



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

Secretary of Labor,
Complainant

v.

Austal USA, LLC,
Respondent.

OSHRC Docket No.: 16-0291

Appearances:

Jonathan Hoffmeister, Esq., U.S. Department of Labor, Office of the Solicitor,
Atlanta, Georgia
For the Secretary
Kathryn Willis, Esq., Burr & Forman, LLP
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

Austal USA, LLC, (Austal) is a defense contractor engaged in the design and manufacture of ships. On August 3, 2015, the Occupational Safety and Health Administration inspected Austal's facility in Mobile, Alabama, in response to an employee complaint about an unsafe hand tool, the "miller tool," provided by Austal to its employees. As a result of this inspection, the Secretary issued a Citation and Notification of Penalty to Austal on January 20, 2016. Austal timely contested the Citation.

Item 1 of the Citation alleges a serious violation of the general duty clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act). It alleges Austal's employees "are exposed to amputations, severe lacerations, and other injuries associated with being struck-by the toothed saw blade of the miller tool." The Secretary proposes a penalty of \$4,125.00 for Item 1.

On September 23, 2016, the Secretary filed a motion to amend the Citation to allege, in the alternative, a violation of 29 C.F.R. § 1915.133(a), for issuing, and permitting employees to

use, unsafe hand tools. On October 7, 2016, over Austal's objection, I granted the Secretary's motion to amend the Citation.

I held a hearing in this matter on March 14 and 15 and April 25 and 26, 2017, in Mobile, Alabama. The parties filed briefs on July 14, 2017.¹ For the reasons that follow, I **AFFIRM** the violation, alleged in the alternative, of 29 C.F.R. § 1915.133(a) and assess a penalty of \$4,125.00.

JURISDICTION AND COVERAGE

Austal timely contested the Citation and Notification of Penalty on February 12, 2016. The parties stipulate the Commission has jurisdiction over this action and Austal is a covered business under the Act (*Joint Prehearing Statement*, p. 6). Based on the stipulations and the record evidence, I find the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Austal is a covered employer under § 3(5) of the Act.

STATEMENT OF AGREED FACTS

On March 6, 2017, the parties submitted a *Joint Prehearing Statement*, in which they state,

The following is a concise statement of those facts which are stipulated to and admitted by the parties and will require no proof at hearing:

1. Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission ("Commission") by § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq.
2. The Respondent is an employer engaged in business affecting commerce within the meaning of § 3(5) of the Act.
3. The Commission's presiding Administrative Law Judge has authority to hear the case and issue a decision.
4. On August 3, 2015, OSHA conducted Inspection No. 1082517.
5. Stephen Yeend was the Compliance Safety and Health Officer ("CSHO") assigned to conduct the inspection of Respondent's workplace.
6. OSHA initially issued one citation to which Respondent provided a timely notice of contest of Citation 1, Item 1.

¹ On August 1, 2017, Austal submitted a reply brief, titled *Supplemental Post-Hearing Brief*, which the Secretary moved to strike. Commission Rule 74(b) provides, "Reply briefs shall not be allowed except by order of the Judge." Austal did not move for an order granting leave to file a reply brief, nor did it consult with the Secretary regarding such a motion, as required by Commission Rule 40(a) ("Prior to filing a motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion."). Having considered the contents of Austal's reply brief, I find it raises no new issues or arguments. I decline to accept Austal's reply brief.

7. On September 23, 2016, OSHA sought to amend Citation 1, Item 1 to allege a violation of 29 C.F.R. § 1915.133(a) in the alternative.

8. Austal is a global prime defense contractor and engages in the design and manufacture of commercial ships.

9. Austal employs approximately 4000 employees at its Mobile, Alabama facility.

10. At all relevant times, Austal maintained a written safety and health program.

11. Fitters and welders at Austal have utilized the "Miller tool," which is a Metabo angle grinder with a toothed saw blade.

12. The Miller tool is used for tasks, including chamfering, clipping, trimming, beveling, back gouging, and cutting.

13. Prior to the August 2015 inspection of Austal's Mobile, Alabama facility, Mr. Yeend did not evaluate any Miller tool as part of an inspection.

14. During the course of his inspection, Mr. Yeend walked in the MMF and tool crib, viewed a demonstration of two employees using the Miller tool, and interviewed hourly and management employees.

15. On January 20, 2016, OSHA issued a single citation to Austal, alleging a serious violation of the general duty clause, Section 5(a)(1), of the Act.

16. As the basis for the general duty clause violation, OSHA alleged that Austal's employees were exposed to a struck-by hazard from the Miller tool, which could result in amputations, lacerations, and other injuries.

17. OSHA relies upon the instruction in the Metabo manufacturers' manual as the basis for contending that there is a recognized hazard.

18. On September 23, 2016, the Secretary filed a Motion to Amend the citation in the alternative, to read as follows: 29 C.F.R. 1915.133(a): Employers shall not issue or permit the use of unsafe hand tools.

(Tr. 7-9)

BACKGROUND

OSHA's Inspection

On July 28, 2015, OSHA's Mobile, Alabama, area office received a complaint from an Austal employee regarding the company's use of an angle grinder fitted with a toothed saw blade. The angle grinder is manufactured by Metabo. The tool fitted with a toothed saw blade is called a "miller tool" because it can be used for milling work (Tr. 339, 864).² Southern Gas and Supply Company is the distributor for Metabo products in Alabama and Mississippi (Tr. 645).

² Exhibit C-2 comprises two copies of photographs showing two views of a miller tool.

Because the complaint referred to amputation hazards created by use of the miller tool, OSHA conducted the complaint inspection under its National Emphasis Program on Amputations (Exh. R-1; Tr. 22-24, 83).

On August 3, 2015, CSHO Stephen Yeend arrived at Austal's Mobile, Alabama, shipyard. He met with Christopher Blankenfeld, Austal's senior safety and health manager, and other company representatives. When CSHO Yeend presented them with the employee complaint, they informed him they "were aware of this issue with the miller tool, because they were already in litigation with employees." (Tr. 26) Blankenfeld provided CSHO Yeend with copies of the company's OSHA 300 log (*Log of Work-Related Injuries and Illnesses*) and disciplinary records (Tr. 28). Blankenfeld told CSHO Yeend the employees who were injured using the miller tool "were injured because they didn't follow the work rules on using it, so they were all disciplined for it." (Tr. 30) In fact, Austal failed to discipline any of the employees injured while using the miller tool for failure to follow work rules related to use of the tool (Tr. 202, 255, 322, 441-48, 613-20, 925, 946).

CSHO Yeend looked at one of Austal's tool cribs and saw several miller tools, as well as other hand tools (Exh. C-1, p. 6; Tr. 105). He then observed two demonstrations of employees using the miller tool: "One was an individual that was beveling or chamfering the edge of . . . [an] aluminum plate. The other was [an] individual that was back gouging a weld." (Tr. 30)

CSHO Yeend took photographs of the demonstration and of the miller tool (Exh. C-1; Tr. 32). He interviewed hourly and management employees (Tr. 41-42). CSHO Yeend subsequently received documents from Austal and Metabo pursuant to document subpoenas for emails and other documents (Tr. 64). Based on his inspection, CSHO Yeend recommended that the Secretary cite Austal for a serious violation of § 5(a)(1), which the Secretary did on January 20, 2016. As noted, the Secretary moved to amend the Citation to allege, in the alternative, a serious violation of § 1915.133(a), which I granted on October 7, 2016.

Testimony of Injured Employees

Five employees who had been injured while using miller tools testified.³ For privacy

³ Most of the employee witnesses who had been injured while using the miller tool at Austal's shipyard are suing Austal, Metabo, and other related defendants. Austal's counsel dwelled on this circumstance at some length. The lead plaintiff in the private action is Michael Keshock. Although Mr. Keshock did not testify as a witness in this

purposes, I will not use their names, but will refer to them numerically.

Employee #1: Employee #1 worked as a welder for Austal. He testified he worked with the miller tool daily in the shipyard, estimating he performed approximately 70% of his tasks with the tool (Tr. 171, 173). Employee #1 could complete any task more quickly with the miller tool, but he would have been able to complete any assigned task with other tools available at the shipyard (Tr. 174).

As with all Austal welders and fitters, Employee #1 attended an eight-week training program conducted by Alabama Industrial Development and Training (AIDT). One day of the training was dedicated to the use of the miller tool (Exh. R-16; Tr. 181, 184-85). Austal provides new hires with welding gloves, neoprene gloves (to be worn when using the miller tool, among other tools), a helmet, face shield, safety glasses, and ear plugs (Tr. 223).

Employee #1 testified he felt the miller tool was unsafe when he was required to use it in an overhead position.⁴ “[W]hen you’re over your head and you’re cutting with the miller tool, it’s right in your face.” (Tr. 176) He also stated the training he received at AIDT on use of the miller tool (standing up at demonstration tables) does not reflect actual use of the tool. “[W]hen you use a miller out there in the field, you’re using it in all different types of stance positions, against walls, cutting frames, on the floor, over your head. I mean, you’re using it all over. You’re not just in a standing position. You’re on your knees. You’re crouched. You’re bent over. I mean, there’s a lot of different ways to use it.” (Tr. 183)

Employee #1 described how his injury occurred:

I was about 40 feet in the air in a man lift, boom lift that -- as we call it. I was instructed to cut off what we call lifting lugs on the side of certain things that we lift high in the air. We put heavy-duty lifting lugs on that have to be removed, so I was in the process of cutting it. ... [T]he next thing I know [the miller tool is] out of my hands. When I look down, I see it's went across the top of my fingers. I don't know how it didn't cut me as it fell to the basket. ...It was gone. It kicked back and was out of my hand in less than seconds, it was -- it was gone, it was out. And it cut me, crank lift came down, told my foreman and they got me to first aid.

⁴ Austal supervisors disagreed about whether Austal’s work rules prohibit overhead use of the miller tool. Senior safety and health manager Christopher Blankenfeld stated using a miller tool for overhead work is prohibited, no exceptions, and an employee caught doing so should be disciplined (Tr. 629). Three supervisors disagreed, stating employees generally are permitted to use the tool to work overhead, or that they are allowed to do so in certain locations (Tr. 669, 732, 753).

(Tr. 198-201)

Employee #1 stated his injury was not due to carelessness on his part (Tr. 198). No Austal employee informed him he had violated an Austal work rule, and Austal did not discipline him as a result of the accident (Tr. 201-202). He stated, “I’ve never been written up or verbally reprimanded at Austal.” (Tr. 202)⁵

Employee #1’s injured hand required extensive medical treatment:

Employee #1: I required my first surgery [on] February the 12th and they put some small pins and different things, went through six weeks of therapy in which my finger had absolutely no movement, couldn't bend it, couldn't do anything with it, so the doctor decided to do what he called a fusion, where he put a longer screw in it to give it a bend, and from there it just -- nothing ever worked. They did a third surgery on my finger to clean some tendons up and I had a little bit of use out of the tip of my finger for about two weeks, and after that I had no use of the finger, you know, it didn't function.

Q.: And at some point was it amputated?

Employee #1: September the 12th, yes, sir.

Q: How long between when the injury occurred and the amputation happened?

Employee #1: My injury was on February the 5th, 2014; my amputation was on September the 12th, the same year, 2014.

⁵Blankenfeld conceded Austal did not discipline Employee #1 for any safety infraction related to his accident (Exh. C-5; Tr. 445). Fabrication foreman Gregory Wright was the supervisor of Employee #1 at the time of his injury (Tr. 662-63). Wright completed a *Supervisor's Statement Form* as part of Austal's *Incident/Near Miss Report* concerning the injury to Employee #1 (Exh. C-12). The form includes the following questions, with Wright's handwritten answers in response:

Anything unusual prior to, during, or after accident/incident—

(Wright:) No [Employee #1] had all PPE and all parts of miller

Do you have any doubts about this accident/incident—

(Wright:) No I do not

Any unsafe acts performed—

(Wright:) No

Despite his signed statement submitted to his employer as part of its accident investigation, Wright testified he later determined, after going back and looking at the area where Employee #1 had been located when he was injured, that Employee #1 had been, in fact, improperly using the miller tool (Tr. 666-70, 679-80). He conceded he never amended his purportedly inaccurate statement and failed to recommend disciplinary action for Employee #1 for his supposed misuse of the miller tool (Tr. 686). I find this testimony to be a transparent attempt to minimize documentary evidence unfavorable to Austal. I base this finding on the implausibility of the testimony, as well as on Wright's defensive and evasive demeanor while testifying. I give great weight to Wright's written statement found in Exhibit C-12, drafted contemporaneously with the accident, and no credit to his testimony to the contrary. I also give no weight to Wright's testimony regarding a conversation he claims to have had with Employee #1 approximately three weeks after the accident: “[Employee #1] even admitted to me, saying what he did wrong.” (Tr. 666) Employee #1 denied having this conversation with Wright (Tr. 788, 793-94). Wright's testimony is implausible, and his demeanor while testifying was shifty. I credit the testimony of Employee #1 that he did not admit any wrongdoing in his use of the miller tool at the time of his accident.

Q.: How long did you have to be off work because of the injury?

Employee #1: I was out of work about 37 and a half weeks.

(Tr. 202-203)⁶

Employee #2: Employee #2 works as a fitter for Austal (Tr. 248). He stated any task he was assigned could be accomplished using another tool available at the shipyard, rather than the miller tool. He believed Austal preferred its employees to use the miller tool because it gets the job done faster (Tr. 256-57, 264).

Employee #2 had been injured twice using a miller tool. He stated he does not feel safe using the tool. “I’ve been cut twice by it. One major time in my arm. Maybe two months ago, three months ago, on my pinky. And it just -- I get scared to use it.” (Tr. 251) He had heard the miller tool referred to as “the suicide saw,” and he had been warned, “It will easily come back, cut a finger off, cut this off. You know, damage parts of your body.” (Tr. 264-66)⁷

Employee #2 described his first accident, which occurred in January of 2016 (Tr. 272). He had been assigned to replace tacks in a piece of plate, a task that required him to use the miller tool in an overhead position.

I got up underneath and I started cutting. And I think I maybe cut one or two tacks and when I got about to the third or fourth one, it kicked back on me one time and I stopped. And I looked at the blade see if maybe it was chipped or there was any aluminum stuck in it. I checked everything, it all looked good. I just went back at it again and then the second time when I cut, when it kicked back and come into my arm. ...I got a laceration for my arm about maybe three or four inches long. The blade had come in contact into my arm and had got -- when I got cut, it kicked back and it was stuck in my arm and it was still going. And I reached around there and I unplugged it. And I had ripped my shirt and I had to pull the blade out of my arm. ... I had got stitches. I got I believe five on the inside, five or six on the inside, and I think about 12 or 13 on the outside.

(Tr. 266-268)

Employee #2 sustained a less severe injury in January of 2017, the day before the anniversary of his first injury (Tr. 272). He was assigned once again to cut off tacks that had

⁶Inexplicably, senior safety and health manager Blankenfeld, engaging in semantics, refused to admit any employee suffered an amputation injury when using the miller tool. “I know of employees that have, through—after surgeries and failure [sic] surgery attempts that have had an amputation of a finger. But not an amputation [.]” (Tr. 438)

⁷ Senior safety and health manager Blankenfeld testified he had heard the miller tool referred to as the “widow maker,” and that he himself “may have” used the term “suicide blade” to refer to the miller tool (Tr. 453-53, 522).

been improperly placed.

So they told me to go through there and get the miller and cut all the tacks off. So I went through there and I was cutting each and every one of the tacks and I come off of one and I let go of the button and I was waiting for the blade to come to a complete stop before I sat it down. And I don't know if it hit the guard, had a piece of metal stuck in it or what. But as I was waiting for it, it just kicked back somehow and kicked out of my arm and it come around and cut my pinky.

(Tr. 270)

Austal did not inform Employee #2 he had used the miller tool improperly either time he was injured. “Both times that I had cut myself [Austal] went and got the miller and they said they had to make sure the handle and the guard was on it and make sure it was in their proper place. And they brought it and both times they told me, they said, well, we don't see where you were doing anything wrong.” (Tr. 254-55) Austal has never disciplined Employee #2 for misuse of the miller tool (Tr. 255, 279).

Employee #3: Employee #3 was the only injured employee witness whose injury was not caused by the miller tool kicking back. He was injured on May 21, 2015 (Tr. 323).

I was injured while shaving down a T-bar on my right index finger. Sliced it from my knuckle down to my nail. ...I was down on my knees shaving down a T-bar and someone came up behind me and said something and I let go of the trigger, like you're supposed to, and I held onto the saw but my right index finger was extended and somehow it snatched the glove into the blade.

(Tr. 322)⁸

Austal did not inform Employee #3 he had violated a work rule and he received no discipline as a result of his accident (Tr. 322).

Employee #4: Employee #4 is a former employee of Austal (Tr. 922). He sustained injuries to his index and middle fingers on his left hand (Tr. 924). He described the accident.

[T]hat Sunday I was cutting across the deck and [the miller tool] just kicked back. It kicked back and came right down through my two -- I don't know what you call these two fingers, but basically took out about 98% of the bone.

(Tr. 924)

Employee #4 stated Austal's supervisors preferred employees to use miller tools because they completed the work more quickly with them (Tr. 928). Despite the efficiency of the miller tool, Employee #4 was wary of the tool's tendency to kick back.

[T]here's always just that one little spot that you're going to hit and it's going to kickback on you, it's going to slice you here or there, finger, kneecap, up and down your leg. I mean it's just -- it's just an inherently dangerous tool but, you know -- like I said, I used it for six years straight. You know, at least three or four days a week. And it was just that one time it jumps on you. ...And, you know, if you're just cutting, you know, just like straight across a piece of plate, usually it's going to kick and it's going to go away from you. But when you're cutting down in a hole, somewhere like that type and you're cutting, that's when it, you know, it's going to kick on you. And, you know, you better be ready.

(Tr. 926-27)

Austal did not inform Employee #4 he had improperly used the miller tool. Austal did not discipline him over the accident (Tr. 924-925).

Employee #5: Employee #5 works for Austal as a fitter (Tr. 943). He was injured twice

⁸ Austal claims Employee #3 "conceded he was distracted while using the miller tool." (Austal's brief, p. 52, n. 12) It is not clear how Employee #3 engaged in misuse of the miller tool because some other employee called his name. Employee #3 stated he "let go of the trigger, like you're supposed to." (Tr. 322) Austal does not otherwise explain its theory of how Employee #3 committed a safety infraction at the time he was injured or why Austal failed to discipline Employee #3 if the company believed he had misused the miller tool.

using the miller tool. He stated that the first time, the miller tool “kicked on me, jumped back,” and nicked one of his fingers, but “it wasn’t too bad.” Approximately two months later, he sustained what he termed “a major injury” on the same finger (Tr. 944).

Austal did not inform Employee # 5 he had improperly used the miller tool and it did not discipline him for the accidents (Tr. 946). Austal fired Employee #5 due to the results of a drug screening administered as part of the investigation of the second accident (Tr. 948, 957).

Testimony of Supervisory Employees

Eleven Austal supervisors and foremen testified.⁹ I will summarize their testimony generally, because they all said essentially the same thing—the miller tool is safe if used properly; any injuries sustained by employees using the miller tool were caused by improper use of the tool (“In my career, 14 years, all the miller accidents that I’ve seen have been self-inflicted.” (Tr. 770)); supervisors do not encourage employees to use the miller tool or discourage employees, by mockery or threats, from using alternative tools; Austal emphasizes “safety first”; and supervisors do not prefer employees to use the miller tool due to its efficiency, because they are not concerned about the time it takes to complete a task (Tr. 622, 675, 677, 684, 690-91, 696-97, 706-07, 715, 726, 728, 745-47, 753, 762). The testimony of fabrication supervisor Labaron Brumfield demonstrates the lengths Austal’s supervisors will go to advance the narrative that Austal is unconcerned with productivity, and thus would not pressure employees to use the most efficient tool.

Q.: If you are supervising an employee and that employee seems to be doing his work slow, is that an issue for you as far as his production is just slow?

Brumfield: Not at all.

Q.: So an employee can just go totally at his own pace?

Brumfield: We recommend for an employee to be comfortable with what he's doing.

Q.: So if one employee is able to do a task in let's say five minutes and you've got another employee, let's say he's been there a long time, but he takes 30 minutes to do the task, that's not an issue for you at all?

Brumfield: It's not an issue for me at all.

⁹ This number includes supervisors and foremen who oversaw work done by employees on a daily basis. It does not include other supervisory personnel who testified.

Q.: Okay. As a supervisor, is getting production out part of your job?

...

Brumfield: Yes. Yes, sir.

Q.: But it's not a problem if some of your employees are just taking long, long periods of time to finish their jobs?

Brumfield: That's what my job qualification, for me to step in and assist them if they need help with the job.

Q.: Okay. So you're saying you would step in and do the job for them?

Brumfield: Most of the time, I would.

Q.: And you don't mind doing that?

Brumfield: Not at all.

(Tr. 707-709)

Credibility Determination Regarding Injured Employee Witnesses and Supervisory Witnesses

Austal argues the injured employee witnesses, referred to by Austal as “the Keshock plaintiffs,” are not credible because they have brought suit against Austal and other defendants in private litigation. In support of this argument, Austal cites *Caribco International Corporation*, 1994 WL 53773 (No. 92-2758, 1994), an unreviewed ALJ decision. The cited case is not helpful to Austal for two reasons. First: “[I]t is well-settled that an unreviewed administrative law judge's decision has no precedential value. See *In re Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985) (holding that ‘[a]n unreviewed ALJ decision does not bind the OSHRC or the courts as precedent’) (citations omitted).” *Elliot Constr. Corp.*, 23 BNA OSHC 2110, n. 4 (No. 07-1578, 2012).

Second, Austal quotes this language from *Caribco* in support of its argument the injured employee witnesses are not credible merely by virtue of their private litigation against Austal: “The Court is not bound to give full faith and credit to the evidence of an interested witness, even though not directly impeached or contradicted.” 1994 WL 53773 at *1. Austal omits the preceding sentence, which establishes the ALJ was not referring to the bias of employee

witnesses who have brought private actions against employers, but instead is referring to a supervisory employee witness seeking to provide cover for his employer: “My opinion is that [the project engineer] framed his testimony as to the work activities on the scaffold and to the hazards alleged thereon so as to serve his best interests and that of his employer.” *Id.* The ALJ, having discredited the project engineer’s testimony, went on to affirm all five violation items cited by the Secretary.

It is apparent in this proceeding that the self-interest of each witness employed by Austal could impact his or her testimony. Whether an employee was seeking a favorable judgment, continued good standing with his or her employer, or exculpation from charges of misconduct or negligence, each witness had some incentive to color his or her testimony in the most favorable light. I do not find the injured employee witnesses lack credibility solely because they are engaged in private litigation with Austal, any more than I find Austal’s supervisor witnesses lack credibility simply because they are in management.

In assessing the credibility of all the witnesses, I have taken into consideration the extent to which their own self-interest may have influenced their testimony. I have also carefully observed the demeanor of each witness, and noted which topics elicited defensiveness, evasiveness, or increased nervousness. I have weighed the internal consistency of their testimony and the degree to which their testimony appeared rehearsed. A great deal of the testimony is immaterial to the issues before me. The testimony that is material is, for the most part, undisputed.

With regard to the testimony I find immaterial, neither the injured employees nor the supervisors were particularly credible. The testimony of the injured employee witnesses that they were mocked and threatened when they expressed reluctance to use the miller tools was inconsistent and hyperbolic. The testimony of supervisory employees that they never encouraged the use of the faster miller tool and they were unconcerned with productivity sounded rehearsed and is implausible. As previously noted, the Secretary did not characterize the alleged violation as willful. He has no burden to prove employees were encouraged or required to use the miller tool—he need only establish the miller tool was available for use in Austal’s shipyard. The availability of the miller tool is not in dispute.

The testimony relevant to the issues in this proceeding establishes the following: (1) a

number of employees over several years were seriously injured while using the miller tool; (2) Austal's supervisors, including its senior health and safety manager, were aware a number of employees had been seriously injured while using the miller tool; and (3) Austal never disciplined any employee injured using the miller tool for misuse of the tool or any other safety infraction. These findings are based on facts for which there is no legitimate dispute.

Significant Documentary Evidence

Metabo's Manual

Metabo's operating instructions manual (*Manual*) applies to Metabo's angle grinder, which comes in five models (WEPBA 14-125 QuickProtect, WEPBA 14-150 QuickProtect, WEBA 14-125 Quick, WBA 11-125 Quick, and WBA 11-150 Quick) (Exh. C-3).¹⁰ Section 3.1.c of the *Manual* states,

Do not use accessories which are not specifically designed and recommended by the tool manufacturer. Just because the accessory can be attached to your power tool, it does not assure safe operation.

(Exh. C-3) (emphasis in original)

Section 10 of the *Manual* reiterates this point:

Use only accessories which fulfil the requirements and specifications listed in these operating instructions.

(Exh. C-3)

Section 3.2 provides a specific and detailed warning relevant to this proceeding:

3.2 Kickback and Related Warnings

Kickback is a sudden reaction to a pinched or snagged rotating wheel, backing pad, brush or any other accessory. Pinching or snagging causes rapid stalling of the rotating accessory which in turn causes the uncontrolled power tool to be forced in the direction opposite to the accessory's rotation at the point of jamming.

¹⁰ Austal used at least three different models of Metabo's angle grinder over the years (since at least 2010), including the models addressed by the *Manual* (Tr. 68; 377-78, 399).

* * *

e) **Do not attach a saw chain woodcarving blade or toothed saw blade.** Such blades create frequent kickback and loss of control.

(Exh. C-3) (emphasis in original)

Section 3.3 emphasizes unauthorized accessories cannot be safely guarded:

e) **Use only wheel types that are recommended for your power tool and the specific guard designed for the selected wheel.** Wheels for which the power tool was not designed cannot be adequately guarded and are unsafe.

(Exh. C-3) (emphasis in original)

Safety Grams

Austal issues *Safety Grams*, its version of toolbox talk safety topics, which are “communications that were passed down for training purposes done at the front line manager level to their teams. These are also posted so that employees can review them.” (Tr. 63) Austal issues approximately three *Safety Grams* a week (Tr. 187). Exhibit C-6 comprises several copies of *Safety Grams*, three of which specifically address miller tools. Two of the *Safety Grams* consist of extensive lists of “dos and don’ts” when using the tool. One *Safety Gram* states,

DID YOU KNOW

That 90% of all accidents involving Miller tools and subsequent employee injuries are caused by the tool KICKING BACK during use. WHY YOU ASK? Millers kick back when the miller blade is engaged in cutting on more than one surface. If the miller blade engages the vertical structure member while cutting the horizontal member, the force of the cut will push the miller up into the operator. An unsuspecting operator will likely not be prepared to manage the new directional force, putting he [sic] or she [sic] directly in the way of the spinning blade.

(Exh. C-6, p. 1) (emphasis in original)

Emails

March 2011

Exhibit R-17 is a copy of an email thread between Austal’s senior safety and health manager Christopher Blankenfeld and various officials at Metabo. The purpose of the emails is to set up a meeting for Blankenfeld in West Chester, Pennsylvania, “to meet the representatives from Metabo to talk about improvements to their tools.” (Tr. 542-543)

May 3 & 4, 2011

Exhibit C-10 comprises two emails. The first, sent on May 3, 2011, is from David Tomlin, Austal's director of module manufacturing, to Blankenfeld and other Austal supervisors. He states,

We received a large order of new millers . . . that are garnering significant complaints from the shop floor guys. They are stating they are unsafe and that someone is going to get hurt. To that end, we have begun to pull them off the floor.

I have a few questions:

- 2)¹¹ Are you getting the same complaints?
- 3) How did we make the decision to purchase these?
- 4) What other options do we have from other manufacturers?

I still have a need for Millers, but do not want to place a unit on the floor that is getting such a great amount of concern coming from the floor. Can you help with this?

(Exh. C-10)

On May 4, 2011, Blankenfeld responded, in pertinent part,

I understand that these tools are not as easy to use as some of the past designs but it's the employee who makes the tool unsafe not the tool itself. Any tool that we put these miller blades into **will be just as dangerous**. These blades were never designed to be used in a hand power tool. They are blades that go into a fixed milling machine.

(Exh. C-10) (emphasis in original)

Blankenfeld goes on to state Metabo is working on a new design based on his recommendations.

August 24, 2011

Exhibit R-4 is a copy of an email from August 24, 2011. It is from John Kritzski, who was Metabo's Gulf Coast territory manager in 2011, to David Tomlin and other Austal supervisors. Kritzski wrote, in pertinent part:

¹¹ The copy of the email admitted as Exhibit C-10 starts with "2)."

Hello Everyone,

Thanks again for the opportunity to sit down and discuss the tool concerns on site at Austal. I just wanted to follow up with a summary of what we discussed and what the plan will be moving forward.

...

This is my immediate agenda:

- 1)-address the issue of finding a way to cover the [paddle] switch during operation
- 2)-introduce this modified tool into production on a trial basis to get feedback
- 3)-follow up with production and discuss with all involved the implementation of the modified tool on the floor provided the trial goes well
- 4)-address any repair concerns on existing tools in use
- 5)-keep everyone up to speed on the introduction of the new tool in a few months
- 6)-introduce new tool to Austal via safety training, and or an operational instruction meeting when tool is available to put into production

October 21, 2011

On October 21, 2011, in response to an email asking about ordering new miller tools, Blankenfeld complains about the price increase from \$115.00 to \$145.00 per tool:

I feel that more than doubling the cost and forcing us to absorb the cost of these inherent safety changes that improves their tool (IN THE INDUSTRY) is way out of bounds. We are a big client with these particular tools; if they don't make the deal quite a bit better (Sharpen that Pencil) I would opt for another tool that is reasonable equivalent. ... If it gets to that point we should retrain the individuals using these particular tools and take these tools away from the lesser trained people. If we can't afford a better smarter tool we need to take the necessary steps at making a better smarter employee.

(Exh. C-11)

October 25, 2011

On October 25, 2011, Kritzski emailed Oliver Howard, an Austal employee in its logistics department (Tr. 356). In it, Kritzski compares Metabo models WP 8115 Quick (the model Austal used at that time) and WEPAB 14-125 Quick (a new angle grinder undergoing tests). Kritzski touts the new model, stating,

Please remember Oliver, no other grinder in the world has all the features available on the new Metabo grinder. Safety of your workers was our number one concern. More importantly it was developed to be the world leader in safety and productivity specific for your industry. It was designed with the leading manufacturers, such as Austal's, input from its very inception. We value your input on the final version of this tool and hope that it far exceeds your expectations on what the most productive and safe angle grinder should be.

(Exh. R-5)

May 21, 2012

On May 21, 2012, Kritzski emailed Michelle Bowden, Austal's communications and marketing coordinator, requesting permission for two of Metabo's engineers from Germany to observe Austal employees using Metabo tools.

Would it be at all possible for you to perhaps meet us at security and escort us to an area where our tools are being used so the engineers can get 'down and dirty' to ensure their proper usage and that they are performing correctly in regard to the safety features and applications usage.

Later that month, two Metabo design engineers visited Austal's Mobile shipyard and observed employees using the miller tool (Tr. 119-122).

June 4, 2012

On June 4, 2012, one of Metabo's German engineers sent an email with the subject line "pictures from training center" to William Bain, stating he was attaching photographs "we made during [our] visit." Attached are copies of four photographs showing a man operating a miller tool (Exh. R-7).

January 7 & 8, 2014

Exhibit C-9 is a copy of an email thread from January 7 and 8, 2014. On January 7, 2014, Amy Dewise, Austal's process engineer, sent this message (in pertinent part) to Blankenfeld and other Austal supervisors:

Chris—

I'm looking at the safety metrics, we have had multiple discussions with the trades about improvements. Their biggest complaint is the Metabo—as usual.¹² The latest design is of issue due to the size of the handle. It is too large to allow for a good grip and leads to the lack of proper control of the tool when cutting.

I had spoken with Metabo about a year back when they were in for a demonstration. The salesmen said that if we were not satisfied with the design, they would entertain a tool buy-back. Can we please meet with Metabo to discuss? Can we pursue a new design with the trades' input, so we can finally get this as close to right as possible?

(Exh. C-9)

In response, Blankenfeld provided Dewise with a description of, and background information on, all the models of Metabo grinders in use at the facility. He went on to write, “Some things we may want to consider when deciding on a model. We have approximately 11 OSHA recordable injuries a year involving a Miller Blade attached to one of the non-modified versions.” (Exh. C-6)

After some back and forth between Dewise, Blankenfeld, and another Austal supervisor, Blankenfeld sent the last email (in pertinent part) in the thread on January 8, 2014:

Another issue is the Miller Blades themselves, they were never designed to be put on an angle grinder; these blades are manufactured for use in fixed table milling machines. They have become status quo in most manufacturing industries though for use on Angle Grinders. **I wish we could find something different that works as well. ... Any tool is dangerous in the hands of the complacent and that have lost respect for the tool. A sander can be just as dangerous if someone is not paying attention.** I think our focus should not be on replacing the tools being used but continued retraining of the employees that are using the tool, unsafely and without the respect they deserve. Supervisors and Foremen can help by stopping incorrect use when they see it also; this would go a long way.

Another solution for this would be to find a cutting wheel that is not as lethal as the miller wheel.

(Exh. C-9) (emphasis in original)

¹² Dewise attempted to walk back the phrasing of this sentence in her testimony. “‘Complaint’ was probably the wrong word to use. And, you know, I guess I didn't see it as a negative word but that was one of [the employees'] biggest things. When I'm asking about improvement opportunities and they're listing them, I consider those complaints. Something -- they're not happy about something, they want to change something. So, yes, I did list it as a complaint.” (Tr. 821)

May 27, 2015

Exhibit C-7 is a copy of an email thread from May 27, 2015. The first email is from John Kritzski, who was Metabo's Gulf Coast territory manager in 2015, to Tom Burch, vice-president of sales for Southern Gas and Supply (Tr. 331, 644-45). On May 27, 2015, Kritzski wrote the following to Burch:

Tom,

Currently Metabo does not approve the use of any wheel on our grinders other than a bonded abrasive, or specifically approved diamond wheels for stone cutting. This is due to current safety designs and requirements both in our tool and our wheel guard.

Unfortunately at this time we can not recommend, endorse or approve any wheels other than the specified wheels to be used on any of our angle grinders.

With its current design we can not recommend or allow the use of an all metal grinding wheel on our angle grinders.

Any such use of such wheel on a Metabo is considered dangerous and a potential safety issue to the user.

Best regards,

John Kritzski

(Exh. C-7)

Later that day, Burch forwarded the email to Jean Michon, Austal's indirect purchasing manager (Tr. 646), with the message, "Jean, FYI...this is why Metabo said they didn't move forward with it..." (Exh. C-7)

THE CITATION

The Secretary initially cited Austal for a violation of § 5(a)(1) and later alleged, in the alternative, a violation of § 1915.133(a). If § 1915.133(a) applies, then § 5(a)(1) does not. "It is well established that section 5(a)(1) cannot apply if a standard specifically addresses the hazard cited." *Active Oil Serv., Inc.*, 21 BNA OSHA 1184, 1185 (No. 00-0553, 2005). In his motion to amend the Citation, the Secretary noted he was "not changing the nature of the alleged violation, the facts upon which the alleged violation is based, nor the hazard created by the alleged violation. ... [T]he Secretary's proposed alleged violation description is unchanged." (Secretary's *Motion to Amend*, p. 2) I find, for the reasons discussed below, § 1915.133(a) applies. Therefore, § 5(a)(1) does not.

Alleged Violation of § 1915.133(a)

The alternative alleged violation description states,

29 C.F.R. 1915.133(a):

Employers shall not issue or permit the use of unsafe hand tools.

a) Facility wide: On or about August 3, 2015 and at times prior thereto, the employer allowed the use of an angle grinder with a toothed saw blade, also known as a miller tool, for shipbuilding related activities such as but not limited to chamfering, clipping, trimming, beveling, back gouging a weld, and cutting which exposed employees to amputations, severe lacerations, and other injuries associated with making contact with the toothed saw blade.

The Secretary's Burden of Proof for a § 5(a)(2) Violation

To establish a violation of a safety or health OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

The Cited Standard Applies

Part 1915 of the OSHA standards is entitled *Occupational Safety and Health Standards for Shipyard Employment*. Section 1915.2(a) states, "Except where otherwise provided, the provisions of this part shall apply to all ship repairing, shipbuilding and shipbreaking employments and related employments." Section 1915.4(k) states, "The term shipbuilding means the construction of a vessel including the installation of machinery and equipment." The parties stipulate Austal "engages in the design and manufacture of commercial ships." (*Joint Prehearing Statement*, p. 7) Austal's worksite is a shipyard covered by part 1915 (Tr. 19-20).

The Secretary contends OSHA's interpretation of "hand tools" includes hand-held power tools, such as the miller tool at issue (Secretary's brief, p. 9). Appendix A to OSHA Directive CPL 02-00-157 (*Shipyard Employment "Tool Bag" Directive*) addresses *Application of 29 CFR Part 1910 Standards When 29 CFR Part 1915 Standards Do Not Address a Recognized Hazard in Shipyard Employment*. The appendix provides a side by side comparison of the Part 1915 shipyard employment standards and the Part 1910 general industry standards. Under *29 CFR Part 1910, Subpart P: Hand and Portable Powered Tools and Other Hand-Held Equipment*,

Appendix A provides § 1915.133(a) preempts § 1910.242(a), stating, “1915.133(a) applies on vessels and on shore for general requirements for hand and portable powered tools and equipment, preempting this standard in its entirety.” (Exh. C-8, p. A-13) The quoted language indicates the term “hand tools” includes hand-held power tools. The Secretary’s reasonable interpretation of the cited standard is entitled to deference.

When the Secretary offers interpretations of . . . regulations during the administrative adjudication process, those interpretations are more than just arguments by a party to an adversarial proceeding. Even in this context, the Secretary’s interpretations of its own regulations constitute “agency action” and “an exercise of the agency’s delegated lawmaking powers” under the Act. *Martin* [v. *Occupational Safety & Health Review Comm’n*,] 499 U.S. [144,] 157, 111 S.Ct. 1171. Indeed, “the Secretary’s litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary’s promulgation of a workplace health and safety standard.” *Id.*; see also *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1294 (D.C. Cir. 1995) (“[W]e defer even where the Secretary offers his interpretation in the context of litigation before the Commission.”).

Sec’y, U.S. Dep’t of Labor v. Action Elec. Co., 868 F.3d 1324, 1331 (11th Cir. 2017).

I determine the miller tool at issue in this proceeding is a hand tool (Tr. 22, 74).

Although Austal argues the Secretary failed to establish it violated § 1915.133(a), applicability of the standard is the one element of the violation Austal does not contest (Austal’s brief, p. 49) (“[T]he Secretary failed to establish a violation of the regulation. The Secretary did not prove employee exposure to a ‘hazard.’ Likewise, at hearing, the Secretary failed to establish knowledge on Austal’s part.”) I find Part 1915 applies to Austal’s worksite as a shipyard where employees engaged in shipbuilding, and § 1915.133(a) applies to the miller tool, which is a hand tool within the meaning of the standard. The Secretary has established the cited standard applies to the cited conditions.

The Terms of the Cited Standard Were Violated

It is the Secretary’s burden to establish Austal issued and/or permitted the use of unsafe hand tools. It is undisputed Austal both provided its employees with miller tools and permitted their use. The critical issue is whether the miller tool is “unsafe.”

“Unsafe” is not defined by the cited standard. The *New Oxford American Dictionary* (3d. ed. 2010) defines the term as “not safe; dangerous.” In turn, “dangerous” is defined as “able or likely to cause harm or injury.” The Secretary argues the miller tool is unsafe based on an

explicit warning in Metabo's operating instructions manual (*Manual*) and the number and nature of injuries to employees between January 2013 and October 8, 2014.

As previously noted, with reference to its angle grinder, Metabo's *Manual* specifically warns:

e) **Do not attach a saw chain woodcarving blade or toothed saw blade.** Such blades create frequent kickback and loss of control.

(Exh. C-3) (emphasis in original)

Here, despite the *Manual's* clear warning that toothed saw blades *should not* be attached to the Metabo angle grinder, Austal provided approximately 2,600 angle grinders fitted with toothed saw blades (miller tools) to its fitters and welders at its shipyard (Tr. 523). The *Manual* establishes the manufacturer believes the angle grinder is unsafe when converted to a miller tool. Austal's record of injuries establishes Metabo's belief the miller tool is unsafe is justified.

Austal's OSHA 300 log (*Log of Work-Related Injuries and Illnesses*) demonstrates the miller tool was implicated in 29 reportable kickback injuries between January 2013 and October 8, 2014. The miller tool accounted for six other injuries not identified as kickback injuries. During the same period, all other tools combined accounted for 12 reportable kickback injuries (Exh. C-4). After October 8, 2014, Austal stopped using the designation of "miller tool" for an injury caused by a miller tool, referring to it as only a "tool," although it continued to specify kickback injuries caused by sanders and drills. Between October 2014 and July 2015, Austal's OSHA 300 log records nine unspecified "tool" injuries (Exh. C-4, pp. 43-51). It is known that at least two of the unspecified "tool" injuries were caused by miller tools (Exh. C-4, pp. 49-50, cases #54 & #66).¹³

Austal's *Safety Grams* also acknowledge the inherent danger of using miller tools. As noted, one *Safety Gram* states,

¹³ Exhibit C-14 is a copy of Austal's *Incident/Near Miss Report* for case #66. Supervisor Jason Ross completed the *Supervisor's Statement Form* for the incident. Asked to describe what happened, Ross wrote, "The Miller jumped & struck his finger." Ross answered the other questions on the form regarding the incident:

Do you have any doubts about this accident/incident—

(Ross:) No

Any unsafe acts performed—

(Ross:) No

(Exh. C-14)

DID YOU KNOW

That 90% of all accidents involving Miller tools and subsequent employee injuries are caused by the tool KICKING BACK during use. WHY YOU ASK? Millers kick back when the miller blade is engaged in cutting on more than one surface. If the miller blade engages the vertical structure member while cutting the horizontal member, the force of the cut will push the miller up into the operator. An unsuspecting operator will likely not be prepared to manage the new directional force, putting he [sic] or she [sic] directly in the way of the spinning blade.

(Exh. C-6, p. 1) (emphasis in original)

Austal does not address the substantive arguments made by the Secretary, but quibbles over two points of CSHO Yeend's testimony. First, during his deposition, Yeend remarked that a manufacturer's manual is "a starting point."

Q.: In . . . previous inspections . . . in shipyards of hand tools, did you review or rely upon manufacturer's manuals?

A. Yes.

Q. To what extent?

A. That is a starting point in reviewing the equipment to determine what it was designed for and how it's to be used with respect to safety.

Q. And you mentioned those manuals are a starting point. Would the employer's actual use and what they do as far as safety precautions also factor into whether there's a hazard posed?

A. Yes.

(Tab A (Deposition of CSHO Yeend, Tr. 27-28) of Austal's *Motion for Summary Judgment*)

Austal appears to believe CSHO Yeend's remark that a manufacture's manual is "a starting point" implies the *Manual's* explicit warning not to retrofit its angle grinders with toothed saw blades is insignificant. Austal argues, "[T]he evidence introduced at hearing regarding Austal's *actual* use makes clear the tool was not 'unsafe.'" (Austal's brief, p. 50) (emphasis in original) I disagree. I find the evidence regarding the actual use of the miller tool by Austal's employees establishes the tool was unsafe. The injured employees testified the miller tools they were using kicked back, causing the injuries they sustained. The actual hazard to which the injured employees were exposed is the specific hazard described in detail in

Metabo's *Manual*:

Kickback is a sudden reaction to a pinched or snagged rotating wheel, backing pad, brush or any other accessory. Pinching or snagging causes rapid stalling of the rotating accessory which in turn causes the uncontrolled power tool to be forced in the direction opposite to the accessory's rotation at the point of jamming.

* * *

e) **Do not attach a saw chain woodcarving blade or toothed saw blade.** Such blades create frequent kickback and loss of control.

(Exh. C-3) (emphasis in original)

Second, upon his initial examination of Austal's OSHA 300 log, CSHO Yeend identified 60 injuries to employees inflicted by miller tools. He subsequently reduced the number of injuries caused by miller tools to 29. Austal claims the OSHA 300 log does not establish the miller tool is unsafe, "given that the Secretary was forced to admit that not all of the injuries listed therein were, in fact, attributable to the miller tool or the alleged kickback hazard." (Austal's brief, p. 50) Austal does not indicate the number of injuries it believes its employees must suffer before it deems the miller tool unsafe.¹⁴ Keeping in mind that "[o]ne purpose of the Act is to prevent the first accident." *Lee Way Motor Freight, Inc. v. Secretary*, 511 F.2d 864, 870 (10th Cir.1975)." *Hamilton Fixture*, 16 BNA OSHC 1073, 1099 (No. 88-1720, 1993), *aff'd* 28 F.3d 1213 (6th Cor. 1994) (unpublished), I find the occurrence of at least 29 serious injuries over a 22-month period sufficient to establish the tool being used in each of these instances is likely to cause harm or injury.

I find, therefore, the miller tool is unsafe. I base this finding on the following: (1) the testimony of the injured employees establishing the miller tools they were using kicked back, inflicting their injuries; (2) the explicit warning in Metabo's *Manual* that its angle grinders should not be fitted with unapproved accessories, *especially* toothed saw blades; (3) the reason given in Metabo's *Manual* for the explicit warning against toothed saw blades (the kickback hazard); (4) the detailed description acknowledging the kickback hazard in Austal's *Safety Gram*; (5) the emails from Austal's management, going back to 2011, acknowledging numerous employee complaints that the miller tool was unsafe;¹⁵ (6) the email forwarded by Tom Burch

¹⁴ Blankenfeld estimated as many as 50 injuries may be attributed to employees using miller tools since 2013 (Tr. 451). In his January 7, 2014, email to Dewise, he acknowledged 11 injures per year are attributable to the miller tool (Exh. C-6).

¹⁵ Specifically, miller tools "are garnering significant complaints from the shop floor guys. They are stating they are

from Metabo to Austal (more than two months before the OSHA inspection at issue) informing the company, “[W]e can not recommend or allow the use of an all metal grinding wheel on our angle grinders. Any such use of such wheel on a Metabo is considered dangerous and a potential safety issue to the user.” (Exh. C-7); and (7) and the number of injuries sustained by employees using miller tools caused by the kickback hazard.

The Secretary has established the miller tool is unsafe. The terms of § 1915.133(a) were violated.

Employees Were Exposed to the Violative Condition

Approximately 1,000 welders and fitters used miller tools on a daily basis (Tr. 133, 377). Every time they used the miller tools, they were exposed to the kickback hazard inherent in the use of the tools.

In its brief, Austal makes the curious argument, without citation to the hearing transcript, that, “CSHO Yeend admitted under oath that his inspection did not reveal exposure to any hazards, whether kickback hazards or otherwise.”¹⁶ (Austal’s brief, p. 51) This is not so. CSHO Yeend testified at length his inspection established Austal’s employees used the miller tools on a daily basis and, as established by Austal’s OSHA 300 log, a number of employees had been injured as a result of the kickback hazard. “[Around 30 injuries] were directly related to [the] miller tool and then there was a question about others that didn’t necessarily mention [the] miller tool but had similar descriptions as far as a kickback or injury types. ... [T]here were examples where kickback was mentioned in the descriptive.” (Tr. 56) “Yes, I determined this was a serious [violation], primarily from the types of injuries that could occur up to amputations, but also because by nature serious type injuries go on their OSHA 300 logs. ... I did notice that there was a significant number of injuries related to the miller tool.” (Tr. 72-73)

Next, Austal contends its OSHA 300 log does “not prove exposure where the evidence did not indicate that injuries were reasonably predictable in light of how the miller tool functions and how Austal employees are required to properly operate the miller tool,” and cites *Better Bilt Products, Inc.*, 15 BNA OSHC 1167 (No. 89-2028, 1991). (Austal’s brief, p. 51) The cited case

¹⁶ Austal may be referring to the fact CSHO Yeend did not observe any Austal employees using miller tools to perform actual work during his walkaround inspection, because Austal only permitted him to observe two controlled demonstrations of the miller tool. If this is the basis for Austal’s statement, it is a disingenuous argument. CSHO Yeend testified that, other than the demonstration, he did not “observe any other Austal employee demonstrating or operating the miller tool” during his inspection (Tr. 103).

is another unreviewed ALJ decision (concerning the machine guarding standard) with no precedential value. Furthermore, the Secretary has established injuries are reasonably predictable in light of how the miller tool functions—it is prone to kicking back, which, as Austal’s *Safety Gram* warns, potentially places the employee using the miller tool “directly in the way of the spinning blade.” (Exh. C-6)

The Secretary has established Austal’s employees were exposed to the kickback hazard created by the use of the miller tool.

Employer Knowledge

The Secretary must establish Austal had either actual or constructive knowledge of the violation.

[T]he Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. *See Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir.1979); *New York State Elec. & Gas Corp.*, 88 F.3d at 105; *see also Secretary of Labor v. Access Equip. Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1718, at *9 (1999). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, “his knowledge and approval of the work methods employed will be imputed to respondent”).

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1307–08 (11th Cir. 2013).

Here, each Austal manager, director, supervisor, and foreman who testified was aware Austal’s employees were using unsafe hand tools when they used miller tools. The record is replete with emails, *Safety Grams*, reports of employee injuries, and numerous employee complaints detailing the kickback danger inherent in using the miller tool, the blades of which, as Blankenfeld acknowledged, were never intended to be used in Metabo’s angle grinders.

Contrary to the abundant evidence of Austal’s knowledge, Austal argues the citation is

due to be vacated because the Secretary failed to prove employer knowledge on behalf of Austal. . . . Austal's communications with Metabo did not establish knowledge of a hazard. . . . The *only* communication to the contrary came on May 27, 2015—*after* the Keshock litigation had been filed against both Metabo and Austal—and, as John Kritzski testified, related to the use of a cutting wheel, not the toothed saw blade.¹⁷

(Austal's brief, p. 53) (emphasis in original) Austal refers to the numerous communications with Kritzski over the years and the visit from the German engineers who observed Austal employees using miller tools. Neither Kritzski nor the engineers raised any safety concerns regarding the use of the miller tools. Thus, Austal argues, it could not know the miller tool is unsafe. Even if I overlook the weaknesses in Austal's argument (Kritzski is a salesman with no background in safety (Tr. 331-32), and Metabo's *Manual* could not be more explicit in warning of the dangers of fitting angle grinders with a toothed saw blades), Austal's contention it did not know the miller tool is unsafe fails. It is undisputed numerous Austal management officials were aware, at least since 2011, that its own employees raised repeated, consistent concerns regarding the kickback hazard characteristic of miller tools. At the hearing, Austal impugned the integrity of the "Keshock plaintiffs" and was dismissive of their claims. But these injured employees only became "Keshock plaintiffs" in May of 2015; for at least four years prior to the litigation, enough employees had raised concerns about the miller tools that Austal's supervisors discussed the complaints in various emails ("Their biggest complaint is the Metabo—as usual." (Exh. C-9)). Austal did not need Metabo to alert it of the dangers of using miller tools--its own employees had informed Austal of the dangers inherent in the use of miller tools for years, based on actual experience.

Even without Kritzski's May 27, 2015, email, there is substantial evidence in the record to establish employer knowledge that the miller tool used daily by Austal's employees was unsafe and in violation of § 1915.133(a). Kritzski's email is one more substantive piece of evidence bolstering the Secretary's case. Austal's argument the email was sent *after* the Keshock litigation is irrelevant—it was sent *before* the OSHA inspection, which is the significant

¹⁷ The email is not related only "to the use of a cutting wheel," rather than the toothed saw blade, as Austal states. By its own terms, the email prohibits the use of any unapproved wheel: "Currently Metabo does not approve the use of any wheel on our grinders *other than a bonded abrasive, or specifically approved diamond wheels for stone cutting*. . . . Unfortunately at this time we can not recommend, endorse or approve any wheels other than the specified wheels to be used on any of our angle grinders. With its current design we can not recommend or allow the use of an all metal grinding wheel on our angle grinders." (Exh. C-7) (emphasis added)

event in this proceeding.

The alleged violation description for both the original and the amended citation states, “Facility wide: *On or about August 3, 2015 and at times prior thereto*, the employer allowed the use of an angle grinder with a toothed saw blade, also known as a miller tool[.]” (emphasis added) Austal had adequate information prior to May 27, 2015, that the miller tool was unsafe; from May 27, 2015, to the date of OSHA’s inspection, Austal had a written communication from Metabo specifically warning that fitting the angle grinder with an unapproved accessory “is considered dangerous and a potential safety issue to the user.” (Exh. C-7) Blankenfeld acknowledged Austal had received the email in May 2015, “roughly five or six days after we received a notice of litigation that I was named in a lawsuit.” (Tr. 544) Austal was still providing its employees with miller tools at the time of the hearing, almost two years after receiving the email (Tr. 377).

The Secretary established Austal’s supervisory employees had actual knowledge the miller tool used by approximately 1,000 employees is unsafe. Their knowledge is imputed to Austal.

I find the Secretary has established Austal was in violation of § 1915.133(a).

Characterization of the Violation

The Secretary characterized the violation of § 1915.133(a) as serious. A serious violation is established when there is “a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” 29 U.S.C. § 666(k). I find serious physical harm is the likely result if a miller tool kicks back while in use, as it is prone to do, as evidenced by the injuries of Austal’s employees. The violation is serious.

Unpreventable Employee Misconduct Defense

Austal argues any violations of the cited standard results from unpreventable employee misconduct. “To establish this affirmative defense, an employer must show that it ‘(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered.’ *Manganas Painting Co.*, 21 BNA OSHC [1964, 1997 (No. 94-0588, 2007)].” *Stark Excavating, Inc.*, 24

BNA OSHC 2215, 2220 (Nos. 09-0004 & 09-0005, 2014).

Because I find the miller tool is unsafe and any use of the tool is a violation of § 1915.133(a), Austal cannot establish the first element of the defense—it did not have a work rule designed to prevent the use of the miller tools. It therefore could not have communicated a rule prohibiting the use of the miller tool to its employees; it could not take steps to discover violations of the work rule; and it could not enforce such a rule when violations were discovered.

Even if one accepts Austal’s position that any employee who sustained an injury necessarily misused the miller tool, Austal would be unable to establish it effectively enforced a work rule designed to prevent the misuse. Austal argues, without citation to the transcript, “Austal disciplined those who were discovered not complying with such rules. Nothing offered by the Secretary—or by the last-minute Keshock plaintiff witnesses—controverts the fact that known violators were disciplined.” (Austal’s brief, p. 55) Blankenfeld also asserted employees who misused hand tools were disciplined. “Any time we've had an incident where an employee is using a hand tool or a power tool unsafely, there's been disciplinary action, so that would be employee misconduct, which we act on accordingly, according to our progressive discipline policy.” (Tr. 577-78) This assertion is belied by the record.

Austal adduced no documentary evidence it disciplined any of the injured employees. Blankenfeld testified from memory that Austal disciplined three employees injured while using miller tools, but Austal failed to produce proof of the purported discipline (Tr. 558-62). I determined at the hearing, based on Blankenfeld’s testimony and counsel for Austal’s representations, that disciplinary records did not exist for the three employees cited by Blankenfeld (Tr. 613-620). Blankenfeld testified even verbal reprimands should be documented, yet none were introduced by Austal to show enforcement of its safety program (Tr. 446). CSHO Yeend compared the OSHA 300 log injuries to Austal’s disciplinary records and found employees “had not necessarily been disciplined when there was an OSHA 300 entry.” (Tr. 61) The five injured employees who testified each stated Austal had not disciplined them for any safety infraction related to their accidents. I determine Austal failed to enforce its safety policy.

I find Austal failed to establish the employee misconduct defense.

Alternative Alleged Violation of the General Duty Clause

Having found Austal committed a violation of § 1915.133(a), a specific standard, it is

unnecessary to dispose of the alternate alleged violation of § 5(a)(1). “Where, as here, the Secretary makes an alternative allegation, only one of his allegations can prevail, i.e. the alternative allegation is moot if the first provision alleged is found to apply.” *Tower Maint. Corp.*, 25 BNA OSHC 2146, 2147 (No. 13-0777, 2016). For purposes of review, however, I will briefly address the evidence in this proceeding that establishes the elements of the alleged § 5(a)(1) violation that do not overlap with the elements of a § 5(a)(2) violation.

The Secretary’s Burden of Proof for a § 5(a)(1) Violation

To prove a general duty clause violation, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). He must also prove that the employer had knowledge of the hazardous condition. *Burford’s Tree, Inc.*, 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010), *aff’d*, 413 F. App’x 222 (11th Cir. 2011) (unpublished).

S. J. Louis Constr. of Texas, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016).

Alleged Serious Violation of § 5(a)(1)

Item 1 of Citation No. 1 alleges,

OSH ACT of 1970 Section (5)(a)(1): The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees are exposed to amputations, severe lacerations, and other injuries associated with being struck-by the toothed saw blade of a miller tool:

a) Facility wide: On or about August 3, 2015 and at times prior thereto, the employer allowed the use of an angle grinder with a toothed saw blade, also known as a miller tool, for shipbuilding related activities such as but not limited to chamfering, clipping, trimming, beveling, back gouging a weld, and cutting which exposed employees to amputations, severe lacerations, and other injuries associated with making contact with the toothed saw blade.

Among other methods, one feasible and acceptable means of abatement to correct this hazard includes but not limited to using tools designed for the shipbuilding related activities such as but not limited to the GTW series plate beveling tool provided by the same manufacturer.

I find the Secretary met his burden for proving element (1) (a condition in the workplace presented a hazard), element (3) (the hazard was causing or likely to cause death or serious physical harm), and the element of employer knowledge for the reasons discussed in the previous section finding a violation of § 1915.133(a). To prove a violation of § 5(a)(1), the Secretary

must also establish Austal or the shipbuilding industry recognized the cited hazard and that a feasible and effective means existed to eliminate or materially reduce the hazard. I determine the Secretary established both of these elements.

The Employer or Its Industry Recognized the Hazard

A “recognized hazard” is a condition that is “known to be hazardous.” *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979) (quoting *Georgia Elec. Co.*, 5 BNA OSHC 1112, 1115–1116 (No. 9339, 1977)). I find Austal knew use of the miller tool was hazardous. Austal recognized the kickback hazard caused by use of the miller tool. I base this finding on the following documentary evidence:

(1) Austal’s *Safety Gram* stating,

Millers kick back when the miller blade is engaged in cutting on more than one surface. If the miller blade engages the vertical structure member while cutting the horizontal member, the force of the cut will push the miller up into the operator. An unsuspecting operator will likely not be prepared to manage the new directional force, putting he [sic] or she [sic] directly in the way of the spinning blade.

(Exh. C-6);

(2) The May 3, 2011, email from Austal’s director of module manufacturing, David Tomlin, stating, “We received a large order of new millers . . . that are garnering significant complaints from the shop floor guys. They are stating they are unsafe and that someone is going to get hurt,” and Blankenfeld’s response on May 4, 2011, stating, “These blades were never designed to be used in a hand power tool. They are blades that go into a fixed milling machine.” (Exh. C-10);

(3) The January 7, 2014, email from Austal process engineer Amy Dewise, stating, “[W]e have had multiple discussions with the trades about improvements. Their biggest complaint is the Metabo—as usual. The latest design is of issue due to the size of the handle. It is too large to allow for a good grip and leads to the lack of proper control of the tool when cutting.” Blankenfeld’s response indicating the miller tool was the cause of 11 recordable injuries per year and his later response on January 8, 2014: “Another issue is the Miller Blades themselves, they were never designed to be put on an angle grinder; these blades are manufactured for use in fixed table milling machines. . . . Another solution for this would be to find a cutting wheel that is not as lethal as the miller wheel.” (Exh. C-9); and

(4) The May 27, 2015, email from Metabo's Kritzski to Tom Burch of Southern Gas and Supply, subsequently forwarded to Austal's purchasing manager:

Tom,

Currently Metabo does not approve the use of any wheel on our grinders other than a bonded abrasive, or specifically approved diamond wheels for stone cutting. This is due to current safety designs and requirements both in our tool and our wheel guard.

Unfortunately at this time we can not recommend, endorse or approve any wheels other than the specified wheels to be used on any of our angle grinders.

With its current design we can not recommend or allow the use of an all metal grinding wheel on our angle grinders.

Any such use of such wheel on a Metabo is considered dangerous and a potential safety issue to the user.

Best regards,

John Kritzski

(Exh. C-7)

Means to Eliminate or Materially Reduce the Hazard

The Secretary alleges in the Citation, "Among other methods, one feasible and acceptable means of abatement to correct the hazard includes but [is] not limited to using tools designed for the shipbuilding related activities such as but not limited to the GTW series plate beveling tool provided by the same manufacturer."

The Secretary has the burden of "demonstrat[ing] both that the [proposed abatement] measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard." *Beverly Enters.*, 19 BNA OSHC at 1190, 2000 CCH OSHD at p. 48,981. "Feasible means of abatement are those regarded by conscientious experts in the industry as ones they would take into account in 'prescribing a safety program.'" *Id.* at 1191 (quoting *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973)). If the proposed abatement "creates additional hazards rather than reducing or eliminating the alleged hazard, the citation must be vacated for failure to prove feasibility" *Kokosing*, 17 BNA OSHC at 1875 n.19, 1995-1997 CCH OSHD at p. 43,727 n.19. But the Secretary is not required to show that the proposed abatement would completely eliminate the hazard. *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122, 1993-1995 CCH OSHD ¶ 30,048, p. 41,279 (No. 88-572, 1993).

Acme Energy Servs., 23 BNA OSHC 2121, 2127 (No. 08-0088, 2012).

CSHO Yeend testified, “[T]he abatement could be as simple as not using [the miller tool] and using the right tool for the job.” (Tr. 71) Blankenfeld conceded Austal had other tools available capable of doing all the tasks for which employees used miller tools (Tr. 384-87). Austal’s supervisors repeatedly stated employees were not required to use miller tools if they were uncomfortable using them, and they were allowed to use alternative tools (Tr. 690, 696-97, 706-07, 715, 726, 745-47, 762).

The parties stipulated, “The miller tool is used for tasks, including chamfering, clipping, trimming, beveling, back gouging, and cutting.” (Tr. 8) Despite this stipulation, one of Austal’s *Safety Grams* specifically lists tasks for which a miller tool should *not* be used:

Never Use a Miller Tool when you are:

- Cutting Long Length of Plate —“You should ONLY use a Skill Saw to make this cut”
- Trimming Loose Parts —“You should ONLY use a Band Saw or Reciprocating Saw”
- Cutting Pipe —“You should ONLY use a Chop Saw or a Band Saw”
- Cutting Extrusions —“You should ONLY use a Skill Saw to make this cut”
- Beveling —“You should ONLY use a Trimmer, Router or Sander”

(Exh. C-6)

Shawn Wilber is Austal’s advanced shipbuilding manager. His job entails “basically continuous improvement across the board. So that applies to tools, to processes, software, everything. So cheaper, faster, better.” (Tr. 878) Austal asked Wilber to look at a list of tools and evaluate whether they could be used by Austal’s employees to perform tasks for which the miller tool is used. One of the tools Wilber evaluated was the GTW series plate beveling tool proposed as a means of abatement in the Secretary’s Citation. Wilber agreed it could be used at Austal’s shipyard.

Q.: All right, you were asked some questions about the GTW beveling –

Wilber: Yes, sir.

Q.: Is that a tool that can be used for some applications at Austal?

Wilber: Yes, sir.

Q.: And is -- well I guess it can be used to bevel, right?

Wilber: Yes.

Q.: And at Austal the miller tool is also used to bevel?

Wilber: Not so much. It is used in a handful of locations, but we also have routers and we have multiple different tools that we can use to bevel. But it is used to bevel, I'm not saying that's not.

(Tr. 911)

Blankenfeld testified an employee could use a grinding tool to chamfer (Tr. 604). He stated all tools alternative to the miller tool are “safe for whatever application we allow [employees] to use it in.” (Tr. 605) Blankenship testified employees can use sawzalls and band saws to clip, cut, and trim. They can back gouge by using a plunge router or a bull nose grinder (Tr. 384-86). The Secretary has established his proposed abatement measures are capable of being put into effect. He must also prove they would be effective in materially reducing the incidence of the hazard.

I find the record evidence establishes the miller tool has an inherently heightened risk of kicking back and injuring employees. Evidence for this heightened risk includes the specific warning against fitting toothed saw blades in angle grinders found in Metabo’s *Manual*, the warning about the kickback hazard in Austal’s *Safety Grams*, the number of injuries in Austal’s OSHA 300 log attributed to miller tools kicking back, and the descriptions of the accidents in which the employee witnesses were injured. Shawn Wilber’s testimony explains why a toothed saw blade increases the likelihood of kickback compared to other accessories that are approved for Metabo’s angle grinders.

Wilber: [W]e’re slowly processing to try and make the blades safer. One of the things that we’re trying to do is remove the gullet part of the saw[.] ... As you look at the saw blade, the hole behind the tooth, that’s basically what allows you to over-feed the tooth and provide the kickback. So what we’ve doing is we’re modifying the blade of the body to reduce the possibility of the kickback. And currently that blade is in use at Austal. And all the older style blades are off the floor.

...

JUDGE JOYS: Tell me what the gullet is again?

Wilber: Right behind the tooth, the carbide, is a piece of the saw blade itself. And there's a relief that goes down. And that opening that goes down is where you can feed the next tooth. So we raise that up so there's less of an opening so you can't - it's more difficult to over feed it.

JUDGE JOYS: And over-feeding is what causes the kickback?

Wilber: Basically, yes.

(Tr. 902-03)

I find the Secretary has established that using available alternative hand tools instead of miller tools to perform required tasks at Austal's shipyard would be effective in materially reducing the incidence of the kickback hazard.

The Secretary has established a violation of § 5(a)(1). For the reasons discussed in the section addressing the § 1915.133(a) violation, I find the violation is serious.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination 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).

Austal employs approximately 4,000 employees at its Mobile, Alabama, shipyard (Tr. 7). CSHO Yeend testified he had inspected Austal's facility prior to the inspection at issue, but the Secretary did not introduce evidence of prior citations (Tr. 164). I do not credit Austal with good faith based on the awareness of its supervisory personnel of the risks inherent in the use of the miller tool. *Gen. Motors Corp., CPCG Okla. City Plant*, 22 BNA OSHC 1019, 1048 (No. 91-2834E, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

The gravity of the violation is high. Approximately 1,000 welders and fitters at Austal's shipyard used miller tools on a daily basis. Despite frequent complaints from employees going back to at least 2011, Austal took no steps to address the daily exposure to kickback hazard. I

assess a penalty of \$4,125.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 1, Citation 1, alleging a serious violation of § 1915.133(a), is **AFFIRMED** and a penalty of \$4,125.00 is assessed.

SO ORDERED.

Date: November 21, 2017

/s/
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia