) is proven.

Classifications and Penalty for Grouped HCS Violations

Each of the three violations is properly classified as repeated. As described above, Midvale violated the same standards arising out of violations identified by inspection number 1081074, which became a final order on January 28, 2016. (T. 460; Exs. C-73 and C-77). This prima facie showing of substantial similarity for each of the three violations is not rebutted by evidence that

the prior violations involved disparate conditions and hazards and establishes the three violations as repeated. *Potlatch Corp.*, 7 BNA OSHC at 1063.

The maximum penalty for a repeat violation in connection with the inspection here is \$129,336. 29 C.F.R. § 1903.15(d)(2) (2018). In addition to classifying the violations as “repeated,” the Secretary regarded each violation to be “serious” in nature for purposes of formulating a single proposed gravity-based penalty. (Ex. C-30 at Bates 138; T. 400-01).

The undersigned concurs with the Secretary’s determination to group the three HCS violations and assess a single penalty for all. (T. 433). *See Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1559-60 (No. 93-2535, 1996) (combining penalties for items involving violations of separate components of a hearing conservation program). The undersigned concurs further in the Secretary’s assessment that the gravity of the violations of subparagraphs (e)(1) and (h)(1) was “moderate” and the gravity of the violation of subparagraph (f)(6) was “low.” (Ex. C-45 at Bates 187; Ex. C-15 at Bates 93; T. 429-33). In view of the interrelatedness of the “low” gravity violation to the two “moderate” gravity violations, the undersigned concurs in the Secretary’s proposed gravity-based penalty for the three grouped violations at \$9,239. The undersigned concurs in doubling that sum to account for the repeated nature of the violations and concurs further in reducing that resulting sum by 60% to account for Midvale’s small size, which includes consideration of Midvale’s financial wherewithal. The undersigned does not concur in increasing that resulting sum by 10% to account for history of the violations, because the doubling of the gravity-based penalty to account for its repeated nature sufficiently addresses this statutory factor. The undersigned concurs with the Secretary’s assessment that no penalty reduction is appropriate for the “good faith” factor. Accordingly, a penalty of \$7,391 will be assessed for the three grouped violations of the HCS.

**G. Design Safety Standards for Electrical Systems–
§§ 1910.305(b)(1)(ii), 1910.303(f)(2) & 1910.304(f)(1)(viii)**

(Serious Citation 1, Items 1a, 1b, & 1c)

In serious Citation 1, the Secretary alleges three violations, grouped for penalty purposes, of the design safety standards for electrical equipment, codified at 29 C.F.R. § 1910.302—.308. All three violations relate to alleged deficiencies in an electrical panelboard that is housed a doorless metal cabinet that is in plain view mounted on the east wall of the plant’s “in-process” room. (T. 47; Ex. C-6 at Bates 70). Employees work in this room to operate the “window box” machine, a shredder, a shrink-wrap machine, and a conveyor. (T. 47-48). Employees also pass through this room when moving between the room where the Zerand machines are located (the printing and die cutting department) and the room where most of the gluers are located (the finishing department). (T. 47-48). The metal cabinet is shown in the photograph at Exhibit C-7, which the CO took during his inspection. The panelboard has seven circuit breaker switches, five of which are blue-colored 15-amp switches and two of which are orange-colored 20-amp switches. One of the 15-amp switches controls electricity to the overhead fluorescent lighting in the room, and employees operate that switch daily to switch the room’s lights on and off. (T. 48-49).

Grouped Items 1a, 1b, and 1c of the citation allege respectively violations of §§ 1910.305(b)(1)(ii), 1910.303(f)(2) & 1910.304(f)(1)(viii).

Item 1a -- § 1910.305(b)(1)(ii)

Section 1910.305(b)(1)(ii) provides: “Unused openings in cabinets, boxes, and fittings shall be effectively closed.” Item 1a of Citation 1 alleges Midvale violated this standard on October 18, 2017, “when employees turned fluorescent lights on or off by cycling circuit breakers located in an energized electrical panel with an opening.”

There was an opening in between two of the 15-amp circuit breakers. The opening was about four inches wide and two inches high, which are the dimensions of a normal circuit breaker.

(T. 49; Ex. C-6 at Bates 69; Ex. C-7). The opening itself was about 64 inches above floor level. (Ex. C-6 at Bates 69). Employees were exposed to the live electrical supply into the cabinet when operating the circuit breakers, and they could sustain burns in an electrical incident (i.e., arc flash) or shock from negligent or inadvertent contact with live parts inside the cabinet. (T. 51; Ex. C-6 at Bates 69).

The cited standard applies to the cabinet depicted in the photograph in Exhibit C-7. The opening in the cabinet between two blue switches depicted in that photograph is violative of the standard. Employees were exposed to the violative condition when operating switches on the doorless cabinet, one of which was switched on and off at least once daily because it controlled the overhead florescent lighting in the room, which was essential to providing adequate lighting. (Ex. C-6 at Bates 69-70; T. 60). Two of Midvale's managers, Northwood and Dellaperuto, regularly operated the switch that controlled the overhead fluorescent lights. (T. 48-49; Ex. C-6 at Bates 69-70). It would have been impossible for those managers not to have seen the opening in the cabinet when operating the circuit breaker that controlled the lights, and so both managers had actual knowledge of the violative condition. Midvale violated § 1910.305(b)(1)(ii) as alleged in Item 1a.

The violation is appropriately classified as serious. A violation is "serious" if there was a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k); *Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1330-31 (No. 97-0469, 2003) (consolidated) (citation omitted).

The violative condition here was “serious” because an employee could suffer electrical burns in the event of an electrical incident. (T. 51). Also, the negligent or inadvertent insertion of fingers or a conductive instrument into the opening could result in electrical shock. (Ex. C-6 at Bates 69).

Item 1b -- § 1910.303(f)(2)

Section 1910.303(f)(2) provides: “Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident.” Item 1b of Citation 1 alleges that the panelboard was violative of this standard because “employees operated equipment that was protected by circuit breakers that were not marked to indicate their purpose.”

The circuit breakers control electricity to electrical outlets and the florescent lighting in the in-process room. (T. 59). But none of the seven circuit breakers bore any markings to indicate which electrical outlet, etc. the circuit breaker powered. (Ex. C-10; Ex. C-6 at Bates 75; T. 57). Moreover, it was not self-evident from the location or arrangement of the circuit breakers what the purpose of any of them was. (Ex. C-6 at Bates 75; Ex. C-10).

The cited standard applies to the circuit breakers, in that each constitutes an “overcurrent device” as that term is defined in § 1910.399. The circuit breakers were violative of the cited standard because they were neither marked to indicate their purpose, nor were they located or arranged in such a manner that their purpose was evident. Employees had access to the violative condition in that the circuit breakers supplied electricity to electrical outlets and the lighting fixtures in the room where employees regularly operated equipment that received electricity through the cabinet that housed the circuit breakers. The actual knowledge of the violative condition by Midvale managers (Northwood and Dellaperuto) is imputed to Midvale. Midvale violated § 1910.303(f)(2) as alleged in Item 1b.

The violation is properly characterized as serious. If some incident occurred that required turning off a circuit breaker, there is a possibility that the incorrect circuit breaker could be shut off with potentially calamitous results depending on what that erroneous circuit breaker controlled. (T. 55; Ex. C-6 at Bates 75).

Item 1c -- § 1910.304(f)(1)(viii)

Section 1910.304(f)(1)(viii) provides: “Circuit breakers used as switches in 120-volt and 277-volt, fluorescent lighting circuits shall be listed and marked ‘SWD.’” Item 1c of Citation 1 alleges that the circuit breaker that controlled the room’s overhead florescent lighting was violative of this standard because it was not manufactured as an SWD circuit breaker in that it lacked the manufacturer’s embossed marking “SWD.” Such a marking signifies that the circuit breaker is designed and manufactured to be used for “switching duty,” which is to say that it is designed and manufactured to withstand frequent on/off cycles and is less likely to fail than non-SWD switches under frequent use. (Ex. C-6 at Bates 81; T. 59-61).

The cited standard applies because a circuit breaker switch was used for switching duty to control the florescent lights in the in-process room. Midvale was non-compliant with the standard because the circuit breaker used to control the florescent lights in the room was a non-SWD circuit breaker and was not marked “SWD”. Employees were exposed to the violative condition because the non-SWD circuit breaker was used daily to switch the florescent lights in the room on and off. Northwood and Dellaperuto had actual knowledge of the violative condition in that both used the circuit breaker to switch the lights on and off, and their actual knowledge is imputed to Midvale. Midvale violated § 1910.304(f)(1)(viii) as alleged in Item 1c.

The violation is properly characterized as serious. The failure of the non-SWD circuit breaker could result in it failing to trip as it is designed to do in an overcurrent situation and resulting in an electrical incident. (Ex. C-6 at Bates 76)

Penalty for Citation 1, Grouped Items 1a, 1b, & 1c

The undersigned concurs with the Secretary's determination to group the three violations involving deficiencies in the electrical cabinet in the in-process room. (T. 52-53). The undersigned concurs further in the Secretary's assessment that the gravity of each of the violations is "moderate," for a resulting gravity-based penalty of \$9,239. (Ex. C-6; T. 51). The undersigned concurs further in reducing that figure by 60% to account for Midvale's small size, which includes consideration of Midvale's financial wherewithal, in increasing that figure by 10% to account for history of prior violations, and in allowing no reduction for good faith. Accordingly, the undersigned concurs in the Secretary's proposed penalty \$4,065 for the three grouped violations in Citation 1, Items 1a, 1b, and 1c.

H. Design Safety Standards for Electrical Systems–
§§ 1910.305(b)(2)(i) & 1910.305(g)(1)(iv)(A)
(Repeat Citation 3, Items 5b and 5c)

Items 5b and 5c of repeat Citation 3 allege violations of § 1910.305, which pertains to design safety standards for electrical equipment.²⁸

Item 5b -- § 1910.305(b)(2)(i)

Item 5b alleges two instances of a violation of § 1910.305(b)(2)(i) which requires in pertinent part that "junction boxes ... be provided with covers identified for the purpose." Item 5b alleges Midvale violated this standard in two instances. Instance 1 identifies "an uncovered conduit outlet body" on Gluer #2 that was 28 inches above floor level. Instance 2 similarly identifies an "uncovered conduit outlet body," this one on Gluer #3 that was 26 inches above floor level.

²⁸ The Secretary had originally alleged in Item 5a of Citation 3 a repeat violation § 1910.303(b)(2), but the Secretary withdrew that citation item in his post-hearing brief. (Sec'y Br. 56). Item 5a of Citation 3 will therefore be vacated.

The open conduit outlet body on Gluer #2 is accurately depicted in the photograph at Exhibit C-44. That photograph shows the cover of the metallic conduit outlet body opened, with one wire with red-colored insulation and a second wire with black-colored insulation protruding out of the uncovered conduit outlet body. There is a wire nut on each wire, each of which also protrudes. (T. 246).

The uncovered conduit outlet body on Gluer #3 is accurately reflected in a video exhibit (Ex. C-23, at the 2'24" mark), which depicts an exposed wire with red-colored insulation slightly protruding from the conduit outlet body that is lacking a cover. (T. 243-44).

The CO took both the photograph and the video during his inspection. Both conduit outlet bodies are components of energized 120-volt circuits and are attached to the frames of the respective gluers along aisles in the plant that are about 40 inches wide and that employees navigate regularly in performing their ordinary duties. (T. 195, 243-44; Ex. C-23; Ex. C-41 at Bates 178).

The two outlet bodies are a type of junction box and thus the cited standard applies and requires that they be covered. The photographic and video evidence establishes non-compliance with the standard, and their location along frequently traveled aisles or paths establishes employee access to the violative conditions. Plant manager Northwood told the CO that the outlet bodies had likely been uncovered for more than six months at the time of the inspection. The uncovered conduit outlet bodies were in conspicuous locations in plain view situated on aisles that Midvale supervisors navigated daily. Those supervisors had either actual or constructive knowledge of the violative conditions that is imputable to Midvale. The great weight of the evidence establishes that Midvale violated the cited standard in the manner described in the two instances alleged in Item 5b of Citation 3.

Item 5b is properly classified as a repeat violation. Midvale had violated the same standard in connection with citations issued following inspection numbers 954509 and 1066769, and those prior violations became final orders respectively on February 20, 2014, and June 19, 2017. (Ex. C-71 at 1 & 11; T. 459; T. 11; Ex. C-1 at 20 & 24). This prima facie showing of substantial similarity is not rebutted by evidence that the prior violations involved disparate conditions and hazards. *Potlatch Corp.*, 7 BNA OSHC at 1063. The violation identified in Item 5b is properly classified as repeated.

Item 5c -- § 1910.305(g)(1)(iv)(A)

Item 5c alleges a violation of § 1910.305(g)(1)(iv)(A), which proscribes (subject to certain exceptions not applicable here) the use of flexible cords and cables as “a substitute for the fixed wiring of a structure.” Item 5c alleges that Midvale violated this standard by using a flexible cord to energize two motors that powered a belt-driven conveyor system associated with the “window box” machine in the plant’s in-process room.

The extension cord identified in Item 5c is accurately depicted in the photograph at Exhibit C-43, which the CO took during the inspection. (T. 248-49). The female end of the extension cord is suspended in mid-air about eight inches above floor level underneath a curved roller conveyor and about one foot from a wood pallet on the floor. There appear to be about 15 to 20 feet of unorganized excess cord lying on the floor beneath the curved roller conveyor and next to the wooden pallet. (Ex. C-41 at Bates 184). From the excess cord on the floor, the cord rose vertically for about twelve feet, was wound two times around a plastic pipe, was then draped over a metal pipe, and then dropped vertically down an I-beam where the male end was plugged into a receptacle outlet that was about five feet above floor level. (Ex. C-41 at Bates 184). The plant manager, John Northwood, configured this usage of the flexible cord about two years earlier when he personally installed the conveyor system. (T. 249; Ex. C-41 at Bates 185). Employees regularly

walked near the pallet and within a foot of the suspended female end and the excess cord lying on the floor underneath it while performing routine work activities. (T. 250).

The cited standard applies and prohibits the use of the flexible cord to energize the two motors that powered the belt-driven conveyor that had been installed about two years earlier. Midvale's use of the flexible cord as a substitute for fixed wiring for the conveyor belt system was violative of the cited standard. Employees worked in the in-process room where the violative condition was located and from time to time came within a foot of the violative condition. Midvale had actual knowledge of the violative condition because the plant manager had set it up when he installed the conveyor system two years before the inspection. Midvale violated the cited standard in the manner alleged in Item 5c of Citation 3.

Item 5c of Citation 3 is properly classified as a repeat violation. Midvale had violated the same standard in connection with a citation issued following inspection number 994212, which became a final order on December 8, 2014. (Ex. C-20 at 10 & 13). Midvale violated the same standard a second time in connection with inspection 1066769, which became a final order on June 19, 2017. (T. 251; T. 11; Ex. C-72 at 1-3; Ex. C-1 at 18 & 24). This prima facie showing of substantial similarity is not rebutted by evidence that the prior violations involved disparate conditions and hazards. *Potlatch Corp.*, 7 BNA OSHC at 1063. The violation identified in Item 5c is properly classified as repeated.

Penalty for Grouped Violations of § 1910.305

The maximum penalty for a repeat violation in connection with the citation here is \$129,336. 29 C.F.R. § 1903.15(d)(2) (2018). In addition to classifying the violations as "repeated," the Secretary regarded each violation to be "serious" in nature for purposes of formulating a single proposed gravity-based penalty. (Ex. C-41).

The undersigned concurs with the Secretary's determination to group the three original citation items alleging violations the design safety standards for electrical equipment, one of which the Secretary has now withdrawn, and assessing a single penalty for all. See *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1559-60 (No. 93-2535, 1996) (combining penalties for items involving violations of separate components of a hearing conservation program). The undersigned concurs further in the Secretary's assessment that the gravity of the established violations is "low" based on assessments that the severity of possible injury was "low", and the probability of injury was "lesser" for both proven violations. (Ex. C-41). The undersigned therefore concurs in the Secretary's proposed gravity-based penalty for each of the two established violations at \$5,543. (Ex. C-41 at Bates 175 & 181). The undersigned concurs in applying a multiplier of five to that figure to account for the multiple prior violations of both cited standards and concurs further in reducing that resulting figure by 60% to \$11,086 to account for Midvale's small size, which includes consideration of Midvale's financial wherewithal. The undersigned does not concur in increasing that resulting sum by 10% to account for Midvale's history of violations, because the quintupling of the gravity-based penalty to account for its repeated nature sufficiently addresses this statutory factor. The undersigned concurs with the Secretary's assessment that no penalty reduction is appropriate for the "good faith" factor. Considering that the Secretary withdrew one of the three grouped items originally alleged in Citation 3 and considering further that this withdrawn item involved a different alleged violative condition involving different equipment, this figure is reduced by one-third. Accordingly, a penalty of \$7,391 will be assessed for the two grouped violations represented by Items 5b and 5c of Citation 3.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. As to Serious Citation 1:

a. Item 1a, alleging a Serious violation of 29 C.F.R. § 1910.305(b)(1)(ii), is AFFIRMED as a Serious violation.

b. Item 1b, alleging a Serious violation of 29 C.F.R. § 1910.303(f)(2), is AFFIRMED as a Serious violation.

c. Item 1c, alleging a Serious violation of 29 C.F.R. § 1910.304(f)(1)(viii), is AFFIRMED as a Serious violation.

d. A penalty of \$4,065 is ASSESSED for grouped Items 1a, 1b, and 1c.

2. As to Willful Citation 2:

a. As to Item 1a, alleging a Willful violation of 29 C.F.R. § 1910.147(c)(4)(i):

i. Instance 1 (pertaining to Gluers #1, #2 & #5 [the “FZ Gluers”]), having not been proven, is VACATED.

ii. Instance 2 (pertaining Gluers #3 & #4 [the “KH Gluers”]), having not been proven as to Gluer #4, and having been proven as to Gluer #3 but that proven violation being duplicative of the violation proven for Citation 2, Item 2, Instance 3, is VACATED.

iii. Instance 3 (pertaining to the “Window Machine Model 5A”) is AFFIRMED as a Serious violation.

- iv. Instance 4 (pertaining to the Zerand machines), having not been proven as to Zerand #1 and #3, and having been proven as to Zerand #2 but that violation being duplicative of the violations proven for Citation 3, Items 3a and 3b, is VACATED.
- b. Item 1b, alleging a Willful violation of 29 C.F.R. § 1910.147(c)(7)(i), is AFFIRMED as a Serious violation.
- c. A penalty of \$6,881 is ASSESSED for grouped Items 1a and 1b of Citation 2.
- d. As to Item 2, alleging a Willful violation of § 1910.219(c)(2)(i):
 - i. Instance 1 (pertaining to Gluer #1) and Instance 3 (pertaining to Gluer #3) are AFFIRMED as a Willful violation.
 - ii. Instance 2 (pertaining to Gluer #2), Instance 4 (pertaining to Gluer #4), and Instance 5 (pertaining to Gluer #5), having not been proven, are VACATED.
- e. A penalty of \$30,000 is ASSESSED for Item 2 of Citation 2.
- 3. As to Repeat Citation 3:
 - a. Item 1, alleging a Repeat violation of 29 C.F.R. § 1910.133(a)(1), is AFFIRMED as a Repeat violation and a penalty of \$7,391 is ASSESSED.
 - b. Item 2, alleging a Repeat violation of 29 C.F.R. § 1910.178(l)(1)(i), having not been proven, is VACATED.
 - c. Item 3a, alleging a Repeat violation of 29 C.F.R. § 1910.219(d)(1), is AFFIRMED as a Repeat violation.
 - d. Item 3b, alleging a Repeat violation of 29 C.F.R. § 1910.219(e)(1)(i), is AFFIRMED as a Repeat violation.
 - e. Item 3c, alleging a Repeat violation of 29 C.F.R. § 1910.219(f)(3), having been withdrawn by the Secretary, is VACATED.

- f. A penalty of \$7,391 is ASSESSED for grouped Items 3a and 3b of Citation 3.
- g. Item 4, alleging a Repeat violation of 29 C.F.R. § 1910.219(f)(1), is AFFIRMED as a Repeat violation and a penalty of \$7,391 is ASSESSED.
- h. Item 5a, alleging a Repeat violation of 29 C.F.R. § 1910.303(b)(2), having been withdrawn by the Secretary, is VACATED.
- i. Item 5b, alleging a Repeat violation of 29 C.F.R. § 1910.305(b)(2)(i) is AFFIRMED as a Repeat violation.
- j. Item 5c, alleging a Repeat violation of 29 C.F.R. § 1910.305(g)(1)(iv)(A) is AFFIRMED as a Repeat violation.
- k. A penalty of \$7,391 is ASSESSED for grouped Items 5b and 5c of Citation 3.
- l. Item 6a, alleging a Repeat violation of 29 C.F.R. § 1910.1200(e)(1), is AFFIRMED as a Repeat violation.
- m. Item 6b, alleging a Repeat violation of 29 C.F.R. § 1910.1200(h)(1), is AFFIRMED as a Repeat violation.
- n. Item 6c, alleging a Repeat violation of 29 C.F.R. § 1910.1200(f)(6), is AFFIRMED as a Repeat violation.
- o. A penalty of \$7,391 is ASSESSED for grouped Items 6a, 6b, and 6c of Citation 3.

/s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: September 20, 2021