Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

MARTIN JOSEPH WALSH, Secretary of Labor, United States Department of Labor, Complainant, v. ROLLY MARINE SERVICE COMPANY, Respondent.	OSHRC Docket No. **20-0208**

DECISION AND ORDER

Attorneys and Law firms

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JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Rolly Marine Service Company owns and operates a full-service shipyard for yachts in Fort Lauderdale, Florida. On July 13, 2019, a yard foreman (GE)[1] employed by Rolly told co-workers he felt unwell. GE called his wife, who drove to the shipyard to pick him up and take him to the hospital, where he was admitted, diagnosed, and rushed into surgery. Despite emergency surgery, GE died the next morning from "complications of blunt force injury" to his abdomen (Ex. J-2). On July 14, 2019, Rolly notified the Occupational Safety and Health Administration (OSHA) of GE's death.[2] OSHA Compliance Safety and Health Officer (CSHO) David Tiesi arrived at Rolly's shipyard on July 15, 2019, to conduct a fatality investigation.[3] Based on employee

[1] For confidentiality purposes, the foreman is referred to by his initials "GE."
[2] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. See Order 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), superseding Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012) (Order No. 1-2012 was in effect when the citation was issued). The terms "Secretary" and "OSHA" are used interchangeably herein.
[3] A Compliance Safety and Health Officer is a person authorized by OSHA to conduct inspections. *See* 29 C.F.R. §1903.22(d).

interviews and video from a security camera, CSHO Tiesi concluded GE had been operating a DAKE 70-ton hydraulic press when it ejected a metal bar that struck him in the abdomen, causing the injury that ultimately led to his death.[4] (Tr. 76-80.)

The Secretary subsequently issued Rolly a two-item citation under the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651-78. Item 1a alleges a serious[5] violation of § 5(a)(1), the "general duty" clause, for exposing employees to struck-by hazards when operating the DAKE hydraulic press, which "was altered from its original design and intended method of use." Item 1b alleges, in two instances, a serious violation of 29 C.F.R. § 1910.212(a)(1), for failing to provide adequate machine guarding on the DAKE hydraulic press, exposing employees to amputation, crush-by, and struck-by hazards. The Secretary proposed a grouped penalty of $13,260. Rolly timely contested the citation and the Secretary filed a formal complaint[6] with the Commission seeking an order affirming the citation and proposed penalties, to which Rolly filed an answer denying that the Secretary was entitled to the relief requested. The Court subsequently held a bench trial and the parties thereafter filed post-trial briefs.

The parties stipulated the Commission has jurisdiction over this action, and Rolly was a covered employer under the Act (Compl. ¶¶ 1, 2; Answer ¶¶ 1, 2; *see also Pretrial Order*, ¶ 4; Attach. C, ¶ 1). Based on the stipulations and record evidence, the Court concludes the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and Rolly is a covered employer under § 3(5) of the Act.

Rolly objected at trial to the admission of the OSHA interview statements taken from Rolly employees, arguing they were hearsay. The Court ruled the statements were admissible under Rule 801(d) of the Federal Rules of Evidence, which provides a statement is not hearsay if it is offered

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[4] The parties stipulate the Citation erroneously identifies the DAKE press's capacity as 75 tons, rather than 70 tons (Tr. 158).

[5] The Act contemplates various grades of violations of the statute and its attendant regulations—"willful"; "repeated"; "serious"; and those "determined not to be of a serious nature" (the Commission refers to the latter as "other-than-serious"). 29 U.S.C. § 666. A "serious" violation exists "if there is a substantial probability that death or serious physical harm could result from [the] condition[s]." 29 U.S.C. § 666(k). "The gravamen of a serious violation is the presence of a 'substantial probability' that a particular violation could result in death or serious physical harm." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979).

[6] Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R §2200.30(d). Attached to the complaint and also adopted by reference was the citation, which was "a part thereof for all purposes."

against an opposing party and is "a statement by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. of Evid. 801(d)(2)(D).[7] "Agency" does not, as Rolly repeatedly insisted at trial, require a showing that supervisory authority was delegated to the employee making the statement (Tr. 89, 95-96, 101). The Court admitted the statements as Exhibits C-3, C-4, and C-5 (Tr. 94-103).

In its post-trial brief, Rolly renewed its objection to the admission of the statements, arguing they do not concern matters within the scope of the employees' relationships with Rolly and cites in support *Wilkinson v. Carnival Cruise Lines,* 920 F.2d 1560 (11th Cir. 1991). In *Wilkinson,* the Eleventh Circuit held that a statement made by a room steward (named Fletcher) regarding a sliding glass door that injured a passenger was not admissible under Rule 801(d)(2)(D) because the sliding glass door was not a matter within the scope of his relationship with Carnival. The Eleventh Circuit found persuasive an affidavit from a Carnival employee in the operations department, who stated,

> The function of a room steward is to clean rooms. Room stewards do not work in the engineering department. They are not mechanics, electricians, ship's officers or sliding glass door repairmen. . . . Room stewards are restricted to crew areas of the ship except for those areas in which they work. A cabin steward such as the "Fletcher" described in the deposition of Tracie Sanders could only work in the passenger area where rooms he serviced were located and in the adjacent service areas (to get ice, food, etc.). Room stewards are not authorized to be in the area of the sliding glass door (near the swimming pool) where Ms. Wilkinson says she was when injured. That is a passenger area.

Id. at 1566. The Eleventh Circuit found Carnival established the room steward's statement did not concern a matter within the scope of his employment with Carnival and was, therefore, hearsay.

Here, with one exception, the interview statements were made by management employees and employees who worked with GE in the fabrication shop where the accident at issue occurred. They were authorized to work in the fabrication shop, and the fabrication shop employees had access to the DAKE press. Their statements concern matters within the scope of their relationship with Rolly. The one exception is the interview statement of GE's wife [Redacted] (who is also Rolly's secretary), which concerned the phone call she received at home from GE on July 13, 2019; what occurred when she picked GE up at the shipyard and drove him to the hospital; and the

[7] Commission Rule 71 provides that "[t]he federal Rules of Evidence are applicable" in Commission proceedings. 29 C.F.R.§ 2200.71.

treatment GE received there, none of which concern matters within the scope of her employment relationship with Rolly. Therefore, Rolly's renewed objection to the admission of Exhibits C-3, C-4, and C-5 is again overruled, except as to [Redacted] interview statement contained within Exhibits C-3, which is sustained and excluded as hearsay.

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceeding under § 12(j) of the Act. For the reasons *infra*, Citation 1, Item 1a and Item 1b are **VACATED**.[8]

II. BACKGROUND

Rolly is a family-owned business founded by a married couple (Rolly was the first name of the husband) in 1966 in Fort Lauderdale, Florida, and is now run by the couple's three daughters, Sheryl Lopez, Sue Rocks, and Sandra Latta (Tr. 263-64, 336-37). Rolly is a full-service shipyard for yachts, including design and engineering as well as interior, bottom, and fabrication work. General manager Sheryl Lopez stated, "pretty much anything that needs to be done on a vessel, we can service." (Tr. 337.)

One of the machines in Rolly's fabrication shop is a DAKE 70-ton hydraulic press (the DAKE press), manufactured in 1940 (Tr. 113-14; *see also* Ex. C-1a).[9] It is used primarily to remove bearings. After the item to be pressed (the workpiece) is placed on the DAKE press, the press can be operated either by motor or manually by hand (Tr. 290). If operated manually, the press moves "a half an inch in about a minute. It's very slow." (Tr. 291.) An operator of the DAKE press may use 12-inch-long metal bars to help position the workpiece. The metal bars are not attached to the DAKE press (300-01).[10] When operating the machine, the operator stands two or three feet back from the machine, close enough to turn it off if necessary (Tr. 323).

GE (who was 70 years old at the time of his death) was a longtime Rolly employee (Ex. J-2; Tr. 356). GE occasionally made artwork at Rolly's shipyard as a personal project. He fashioned boat propeller blades into turtle figures and gave them as gifts to friends and relatives, including

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[8] All arguments not expressly addressed have nevertheless been considered and rejected. If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

[9] The terms "fabrication shop" and "metal shop" were used interchangeably by witnesses to refer to the room where the DAKE press is located (Tr. 327).

[10] Two metal bars can be seen atop the table of the DAKE press in several photographs admitted as Exhibit C-1 (pp. 1-6).

his coworkers at Rolly (Tr. 248, 251, 314, 323-34, 343, 355-56, 381, 393). On Saturday, July 13, 2019, GE was in Rolly's fabrication shop, creating another turtle figure. Rolly employees [Redacted] and [Redacted] were assisting him with the project (Tr. 240-51, 323-24).[11]

At some point, GE was alone in the fabrication shop. Video taken by the security camera located near the ceiling in the fabrication shop shows GE standing in front of the area where the DAKE press is located.[12] The security camera is equipped with a fisheye lens, resulting in a circular video image (Tr. 142). The DAKE press is not visible in the video. Approximately a minute and 28 seconds into the video, GE stumbles backwards and falls to a sitting position on a wooden pallet directly behind him, then gets up and, with his back to the camera, appears to be looking down and clutching his abdomen (Ex. C-6). When the video begins, GE's back is partially visible in the lower right of the video, at approximately the 4:00 position if the video image were a clock. After he stumbles backwards, he is in full view of the camera (Ex. C-6).

GE called his wife at home and asked her to drive over and pick him up. Meanwhile he sat in a golf cart with his feet propped up against the golf cart's windshield (Tr. 250, 383). GE's wife arrived, and Rolly employees assisted GE into the car. GE's wife drove him to Broward General Hospital, where he was admitted and taken into surgery shortly afterward (Tr. 387). GE died the next day. The Broward County Medical Examiner's report stated GE was "diagnosed with a duodenal hematoma and traumatic aortic occlusion. Surgical intervention was performed but the decedent continued to decline despite these efforts and was pronounced dead." (Ex. J-2.) Under the "Opinion" section, the report concludes GE "died as a result of blunt force injury." (Ex. J-2.) Sheryl Lopez reported GE's death to OSHA on July 14, 2019 (Tr. 76).

GE's wife has worked as a secretary at Rolly's shipyard for 16 years and testified regarding Rolly's policy for employees working on personal projects at the shipyard: "Personal projects . . . are rarely done, but sometimes people do them, yes." (Tr. 379-80, 381.) She was aware of GE

[11] [Redacted] was working with GE at Rolly's shipyard that morning while GE was creating artwork, "making a turtle for somebody," out of a propeller blade (Tr. 248). GE had made turtle figures "[q]uite a few times" for people and planned to make one for [Redacted] next (Tr. 251). [Redacted] assisted GE for an hour or two as he heated the propeller blade and then beat it with a hammer to bend it into shape (Tr. 240-41). [Redacted] did not observe GE using the DAKE press (Tr. 242). [Redacted] identified the photograph admitted as the first page of Exhibit C-1 as showing the propeller blade that he and EG were working on. The blade is placed on the DAKE press at issue (Tr. 245-46).

[12] Gregory Poulos worked as the general manager at Rolly for 25 years and identified the machine that GE can be seen facing as the DAKE press (Tr. 304).

making "[p]robably five" decorative turtles using Rolly's machinery (Tr. 381.) She had observed GE make two of the turtles (Tr. 393). She described his process.

> [Redacted]: He takes the propeller, the prop, the thing that goes around. He puts it on that machine. He flattens the ends of it, and that's how he makes the shape. And then he takes it in the back and he polishes it and polishes and polishes it. But to flatten it out, he uses that machine in the back.
> Q.: When you say, "that machine in the back," are you referring to the DAKE 70H hydraulic press?
> [Redacted]: Yes, I am.
> Q.: Do you have knowledge of whether he used that press for each of the five turtles you just testified about?
> [Redacted]: Yes, he did.

(Tr. 382-83.) GE's wife also described the events of July 13, 2019.

> I was at home. It was a Saturday. He called me about eleven o'clock and told me he had hurt himself. I got here as fast as I could. In between the time it took me to get to Oakland Park to 84, he called me four times telling me to hurry and get there. By the time I got here, he was laying on the ground. . . . I called for the security guard. He picked up [GE], put him in the back of my car, and I ran him to Broward General Hospital. . . . I went in through the emergency room. They took him into trauma, and from there they were operating on him till twelve o'clock that night.

(Tr. 383.)

GE's wife was with GE when he was undressed by hospital personnel. She observed bruises across his groin area. GE told her he had been hit by a bar that had come "[t]hrough from the press." (Tr. 388.) She stated GE was supposed to work at the shipyard until noon on July 13, 2019, but she picked him up between 11:00 and 11:30 a.m. after he called and told her a bar had come "[t]hrough from the press" (Tr. 388) and struck him "across the top of his legs where his groin area is." (Tr. 387.) GE's wife testified that in the time it took her to drive to the shipyard, GE "called me four times telling me to hurry and get there." (Tr. 383.) The few words GE said to his wife over the phone were all he communicated regarding the accident. When GE's wife arrived at the shipyard, GE was lying on the ground, unable to move his legs. "[H]e was in so much pain he couldn't tell me what happened." (Tr. 387.) At trial, she was asked if GE was able to elaborate on his accident. "No, not at all. Like I said, he was in so much pain he was pretty much out of it by the time I got [there]. That was just something he relayed to me on the phone before I got [there]." (Tr. 387.) When asked if GE talked about the accident during the drive or at the hospital, GE's wife replied, "He could not. They took him straight into trauma, and that's the last time I

saw him alive." (*Id.*) GE's wife's demeanor was straightforward and matter of fact as she testified. She did not embellish her account of what GE told her about the accident, despite being asked several times about it. She was candid and forthcoming with her testimony, and she exhibited no signs of evasiveness. The Court credits GE's wife's testimony that GE told her he was using the DAKE press when it ejected a bar that struck and injured him.

Both parties expended considerable time and effort, both at trial and in their post-trial briefs, arguing about the cause of GE's death. The Secretary contends that, based on witness testimony, the Broward County Medical Examiner's report (Ex. J-2), and the security camera footage (Ex. C-6), that he established GE was operating the DAKE press on July 13, 2019. The Secretary asserts that while in operation, the DAKE press unexpectedly ejected one of the metal bars used to position workpieces, striking GE in the abdomen, and the injury caused by this projectile ultimately resulted in GE's death. Rolly disputes the Secretary's theory, arguing the security camera video is inconclusive, and that there is no evidence GE operated the DAKE press on July 13. Rolly questions whether there was an accident at all and cites GE's preexisting health problems as potentially causing his death. However, as the Commission has long held, "[d]etermining whether the standard was violated is not dependent on the cause of the accident." *Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003). "It is therefore not necessary for the Secretary to demonstrate . . . the actual cause of the accident to prove the violation[.]" *Ceco Concrete Constr.*, No. 17-0483, 2021 WL 2311867, at *8, n. 4 (OSHRC Feb. 22, 2021).

As noted, there is security camera footage of GE alone in the fabrication shop on July 13, 2019, and the DAKE press is not visible in the video image captured by the security camera. The only witness who testified regarding this time period when GE was alone in the fabrication shop was his wife, who was then at her house but spoke to GE on the phone about the incident. She also testified that on two separate occasions in the past, she had observed GE make decorative turtles using the DAKE press and believed he used the DAKE press to make the other three turtles of which she was aware (Tr. 382-83). She testified GE would place the propeller in the DAKE press. "He flattens the ends of it, and that's how he makes the shape. And then he takes it in the back and he polishes it and polishes it and polishes it. But to flatten it out, he uses the machine in the back." (Tr. 382.) When asked for clarification if she meant the DAKE press when referring to "the machine in the back," GE's wife responded, "Yes, I am." (Tr. 383.)

Dr. Iouri Boiko is an associate medical examiner for the Broward County Medical Examiner's Office (Tr. 38). He conducted an external examination of GE's body on July 15, 2019, and he signed and issued the report admitted as Exhibit J-2 (Tr. 45-46). Dr. Boiko listed "Cause of Death" as "Complications of Blunt Force Injury" and "Manner of Death" as "Accident." (Ex. J-2.) Under "Circumstances of Death," Dr. Boiko wrote:

> A pipe broke loose and struck the decedent in the abdomen at work. The decedent was diagnosed with a duodenal hematoma and traumatic aortic occlusion. Surgical intervention was performed, but the decedent continued to decline despite these efforts and was pronounced dead.

(Ex. J-2.)

Dr. Boiko testified at trial that he did not make an independent determination of the object that struck GE in the abdomen but relied on "information from our investigators who conduct this." (Tr. 47.) The type of object that struck GE was incidental to his determination that blunt force injury was the cause of death (Tr. 47). Dr. Boiko testified the duodenal hematoma and traumatic aortic occlusion sustained by GE could not have been preexisting conditions because a person cannot live with an aortic occlusion. "He cannot work. So if he was walking, and he was working, he cannot have this condition before trauma. This condition [is] caused by blunt force injuries. It's [a] very serious condition." (Tr. 50.) "You cannot survive with such a condition if it was preexisting." (Tr. 53.)

The security camera, located near the ceiling, appears to be mounted on the same wall against which the DAKE press is located. Rolly contends, the "video evidence is inconclusive," and the Secretary "is unable to establish that [GE] operated the [DAKE press] on the day of the incident." (Resp't's Br. at 4, 5.) The Court disagrees on both counts. Rolly posits an alternative theory that GE was using a metal pipe to hold the propeller in place as he hammered it. Rolly relies on the deposition testimony of Michael Shea, admitted as Exhibit C-7, to shore up this theory.[13]

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[13] On the eve of trial, the Secretary filed a motion seeking leave to admit Shea's deposition and expert report, which the Court denied since the Secretary made no showing that Shea was unavailable pursuant to Rule 804(a). At trial, Shea's deposition was nonetheless admitted without objection but his report was not. However, Shea did not testify at trial, and was never proffered by the Secretary to the Court as an expert and was never qualified by the Court as an expert. In *Kaspar Electroplating Corp.*, 16 BNA 1517, 1519 (No. 90–2866, 1993) (*citing Harrington Constr. Corp.*, 4 BNA OSHC 1471, 1472 (No. 9809, 1976), the Commission held that opinion testimony by an OSHA compliance officer may be admissible as non-expert testimony if it is "helpful in the resolution of a material issue and is based on his personal knowledge." However, in both cases the Commission applied Rule 701 of the Federal Rule of Evidence as it existed in 1975, which did not include the 2000 amendment adding subsection (c), i.e., if a witness is not testifying

Shea is an OSHA safety engineer and was assigned to assist CSHO Tiesi with the fatality investigation at issue (Ex. C-7, p. 5). However, since Shea did not testify at trial and was never qualified as an expert witness, he "may testify to a matter only if evidence is introduced sufficient to support a finding that [he] has personal knowledge of the matter." Fed. R. Evid. 602. Shea did not visit Rolly's shipyard as part of his investigation (Ex. C-7, p. 7). Therefore, since he had no first-hand knowledge regarding the incident, the Court gives no weight to his testimony. Rolly's alternative theory also relies heavily on use of the word "pipe" instead of "bar" in the medical examiner's report (Ex. J-2) to describe the projectile that struck GE.[14] However, as indicated *supra*, the type of object that struck GE was incidental to Dr. Boiko's determination that blunt force injury was the cause of death (Tr. 47). When looking frame by frame at Exhibit C-6, and the individual frames of the video admitted as Exhibits 6a, 6b, and 6c, the object is visible. The Court finds based on a preponderance of the evidence that GE was using the DAKE press to shape the propeller blade on which he was working on July 13, 2019, and was struck in the lower abdomen by a metal bar that was ejected from the press.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). "The Act

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as an expert, testimony in the form of an opinion is limited to one that is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Therefore, the Commission's precedent must be read *in pari materia* with the 2000 amendment. Even in *Kaspar*, the Commission held that "Commission judges should not admit opinion testimony by a compliance officer on a subject about which only an expert may testify, unless the compliance officer has been shown qualified as an expert in that area." *Kaspar Electroplating Corp.*, 16 BNA at 1519. As the gatekeeper, it is ultimately the Court's responsibility to channel testimony that is actually expert testimony to Rule 702, even where a timely objection is not made. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589 (1993) (finding that judge serves as a "gatekeeper" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (extending the court's gatekeeper function to all expert testimony). Since Shea did not testify at trial, and was never proffered to the Court as an expert or qualified by the Court as an expert, any expert opinions he may have offered in his deposition have not been considered by the Court.

[14] The origin of the word "pipe," rather than "bar," in the medical examiner's report is unknown. According to GE's wife, GE was unable to speak by the time they arrived at the hospital. In her testimony, she refers only to a bar striking him and does not use the word pipe. (Tr. 387, 388.)

charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id*. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel Corp*., 499 U.S. at 151.

"To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013). "They also have a 'special duty' to comply with all mandatory health and safety standards." (*Id.*) A covered employer "commits a general duty clause violation when he fails to 'furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.' " *Pepper Contracting Servs. v. Occupational Safety & Health Admin.*, 657 F. App'x 844, 847 (11th Cir. 2016) (*quoting* 29 U.S.C. § 654(a)(1)). With respect to the latter, Congress provided for the promulgation and enforcement of the mandatory standards through a regulatory scheme that divides responsibilities between two federal agencies." (*Id.*) "The Secretary establishes these standards through the exercise of rulemaking powers." *CF & I Steel Corp*., 499 U.S. at 147. *See* 29 U.S.C. § 665.

Under the law of the Eleventh Circuit where this case arose,[15] to prove a violation of a general duty clause, "the Secretary must establish that '(1) the employer failed to render its workplace free of a hazard; (2) the hazard was recognized; ... (3) the hazard caused or was likely to cause death or serious physical harm' and '(4) the hazard [was] preventable.' " *Pepper Contracting*, 657 F. App'x 844 at 847–48 (omission in original) (citation omitted). On the other

[15] The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. See 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Fort Lauderdale, Florida, which is also the location of Rolly's principal place of business, both in the Eleventh Circuit. (Compl. 3; Answer ¶ 3.) The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96- 1719, 2000). The Court applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable the case would be appealed.

hand, a violation of an OSHA standard is established by showing "(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *ComTran Grp., Inc.*, 722 F.3d at 1307. However, under either the general or special duty clause, a hazard does not itself establish a violation. *United States v. Mar-Jac Poultry*, Inc., 756 F. App'x 856, 862–63 (11th Cir. 2018).

A. Item 1a: Alleged General Duty Clause Violation

The Secretary alleges in Citation 1 Item 1a Rolly committed a serious violation of § (5)(a)(l) of the Act by exposing employees to a "struck-by hazard" when operating a DAKE 70-ton hydraulic press "that was altered from its original design and intended method of use." (Compl. Ex. A.)[16] It is undisputed the DAKE press has been modified since it was manufactured in 1940. Somebody (it is unknown who) altered its original configuration by extending its frame and adding an electric motor with an electronic switch to activate the piston.[17] The switch was located approximately shoulder height on the left side of the H-frame of the DAKE press (Tr. 81-82). Rolly's employees used the DAKE press in both modes. However, it was impossible to use both modes at the same time (Tr. 82-83).

The Commission has held that a hazard should be "defined 'in terms of the physical agents that could injure employees rather than the means of abatement.' " *Arcadian Corp*., 20 BNA OSHC 2001, 2009 (No. 93-0628, 2004) (quoting *Chevron Oil Co.*, 11 BNA OSHC 1329, 1331, n.6 (No. 10799, 1983)). Although Item 1a alleges the existence of a "struck-by hazard," it is silent on what is doing the striking and what is causing the striking to occur. It does not describe the physical agent that could injure employees by striking them. Instead, it characterizes the violative conduct in terms of Rolly's alteration of the DAKE press. Item 1a also states Rolly could have abated this "struck-by hazard" by making only manufacturer's approved modifications on the

[16] CSHO Tiesi testified that in the phrase "altered from its original design and intended method of use," "altered" means "the cutting of the frame and then installation, the addition of the electric motor." (Tr. 159.) "[O]riginal design" means "designed to be used manually with . . . just the horizontal lever, the pump lever." (Tr. 159.)

[17] General manager Poulos stated he had spent time at Rolly's shipyard since 1974. At that time, the fabrication shop did not exist, and all of Rolly's machines were located in the main building. Poulos had never seen the DAKE press being used until the fabrication shop was built in 1986, and the DAKE press was placed in it. Poulos did not know where the DAKE press was acquired and did not know who modified it or when the modification occurred (Tr. 296).

machine." However, a "workplace hazard cannot be defined in terms of a particular abatement method." *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007).

The user manual shows various safety labels that are to be placed at specified locations on the DAKE press. One label (300168) contains three panels showing hazardous situations, one of which depicts a stick figure of a person, with broken lines intended to track the trajectory of projectiles targeting the figure's head, torso, and one foot. The accompanying text states, "Guard workpiece to prevent projectiles from reaching operator. Wear eye protection." (Ex. J-3, p. 3.) Thus, although the manufacturer warns of a struck-by hazard when operating the DAKE press, it does not state that the hazard is created by modifying the press, which is the violative condition alleged in the Item 1a. And CSHO Tiesi admitted the modifications to the DAKE press did not contribute to GE's accident (Tr. 197-98).

The Court concludes the Secretary failed to define the hazard in terms of the physical agents that could injure employees, and instead, improperly defined it in terms of a particular abatement method. "It may well be that [Rolly] failed to meet its general duty under the Act, but the Secretary neglected to present evidence demonstrating in what manner the company's conduct fell short of the statutory standard." *Nat'l Realty & Const. Co. v. Occupational Safety & Health Rev. Comm'n*, 489 F.2d 1257, 1263 (D.C. Cir. 1973). Here, the Secretary was required to show the modifications made to the press posed a significant risk of harm, which he failed to do since he failed to prove the modifications created a significant risk of ejection of materials. Thus, since the Secretary has not established the modification of the DAKE press created a struck-by hazard, the Secretary has failed to carry his burden of proving there was a "hazard" within the meaning of the Act, and therefore, Item 1a must be vacated.

Even assuming the Secretary did prove there was a "hazard" within the meaning of the Act, he was also required to prove the "struck-by hazard" was a "recognized" hazard, i.e., a condition that is "known to be hazardous." *Georgia Electric Company v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979) (citation omitted).[18] "This element can be established by proving the employer had

[18] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. The Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). This body of precedent is binding unless and until overruled by the Eleventh Circuit en banc. *Id.* Further, the decisions of the continuing Fifth Circuit's Administrative Unit B are also binding on the Eleventh Circuit, while Unit A

actual knowledge that a condition is hazardous." *Id.* (citation omitted). Rolly argues, and the Court agrees, it did not have actual knowledge that using the DAKE press after it had been altered could result in a "struck-by hazard," which is evident since there had never been an accident using the DAKE press (which had been in use at least since the fabrication shop was built in 1986), nor had there ever been a report that anything was ejected from it.[19] (*See* Tr. 108-109, 370.) The Court concludes Rolly did not have actual knowledge that the cited condition was hazardous.

A "recognized hazard" may also "be shown by proving that the condition is generally known to be hazardous in the industry." *Ed Taylor Const. Co. v. Occupational Safety & Health Review Comm'n*, 938 F.2d 1265, 1272 (11th Cir. 1991) (citation omitted). Thus, courts and the Commission have looked to industry standards to determine whether a particular industry recognizes the hazard cited. *See Bethlehem Steel Corp. v. Occupational Safety & Health Review Comm'n & Marshall*, 607 F.2d 871 (3d Cir. 1979) (safety officer admitted that advisory ANSI standard represented industry consensus); *Betten Processing Corp.*, 2 BNA OSHC 1724 (No. 2648, 1975) (holding judge erred in failing to consider ANSI standard as evidence of industry recognition).

Joint Exhibit 3 is the instruction and operator's manual, which "strongly recommends" that DAKE press "users obtain a copy of the current American National Standard Institute (ANSI) B11.2 standard, for a more complete understanding of their responsibilities." (Jt. Ex. 3 at 2.) The manufacturer of the DAKE press did not identify any "struck-by hazard" resulting from the modification of the press (Tr. 202; Jt. Ex. 3).[20] And although the ANSII standard lists hazards associated with operation of a power press, it did not include struck-by hazards created by modifying the press. (Ex C-2, p. 110, Annex B(3).) Thus, the Court also concludes the Secretary

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decisions are merely persuasive. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377 (11th Cir. 2006).

[19] Poulos testified that there had been no accident on the hydraulic power press during his 25-year tenure and he was never advised that anything was ejected from the press. (Tr. 295.) Campo testified that no one reported that anything was ever ejected from the press and that there were no accidents involving the press in his 20 years with the Company. (Tr. 326, 331-332.) Shotanus testified there has never been an accident, nor did anyone ever report that anything was ejected from the press. (Tr. 370.) Tiesi also testified that his investigation uncovered no prior injuries on the machine; no evidence of any prior projectile ejected from the press; and no evidence of any point of operation accident. (Tr. 207-209.)

[20] Although the manufacturer warns in Label 300168 of the manual of a struck-by hazard when operating the DAKE press, it does not state that the hazard is created by modifying the press, which is the violative condition alleged in the citation.

has failed to prove the industry recognized a "struck-by hazard" from modifying the press. Therefore, the Court concludes the Secretary has failed to carry his burden of proving the "struck-by hazard" was a "recognized" hazard, i.e., a condition that is "known to be hazardous," and Item 1a must therefore be vacated.

B. Item 1b: Alleged Serious Violation of § 1910.212(a)(1)

The cited standard provides in relevant part that "[o]ne or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." 29 CFR § 1910.212(a)(1). In Item 1b, the Secretary alleges Rolly violated the standard when "[o]ne or more methods of machine guarding was not provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks[.]" (Compl. Ex. A.) More specifically, the Secretary asserts in Instance (a) that "an employee was exposed to an amputation and crush-by hazard due to an unguarded nosepiece of a piston assembly for a DAKE 75 ton hydraulic press" and in Instance (b) that "an employee was exposed to being struck-by a metal bar ejected in high velocity from a DAKE 75 ton hydraulic press." (*Id.*)

(1) Applicability

Section 1910.212(a)(1) is found in Subpart O (*Machine and Machine Guarding*) of the general industry standards. Section 1910.212 is titled *General requirements for all machines.* The DAKE press at issue is a machine.

<u>Instance (a)</u>

There is no question that § 1910.212(a)(1) applies to the DAKE press as it relates to Item Instance (a), which describes the hazards presented by the DAKE press as "an amputation and crush-by hazard due to an unguarded nosepiece[.]" The nosepiece is the part of the press that moves up and down hydraulically and exerts pressure on the workpiece.[21] The area of contact between the workpiece and the nosepiece is the point of operation of the press (Tr. 127).[22] The Court concludes the cited standard applies to Instance (a).

[21] The nosepiece of the DAKE press can be seen in the first photograph of Exhibit C-1.
[22] Section 1910.211(a)(1) defines "point of operation" as "that point at which cutting, shaping, boring, or forming is accomplished upon the stock."

Instance (b)

As to the applicability of § 1910.212(a)(1) to Instance (b), the Secretary alleges an employee was "exposed to being struck-by a metal bar ejected in high velocity" from the DAKE press. Section 1910.212(a)(1) requires the employer to provide machine guarding against hazards "such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." Although a metal bar ejected at a high velocity is certainly hazardous, as this case tragically demonstrates, for the reasons indicated *infra*, the Court concludes the hazard is not one contemplated by § 1910.212(a)(1).

The Eleventh Circuit has not addressed a similar issue. Therefore, the Court looks to other Circuits for persuasive guidance. The Second Circuit addressed a similar issue in *Carlyle Compressor Co.*, 683 F.2d 673 (2d Cir. 1982). In that case, a machine called a grinder was used in one of the steps for the production of shafts used in air conditioner compressors. OSHA inspected the workplace in response to five incidents in which the grinder threw shafts, seriously injuring an employee in one instance. The Secretary cited the employer for a violation of § 1910.212(a)(1) for failing to guard against flying shafts and, in the alternative, for a violation of the general duty clause. The Second Circuit affirmed the violation of the general duty clause but agreed with the employer that § 1910.212(a)(1) was inapplicable to the cited condition of flying shafts.

> The language of that section does not cover the instant hazard; it requires protection, such as barrier guards, against "hazards such as those created by rotating sparks, flying chips and sparks." The ALJ apparently interpreted "flying chips" to include shafts thrown by the machine.
>
> The Secretary argues that the phrase "such as" covers anything flying out of machines. We hold that the language cannot be stretched to that extent. "(W) here specific words follow a general word, the specific words restrict application of the general term to things that are similar to those enumerated." *General Electric Co. v. OSHRC,* 583 F.2d 61, 65 (2 Cir. 1978).

683 F.2d at 675.

The Eighth Circuit grappled with a similar issue in a case where it also found the scope of § 1910.212(a)(1) may not be expanded to apply to objects forcibly ejected from machines. The employer in that case manufactured air circulating equipment. It used lathes to form and mold metal discs (the workpieces). In 2009, a 12-pound rotating metal workpiece broke free from the lathe and struck the lathe operator in the head, killing him. OSHA inspected the workplace and subsequently cited the employer for seven violations of § 1910.212(a)(1) for failing to install

barrier guards on lathes to protect employees from ejected workpieces. The Eighth Circuit analyzed in detail the types of hazards contemplated by § 1910.212(a)(1), as well as those not found to be within the standard's ambit.

> [T]he Secretary's interpretation of section 1910.212(a)(1) strains a commonsense reading of the section. The basic operative language of the section identifies five examples of hazards the barrier guards are meant to protect a lathe operator from: "hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." 29 C.F.R. § 1910.212(a)(1). We note that the inclusion of the words "such as" in the language of the regulation indicates this list is illustrative rather than exhaustive. *See Donovan v. Anheuser–Busch, Inc.,* 666 F.2d 315, 327 (8th Cir.1981). These five hazards create two distinct categories: sources or causes of the hazard (point of operation, ingoing nip points, and rotating parts) and by-products from routine operation of the machinery (flying chips and sparks).
>
> It follows that section 1910.212(a)(1) only covers the catastrophic failure of a lathe and the ejection of a workpiece if such an event is like one of these two categories. This event is not like the first category because a plain reading of the regulation limits this category to sources of the hazard relating to the worker's point of contact with the machinery and does not encompass the ejection of a spinning workpiece.
> . . .
> The guarding devices section 1910.212(a)(1) enumerates—barrier guards, two-hand tripping devices, and electronic safety devices—aim to prevent ingress by the operator into the danger zone while the lathe is running. This supports Loren Cook's limited interpretation of this section. These guarding devices would do little to prevent the hazard for which the Secretary cited Loren Cook: the high-speed ejection of a workpiece nearly 3 feet in diameter and weighing 12 pounds.
> This event also is not like the second category of hazards because a 12–pound ejected workpiece differs greatly both in nature and quality from a by-product hazard created by routine operation of a lathe. The enumerated by-product hazards in the regulation—flying chips and sparks—are incidental to the normal operation of a lathe, and differ markedly from the hazard created by the ejection of a 12–pound workpiece from a spinning lathe. Because these hazards differ so significantly, we cannot conclude that a 12–pound ejected workpiece is the same kind of hazard so as to be included by the regulation's use of the phrase "such as." *See Donovan,* 666 F.2d at 327 (explaining that the use of "such as" in regulation indicates illustrative rather than exhaustive list). We thus conclude the Secretary's interpretation does not comport with the language of the regulation itself.

*Id.*at 940-41.

While the opinions rendered by the Second and Eighth Circuits are not binding precedent, the Court finds them persuasive and concludes § 1910.212(a)(1) does not apply to the condition

of the ejected metal bar cited in Instance (b). Therefore, Citation 1, Item 1b, Instance (b) must be vacated.

(2) Whether Cited Standard was Violated

It is undisputed that the press's nosepiece was not guarded (Ex. C-1, p. 1). Fabrication shop supervisor Peter Campo admitted in his interview statement, "the press did not have any type of guard, like a big screen in the front, when I used it, and the press has never had a guard, and I have been working at Rolly for about 18 years." (Ex. C-4, p.4.) In his interview statement, project manager Douwe Schotanus also admitted, "there is no guard on the DAKE press, because the guard is not practical, based on how we use the press and what we use the press for." (Ex. C-5, p. 5.) The Secretary contends the admissions of Rolly's supervisory personnel that the DAKE press was never guarded establish that Rolly was in violation (noncompliance) with the cited standard.

Schotanus's statement, however, that a guard "is not practical, based on how we use the press," points to the blurring of the line between the elements of noncompliance and exposure. The Commission has recognized that the issues of noncompliance and exposure in machine guarding cases are not easily delineated:

> We note that the noncompliance element in machine guarding cases overlaps with, but is not identical to, the exposure element of the Secretary's prima facie case. To establish the exposure element of his prima facie case, the Secretary must prove actual exposure to the violative condition *or* that access to the violative condition was reasonably predictable.

Aerospace Testing All., No. 16-1167, 2020 WL 5815499, at *6, n. 3 (OSHRC Sept. 21, 2020). That overlap is apparent here, where Rolly acknowledges the DAKE press was not guarded but argues its method of operation of the press did not expose employees to amputation and crushing hazards. Rolly addresses the issue (of whether use of the press, without guarding for the point of operation, created reasonably predictable exposure to the cited hazards) as an exposure element (Resp't's Br. at 14-18). The Secretary addressed the issue as an applicability element (Compl't's Br. at 37-40).

In *Wayne Farms, LLC,* No. 17-1174, 2020 WL 5815506 (OSHRC Sept. 22, 2020), although the Commission affirmed the judge's decision vacating a citation alleging a violation of § 1910.212(a)(1), it concluded that it was more accurate to analyze the case in terms of the Secretary's failure to establish the element of noncompliance, rather than the element of exposure on which the judge based her decision.

> Compliance with § 1910.212(a)(1) is framed by the fact that it is a performance standard, which means "it states the result required ..., rather than specifying that a particular type of guard must be used." *Aerospace Testing Alliance*, No. 16-1167, at 3 (OSHRC 2020) (quoting *Diebold, Inc.*, 3 BNA OSHC 1897, 1900 (No. 6767, 1976) (consolidated), *rev'd on other grounds*, 585 F.2d 1327 (6th Cir. 1978)). Performance standards "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007). The noncompliance question here, therefore, is whether the Secretary established that the grate covering the hopper was required to protect employees from "hazards such as those created by [the Accufeeder's] point of operation, ingoing nip points, rotating parts, [or] flying chips and sparks." 29 C.F.R § 1910.212(a)(1).

Wayne Farms, 2020 WL 5815506 at *2. Therefore, the Court analyzes this issue in terms of Rolly's alleged noncompliance with § 1910.212(a)(1).

Here, the noncompliance issue is whether the Secretary established that a guard for the nosepiece of the DAKE press was required to protect employees from "an amputation and crush-by hazard." To prove exposure to a hazard for the element of noncompliance, the Secretary must show that it is reasonably predictable by operational necessity or otherwise that employees have been in the zone of danger of the DAKE press's nosepiece.

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

Wayne Farms, 2020 WL 5815506 at *3.

As noted *supra*, the Court found GE was operating the DAKE press when it ejected the metal bar that struck him in the abdomen, fatally injuring him. Actual exposure may be established by evidence of an employee's injury or death while in the zone of danger of the violative condition. *Phoenix Roofing, Inc.,* 17 BNA OSHC 1076, 1079, *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996) (fact that an employee fell through a skylight unquestionably established actual

exposure to a fall hazard). Here, GE's injury and death do no establish actual exposure for Item 1b, Instance (a), where the alleged exposure was to amputation and crushing hazards due to an unguarded point of operation, not a struck-by hazard resulting from the ejection of a metal bar.

As to reasonably predictability, the Secretary argues that it was reasonably predictable that the hands of DAKE press operators could be in the zone of danger of the press's point of operation, based on the manner in which they used the machine. The Secretary quotes from the testimony of several employees who used the DAKE press. The quoted testimony, however, falls short of establishing exposure to the cited hazards.

Metal shop supervisor Campo explained how an employee would use the DAKE press to remove a bearing, the most common task performed on the DAKE press. He stated the operator stands at arm's length from the press as it operates, close enough to switch off the machine if needed, but not closer than necessary to the point of operation. "Any time that you're operating any machinery in all my years of experience operating machinery, you have to be at a safe position where you can shut it down in case there is an emergency." (Tr. 332.) Campo detailed how an operator would press out a bearing on a windlass. (Campo refers to the nosepiece as "the ram.")

> Campo: You would take the object, lay it on the bed of the—the machine, make sure that everything is stable, bring down the ram, and continue to press until the bearing comes out.
>
> Q.: Okay. When you say, "bring down the ram," how did you bring it down?
>
> Campo: You would bring down the—there's a wheel that you would rotate either clockwise or counter-clockwise and then touch the object to make sure it's secured, and then you could -- then you would take the hand lever and give it one or two cranks to make sure everything is tight, and then you would continue from there by -- with the hand crank or the electric.
>
> Q.: And what reason would you have after you have engaged . . . or made it tight to put your hands or any part of your body under the piston of the . . . press?
>
> Campo: There would be no reason to put your hands under that.
>
> Q.: Would there be any reason that you would have to manipulate the piece at all after you've engaged the press?
>
> Campo: Only if you've seen that it wasn't perfectly aligned, you would stop and start over.
>
> Q.: Okay. When you say 'stop,' what do you mean?

> Campo: You'd stop all forward motion. You'd just stop what you're doing and then start over. You would do your procedure all over.

(Tr. 329-30.) When asked how he could tell if the workpiece was secured as the nosepiece descended, Campo responded, "By looking at it." (Tr. 334.)

The Secretary cites Campo's testimony excerpted here as evidence that the method Rolly employees used to operate the DAKE press exposed them to amputation and crushing hazards. But nothing in the quoted testimony establishes that Rolly's method of operation required the operators' hands to be within the zone of danger of the nosepiece and the workpiece, i.e., the point of operation. However, the Secretary improperly, and completely, excises (twice) Campo's most direct testimony regarding the placement of the operator's hands in relation to the point of operation ("Q.: And what reason would you have after you have engaged . . . or made it tight to put your hands or any part of your body under the piston of the . . . press? Campo: There would be no reason to put your hands under that." (Tr. 329-30)), when he quotes this section in his post-trial brief (Compl't's Br. at 13, 39).

Campo stated that after placing the workpiece on the table, the operator lowers the nosepiece by turning a handwheel until the nosepiece contacts the workpiece. The handwheel is mounted above the nosepiece, as seen in the photograph on the first page of Exhibit C-1.[23] The operator then operates the press, either manually using the handpump or by switching on the motor. The handpump is mounted above the handwheel.[24] The electronic switch for the motor is located at shoulder level on the left side of the H-frame of the DAKE press (Tr. 81-82). Campo states that if the nosepiece and the workpiece are not properly aligned (which the operator detects visually), the operator stops the process and starts over. At no point does Campo state the operator adjusts, manipulates, aligns, or otherwise contacts the workpiece by hand as the nosepiece descends or after it contacts the workpiece.

The testimony of the other employees quoted by the Secretary are similarly lacking in probative significance with regard to exposure to the point of contact. For the testimony of each witness, the Secretary italicizes certain words and phrases (*secured, tight, aligned, stay in line,*

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[23] The user's manual for the DAKE press reproduces a diagram of "the workhead assembly," showing the handwheel at the top of the assembly and the nosepiece protruding from the bottom (Ex. J-3, p. 3).

[24] The handpump can be seen in the photograph on the first page of Exhibit C-1. Pages 3 and 7 of Exhibit J-3 reproduce diagrams showing the location of the handpump.

improper setup, stabilized, straight), apparently to give the impression the witness is describing how he uses his hands to align the workpiece once the nosepiece is lowered. An objective reading of the witness testimony shows, however, that such an inference is unwarranted.

Machinist [Redacted] described how he used the DAKE press. ([Redacted] refers to the metal positioning bars as "parallels" and to the nosepiece as the "piston.")

> [Redacted]: At all times we'd be wearing safety glasses or a safety shield, and anytime were using any equipment, our fingers, hands, any part of our body would be away from the machine as it was being operated.
>
> Q.: And in terms of the operation of the press, how were you trained to operate the DAKE press?
>
> [Redacted]: On the DAKE press, work in removing certain parts, and anytime we would use it to set up, say pressing a bearing out, we would use a setup in which we would put the object on—on the table. We've had parallels which we would secure it down, and as you were using the machine, as the machine was working, you would make sure everything would stay in place, and again, your fingers and hands would stay away from the machine as it was running.

(Tr. 318-19.)

> Q.: You testified about aligning the piece with the piston. . . . Can you describe exactly how you do that?
>
> [Redacted]: Well, you have a circular ring with a piston that comes down, and anytime you're pressing with the piston, it has to be parallel. Anytime that object that you're pressing on is not in line, it's not a safe manner.

(Tr. 322.)

> Q.: Once you engage the hydraulics or—or the motor to finish your task, where are you standing?
>
> [Redacted]: You are standing in front of the machine approximately two—two feet, three feet back as the machine's running, but close enough so you can shut the machine off if you have to.
>
> Q.: Okay. And—and what would occur that would result in you shutting the machine off.?
>
> [Redacted]: That would be improper setup, but that goes back to the beginning on your setup with using the press in manual mode.

(Tr. 323.)

General manager Gregory Poulos described how the DAKE press operator would remove bearings from a strut taken from a boat that could, "depending on what kind of boat, . . . weigh up to 400 pounds." (Tr. 290.)

> Poulos: So we'd come in on a forklift, be held on a pallet until the bearing was placed in the DAKE press at 90 degrees to the ram. . . . [T]he ram also has a screw adjustment with big square threads on it. So you bring it down real tight to a metal washer. . . . Once that came down they could either operate it by hand or in that case the motor would push it out. Most of the time it was pressed with a hand press because it's very slow.
> . . .
> Q.: Once the piece is stabilized on the press, is there any reason to hold it, to place it, or move it around while the press is in motion?
>
> Poulos: You can't move it around. It's got a mandrel going in through the center.

(Tr. 290-91.)

The Secretary also quoted from testimony provided by machinist [Redacted], even though [Redacted] testified he never operated the DAKE press at issue and had never observed anyone else operate it (Tr. 238, 240, 258). The Secretary's counsel questioned [Redacted] about how he operated presses when he worked for other employers (Tr. 260-61). The Court finds the testimony regarding the use of other presses, which [Redacted] had operated 10 years before and for which he could not identify the models, is immaterial to the operation of the DAKE press at issue.

CSHO Tiesi used a measuring tape during his investigation to measure the height of the DAKE press's table (Ex. C-1, p. 1; Tr. 122). However, surprisingly, he did not measure the distance from the point of contact (between the nosepiece and the table where the workpiece would be located) to the handwheel, the handpump, or the electronic switch, where employees testified they were required to place their hands. Further, the user manual for the DAKE press does not provide the machine's dimensions or distances from the various parts (Ex. J-3). Other than stating they stood two or three feet from the DAKE press when it was in operation, the employees did not estimate how far their hands were from the point of operation at any given step of the procedure. CSHO Tiesi did not view the DAKE press in operation and did not time how long it took the nosepiece to descend when motor-operated (Tr. 202, 208).

As the Commission has noted, "there is no hard and fast rule for determining exposure in a machine guarding case—rather, exposure must be determined on a case-by-case basis depending on 'the manner in which the machine functions and the way it is operated." *Dover High*

Performance Plastics, Inc., No. 14-1268, 2020 WL 5880242, at *3, n. 5 (OSHRC Sept. 25, 2020) (quoting *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No. 89-553, 1991)). Here, the manner in which the DAKE press functions and the way Rolly's employees operate it is well-established in the record. After placing the workpiece on the press table, operators may manually contact the handwheel, the handpump, or the electronic switch, all of which are located above the nosepiece. When not in contact with one of these devices, the operator stands two or three feet from the machine. Nothing in the record indicates how close the operator's hands are to the point of operation at any point in the procedure.

Based on the evidence, the Court finds the Secretary has failed to establish the DAKE press's point of operation posed a hazard such that Rolly was required to guard it under § 1910.212(a)(1). Therefore, the Court concludes Citation 1, Item 1b, Instance (a) must be vacated based on the Secretary's failure to establish Rolly's noncompliance with the cited standard. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Item 1a and Item 1b are **VACATED**.

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: November 22, 2021
Atlanta, GA