Some personal identifiers have been redacted for privacy purposes.

**UNITED STATES OF AMERICA**
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>U.S. POSTAL SERVICE, dba PORTLAND PROCESSING AND DISTRIBUTION CENTER,<br><br>Respondent. | OSHRC DOCKET NO. 22-0742 |

Appearances:

Luis A. Garcia, Esq., and Natasha A. Magness, Esq., U.S. Department of Labor, Office of the Solicitor, Los Angeles, California
For Complainant

David P. Larson, Esq., U.S. Postal Service Law Department, OSHA Group, Denver, Colorado
For Respondent

Before: Administrative Law Judge Christopher D. Helms

## DECISION AND ORDER

## I. Procedural History

In response to a complaint, the U.S. Occupational Safety and Health Administration ("OSHA") opened an inspection of the U.S. Postal Service dba Portland Processing and Distribution Center ("USPS" or "Respondent") located at 7007 NE Cornfoot Road, Portland, Oregon ("worksite"). As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act") and proposing a total penalty of $148,137. The

Citation was issued on June 1, 2022[1] and contained the following: (1) Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1910.147(e)(3); (2) Citation 2, Item 1 alleged a repeat-serious violation of 29 C.F.R. § 1910.147(c)(7)(i); and (3) Citation 2, Item 2 alleged a repeat-serious violation of 29 C.F.R. § 1910.212(a)(1).[2]

Respondent timely contested the Citation, bringing this matter before the U.S. Occupational Safety and Health Review Commission ("Commission"). A three-day hearing was held on March 28-30, 2023, in Portland, Oregon. The following witnesses testified: (1) USPS Maintenance Mechanic Scott Ashby; (2) USPS Maintenance Mechanic Drake Dillard; (3) USPS Mail Processing Equipment Mechanic [redacted]; (4) USPS Electronic Technician Adam Adams; (5) USPS Maintenance Mechanic Vladimir Kratovil; (6) USPS Maintenance Mechanic Aaron Fox; (7) USPS Area Maintenance Technician [redacted]; (8) USPS Electronic Technician Gregory Johnson; (9) USPS Maintenance Manager David Chiniewicz; (10) OSHA Area Director Cecil Tipton; (11) OSHA Acting Area Director Richard Quan; (12) OSHA Compliance Officer ("CO" or "CSHO") Cassandra Davis; (13) USPS Acting Supervisor William Bennett; (14) USPS Supervisor Maintenance Operations Justin Pulu; (15) USPS Supervisor Maintenance Operations David Hamlin; (16) USPS Lead Maintenance Manager Jeffrey Moline; and (17) OSHA CO Michael Potter.

Both parties filed briefs after the hearing. Based on what follows, the Court vacates Citation 1, Item 1, Citation 2, Item 1, and Citation 2, Item 2.

[1] By Order dated March 7, 2023, the Citation was amended such that the alleged violation description for Citation 2, Item 1 was updated. *See* Order Granting Secretary of Labor's Notice of Motion and Motion for Leave to Amend Citation 1, Item 1 of the Complaint; Declaration of Luis A. Garcia in Support Thereof (Mar. 7, 2023).

[2] Initially, Citation 2, Item 2 involved two instances, Instance A and Instance B. However, the parties settled Instance A on March 14, 2023, and that matter was severed and terminated from the current case. *See* Order Terminating Proceedings (No. 23-0183, Mar. 23, 2023), Order of Severance (Nos. 22-0742 & 23-0183, Mar. 15, 2023), and Amended Joint Notification of Partial Settlement (No. 23-0183, Mar. 14, 2023). Thus, only the following items are at issue in this matter: Citation 1, Item 1; Citation 2, Item 1; and Citation 2, Item 2 Instance B.

## II. Stipulations

The parties agreed upon a joint stipulation statement ("JSS") prior to the beginning of trial. *See* Joint Stipulation Statement; Complainant Secretary of Labor's Request for Judicial Notice (Mar. 17, 2023); (Tr. 9.) The parties stipulated to 32 enumerated facts which are hereby incorporated by reference. (JSS at pp. 2-5, ¶¶ 1-32.) These stipulations will be addressed herein as appropriate.

## III. Jurisdiction

The Postal Employees Safety Enhancement Act of 1970 made the OSH Act applicable to Respondent in the same manner as any other employer. Pub. No. 105-241, 112 Stat. 1572-1575 (1998); *see also* 29 U.S.C. § 652(5). The record establishes that Respondent is an employer within the meaning of the OSH Act and that it is engaged in a business affecting interstate commerce. (Complaint ¶¶ II, III; Answer ¶¶ II, III; Ex. C-8 at 0307.) The record also establishes that Respondent filed a timely notice of contest. (JSS ¶ 6.) Accordingly, as the parties stipulated, the Court has jurisdiction over this proceeding pursuant to section 10(c) of the OSH Act. 29 U.S.C. § 659(c); JSS ¶ 2; *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, U.S. Dep't of Lab.*, 518 F.2d 990, 995 (5th Cir. 1975), *aff'd sub nom. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (describing "Enforcement Structure of OSHA").

## IV. Factual Background

### A. The Worksite

The worksite is a 24-hour 850,000 square-feet mail-processing facility. Approximately 1,145 employees work at the facility in three "tours," or work shifts: Tour 1 is 10 p.m. to 7 a.m.; Tour 2 is 7a.m to 2 p.m.; Tour 3 is 2 p.m. to 10 p.m.[3] (Ex. C-8 at 0315; Sec'y Br. 2 n.2.) Within

[3] The specific duty hours vary within these tour hour ranges. (Sec'y Br. 2 n.2.)

each area of the workroom floor are numerous different machines – each with their own Energy Control Procedure ("ECP") as documented by Respondent's Maintenance Technical Support Center. *See*, e.g., Ex. C-49 (ECP for Dual Pass Rough Cull (DPRC)). The record includes ECP's for approximately thirteen different machines.[4] (JSS ¶¶ 11-20; Exs. C-49 (DPRC 1 & 2), C-52 (EPPS), C-53 (APBS), C-54 (DIOSS), C-55 (CIOSS), C-56 (ATU), C-57 (AFCS 200), C-58 (AFSM 100), C-59 (AFSM 100 AIAFSM), C-60 (ATSU & ATSII), C061 (USS-1 Intralox), C-62 (USS-1 Sorter), C-63 (LCTS).)[5]

The workroom floor area within the facility is shaped like a rectangle and divided into "rows" and "columns." (Tr. 165.) The rows are named A – S (approximately 19 rows) and denote certain areas of the workroom floor. (Tr. 165.) For example, the "K row encompasses an entire row of the building," and is located in the middle of the workroom floor. (Tr. 97, 165.) The K row, notably, is "a place where people are assigned to cover a large amount of machines, in fact about 12 different acronyms at the Postal Service." (Tr. 97.) Also of note is that while the K row contains multiple machines, the "EPPS area" contains only one "substantially larger" machine (the EPPS) and is in a different area of Respondent's worksite and is the size of a "football field." (Tr. 126.)

The hazards at issue in this case relate to the employees who are mechanics/technicians for the various machines in the facility. Mechanics are responsible for machine preventative and non-scheduled maintenance including tasks such as changing belts, vacuuming, and unjamming tray lines. (Tr. 62-63, 808). During their tour, mechanics are assigned machinery in a certain area of

[4] It is unknown on this record just how many different machines are in Respondent's 850,000 square-feet worksite.

[5] The Court will refer to a specific piece of machinery using the acronym/term found in the record. While most of the machines are referred to using an acronym, many of the acronyms are not consistently or fully explained within the record.

the floor and "in the area [they are] watching the machine, watching the belts, mak[ing] sure the belts haven't drifted from side to side rubbing on the – that they're tracked properly and not rubbing on one of the guard rails. Ensuring that there's nothing jammed in there and tearing apart somebody's mail." (Tr. 929-930).

The record indicates that there are different "levels" of maintenance, starting with "custodian" levels 3, 4, and 5, and then "mechanic" level 7 and level 9. (Tr. 62, 910-912.) USPS Lead Maintenance Manager Moline testified that the difference between a level 7 mechanic and a level 9 mechanic is primarily for compensation purposes. (Tr. 913). The record suggests that the higher level mechanics perform "higher level" tasks.[6] (Tr. 174-175.) The record also suggests, however, that sometimes a level 7 mechanic is trained on how to perform some level 9 mechanic tasks. (Tr. 243-246, 912-913.)

The record establishes that both level 7 and level 9 mechanics can be "authorized employees" at Respondent's worksite. An "authorized employee" at Respondent's worksite is an employee who is trained in lockout/tagout of a specific piece of machinery and performs service or repair tasks on it. (JSS ¶¶ 9-10; Tr. 210; Ex. C-23 at 969). The record indicates that Respondent requires initial and then yearly refresher training for a specific piece of equipment in order for a mechanic to maintain the "authorized employee" status for that machine. (JSS ¶¶ 9-10; Tr. 39-40, 72-73, 97-98, 214-215, 327, 533-534, 946-947; Ex. C-23.) The lockout/tagout training for specific machinery is typically one to two hours long, in group format, and hands-on such that each person will perform the lockout/tagout procedure on the machine so that they are comfortable with locking out that machine. (Tr. 65-69.) As discussed below, the record overwhelmingly supports a finding

[6] Tasks such as vacuuming seem to be considered lower-level tasks. (Tr. 335).

that the mechanic witnesses in this case knew whether, and on which machines, they were each designated as an "authorized employee" to work.

In contrast to "authorized employees," Respondent also designates employees as "affected employees," which are those employees that are not "authorized employees" such as "mail processing employees, carriers, custodians, and management employees." (Tr. 948; Ex. C-23 at 969.) Respondent requires "affected employees"[7] be "instructed in the purpose and use of the energy control procedure, prohibitions relating to attempts to restart equipment, or remove energy control devices." (Ex. C-23 at 969.) The record indicates that Respondent considers that some tasks – such as vacuuming – can be performed by "affected employees" on machines when there is no risk of unexpected energization. (Tr. 812-815; Ex. C-23 at 990.)

On a daily basis, according to Respondent Lead Maintenance Manager Jeffrey Moline, machines are serviced under a "group lockout" situation. (Tr. 919-920.) A group lockout is when one authorized employee locks out a machine, and then other employees[8] perform tasks like vacuuming, computer work or changing a bearing or a belt on that piece of machinery while it is locked out. (Tr. 240-241, 919-920; Ex. C-23 at 982.)

**B. The Workers**

Scott Ashby is a level 7 maintenance mechanic (tour 3) and is authorized to lockout and service the DBCS and CIOS. (Tr. 32-33, 45). He testified that his DBCS and CIOS training was up to date. (Tr. 40).

Drake Dillard is a level 7 maintenance mechanic (tour 1 during the time at issue) and is

[7] Respondent also designates as "other employees" "all other employees whose work operations are, or may be in an area where energy control procedures may be utilized." (Ex. C-23 at 969.) Respondent requires the "other employees" to be trained like "affected employees." (Ex. C-23 at 969.)

[8] The record seems to suggest that both "authorized employees" and "affected employees" regularly participate in a group lockout in the Portland worksite. (Tr. 240-241, 919-920.)

authorized to lockout and service the ATU, APPS, ASCS, DBCS, DIOS/CIOS, and AFSM. (Tr. 63-65).

[redacted] is a level 9 mail processing equipment mechanic (tour 1) and is authorized to lockout and service the DBCS and AFSM. (Tr. 94-97, 127). He testified that he was trained on DBCS and AFSM in 2020. (Tr. 100).

Adam Adams is a level 10 electronic technician and "lead trainer" (tour 1) and is authorized to lockout and service the DB, DIOS, and CIOS. (Tr. 210-213). He testified that he is trained in the DB and DIOS/CIOS (and has trained others) in 2020-2022. (Tr. 213).

Vladimir Kratochvil is a level 7 maintenance mechanic (tour 2) and is authorized to lockout and service the AFCS200, DPRC, BFS, and NEC canceler. (Tr. 256-257, 263). He testified that he is trained in AFCS, DPRC, BFS, NEX, and DPRC 2 as of 2021. (Tr. 257, 262).

Aaron Fox is a level 7 maintenance mechanic (tour 1) and is authorized to lockout and service the DBCS, DIOS, and CIOS. (Tr. 321-322). He testified that he was trained in DBCS, DIOS and CIOS since December 2021. (Tr. 321-322).

[redacted] is a level 10 area maintenance technician (an electronic technician during time at issue) (tour 2) and is authorized to lockout and service the AFCS, Barney, DPRC, AFCS, and BDS (bio detection system). (Tr. 357-359). He testified that he was trained in AFCS and DPRC in 2018. (Tr. 359, 363, 443).

Gregory Johnson is a level 10 electronic technician (tour 3) and is authorized to lockout and service the AFCS, DPRC, DBCS, CIOS, DIOS, and RCS. (Tr. 477-478, 480). He testified that he is trained in AFCS, DBCS, CIOS, DIOS, RCS, and DPRC 1&2. (Tr. 478).

**Initial Employee Complaint**

OSHA's inspection was based on two separate complaints filed by Respondent's employees. The first complaint was e-filed with OSHA on November 24, 2021, by [redacted], who at the time of his complaint was a level 9 mechanic who worked on Tour 1 and was an authorized employee on the DBCS and AFSM at the site. His online complaint includes the following commentary:

> The Postal Service management officials have been placing untrained employees in unsafe situations. They've been allow untrained employees to complete the Operational Maintenance, Preventive Maintenance and Reactive Maintenance Routes. These employees are not qualified per the Electrical Work plan agreement 6 EL-810-2013-5 and MMO-023- 13. There are approximately 6 employees that I've identified so far.

(Ex. C-1 at 221.) Another entry on the online complaint identified the following locations with hazardous conditions: "The EPPS, AFTL, ATS, LCTS, MSWYB, and the APBS areas." (Ex. C-1 at 221.)

Upon receipt of Mr. Drain's online complaint, OSHA Area Director ("AD") Cecil Tipton assigned the matter to CO Cassandra Davis and CO Michael Potter. (Tr. 559.) AD Tipton directed CO Davis to reach out to [redacted]to clarify the complaint. AD Tipton explained:

> You know, because what is written here was not real clear on exactly what we're getting at and a lot of these terms we don't know, so we needed to reach out to the complainant to get a clarification on that. Get clarification on locations. What is actually meant by this complaint.

(Tr. 562.) CO Davis contacted [redacted]by telephone on November 29, 2021, and requested additional information from him regarding the hazards he identified in the online complaint. (Tr. 632-633; Ex. C-73.) CO Davis explained that she did not know what [redacted]was referring to by the acronyms under "Hazard Location." (Tr. 631.) CO Davis testified:

> I asked him to go over his complaint with me. I asked him what the hazards were that he was concerned with, because in the complaint it just said employees are in

> an untrained – I'm sorry, 'Untrained employees are in unsafe situations.' So I asked him to explain to me what that means, and then he went into detail to advise me what the unsafe situations were and the training that he thought was required.

(Tr. 633.) [redacted]sent an email on December 1, 2021, with the following additional information he had discussed with CO Davis on the telephone:

> The Postal Service has been exposing untrained employees to electrical hazards from work on, near conductors or equipment in electric-utilization installations. Per the Postal Service agreement with OSHA, the Electrical Work Plan EL-810-2013-5, employees must successfully complete the required training. The Postal Service has not demonstrated that the employees have completed Lock out tag out training under MMO-033-05 and all required training for New Maintenance Employees under Management Instruction EL-810-2013-5, which requires at least 6 months of on-the-job training with a 'qualified' Postal Service employee.
>
> *One of the many areas the workers in question are being exposed to is the 'K-Row' area*. The 'K-Row' area has 32 machines of many varieties including but not limited to AFTL (Automatic Flats Tray Lidder), APBS (Automated Parcel Bundle Sorter), ATS (Automatic Tray Sorter), and more.

(Ex. 73 at 223) (emphasis added). When asked at the hearing why he submitted the complaint, [redacted] testified:

> There were employees they were having working in the K row and the EPPS area that were new and untrained. And before you work on any equipment you should have lockout/tagout training, you know. And they had expressed to me -- expressed to me over time that, you know, they lacked training.

(Tr. 104). When asked why he selected those particular pieces of equipment, [redacted] testified: "It was just as an example. There was plenty…the K row has like 12 different acronyms." (Tr. 109.) [redacted] then testified that the EPPS area and the K-row area are two separate areas. (Tr. 125.)

After this correspondence, CO Davis and AD Tipton understood Mr. Drain's complaint to be equipment focused and not necessarily location specific. (Tr. 604, 794.) AD Tipton testified that he understood Mr. Drain's concern to be "a systemic issue" related to lockout/tagout, but that OSHA had no capability of looking "at every piece of equipment in that facility." (Tr. 604.) CO

Davis prepared the Notice of Alleged Safety or Health Hazards ("Notice"), which described the hazard at Respondent's worksite as follows: "The Postal Service has been exposing employees to electrical shock, crushed-by, struck-by, any other related hazards while performing maintenance work without proper training in Lock-out Tag-out (LOTO) procedures." (Tr. 563, 638; Ex. C-2.) AD Tipton reviewed the Notice and then assigned CO Davis and CO Potter to inspect Respondent's worksite. (Tr. 563-564.) When asked whether he received a copy of the Notice before CO Davis inspected the worksite, [redacted] said that he remembered seeing the Notice. (Tr. 199, 202.)

**C. The Opening Conference, Initial Walk-Around and Document Request**

On December 3, 2021, CO Davis and CO Potter arrived at Respondent's worksite, showed their credentials, served management with the Notice and conducted an opening conference. (JSS ¶ 3; Tr. 653-660; Exs. C-3, C-8.) CO Davis and CO Potter testified that they discussed the Notice and specific pieces of equipment at the opening conference. The pieces of equipment discussed included the "EPPS," "LCTS," "MSWYD," "AFTL," and the "ATS," which had been listed on Mr. Drain's complaint. (Tr. 656-657, 976; Ex. C-3, C-73.) This conversation was documented in CO Davis's opening conference notes. (Tr. 655-656; Ex. C-3.) Respondent officials present at the opening conference included Brian Gaines (Facilities Operations Manager), N'Kole Bulbul (District Safety Manager), Pamela Simpson (Interim Maintenance Manager), David Chiniewicz[9] (Maintenance Supervisor), Levada Padilla (Regional Senior Lead Manager – via teleconference), Steve Schwartzman (Attorney – via teleconference), and Theresa Mills (via teleconference). (Tr. 653; Exs. C-3, C-8 at 308.)

[9] It is noted that none of these officials was presented as a witness at the hearing except for Mr. Chiniewicz. It is further noted that Mr. Chiniewicz was asked no questions regarding his experience during this opening conference.

During this opening conference, CO Davis also asked for documents from Respondent. (Tr. 658.) CO Davis requested the following documents:

> OSHA 300s for the past three years; the lockout/tagout program and all the procedures for the equipment that requires lockout/tagout; formal and informal lockout/tagout training records for authorized, affected and other employees; a list of authorized employees and affected users; and then the organizational chart for that facility; the work schedules for maintenance mechanics and technicians.

(Tr. 658; Ex. C-8 at 317.) CO Davis testified that Ms. Padilla objected to "the volume" of documents that CO Davis requested; CO Davis told Ms. Padilla that OSHA "needed" the documents and "hope[d] that they would provide them." (Tr. 659-660.)

CO Davis testified that they discussed the possibility of a walk around to inspect the machines they had mentioned. (Tr. 660; Ex. C-3.) She testified, however, that "[t]he employer objected again and said that due to it being the holiday season and the volume of work that they had, they would direct us to [only] one machine," the "EPPS." (Tr. 660.) CO Davis testified that "during the opening conference, I gave a list of the machines. The employer was aware of where those specific machines were located, and took us to the location, based on what was agreed upon in the opening conference." (Tr. 754-755); *see also* Tr. 975-976; Ex. C-3. CO Davis and CO Potter walked through the facility and interviewed several employees. (Tr. 661.) CO Davis testified that "it was difficult again because they said due to business needs there was a limitation on employees we could speak with." (Tr. 661.) The entire visit lasted an hour and a half. (Tr. 660.)

On December 7, 2021, in response to the OSHA 300 logs that Respondent had provided to OSHA on the day of the inspection, CO Davis formally requested the rest of the documents that had been discussed during the opening conference. (Tr. 663-664; Exs. C-19, C-20.) Respondent submitted several documents to CO Davis. (Tr. 665-671; Exs. C-21, C-22, C-23, C-24, C-25.) CO Davis reviewed the documents and determined that there "were still missing documents," and

that the documents that were submitted "did not disprove the allegation." (Tr. 673.) After approval from AD Tipton, CO Davis prepared a subpoena for the missing documents. (Tr. 567-569, 673; Ex. C-27.) The subpoena was issued on February 18, 2022. (Ex. C-27.)

In answer to the subpoena, Respondent attorney Schwartzman emailed a response providing some additional documentation and objecting to some requests. (Tr. 570-571; Ex. C-28.) OSHA responded to Mr. Schwartzman stating "[s]ome of the issues may just need clarification or confirmation while others may need the production of additional documents," and clarified and narrowed the scope of the request. (Tr. 570-571; Ex. C-29.) On March 15, 2022, Respondent submitted "a very large amount of documentation." (Tr. 572-573, 676; Ex. C-30.) After reviewing all the documents, OSHA determined that Respondent had not submitted the requested training records. (Tr. 573-574.) According to CO Davis, "[b]ased on the documentation that had been submitted and reviewed, it still did not disprove the allegation that employees were not being properly trained." (Tr. 686, 689-693.)

**D. The May 2022 Employee Complaint and Walk-Around**

On May 18, 2022[10], Respondent electronic technician [redacted] called CO Davis and then sent her an email at 4:38 p.m. regarding the removal of his lock and tag from the Dual Pass Rough Cull #2 ("DPRC") the previous day, May 17, 2022. (Tr. 357, 419; Ex. C-77.) Mr. King shared with CO Davis photographs of a DPRC machine guard cover that had been removed and placed on the ground, with broken pieces of a shaft and bearing inside it, and photos of the control panel of the DPRC without [redacted] 's lock and tag. (Tr. 420-421.) [redacted] testified that he believed this was a "safety hazard, the potential that management has clearly seen by now" because

[10] CO Davis had also visited the facility on May 5, 2022, regarding the NEC Canceler, which was the subject of Instance A of Citation 2, Item 2. As noted above, Instance A of Citation 2, Item 2 was settled by the parties and is no longer at issue.

"[t]hey've cut my lock off. Because I was trying to, you know, trying to protect co-workers and further damage to the machine." (Tr. 420.)

That same day, at 7:30 p.m., CO Davis arrived at Respondent's worksite after getting approval from her supervisor to conduct another walk-around inspection regarding [redacted] 's complaint. (Tr. 719; Ex. C-8 at 308.) After a brief opening conference, in which CO Davis "identified that this was lockout/tagout and that we had an open inspection" and identified the DPRC as the machine that she needed to see, Lead Manager Moline escorted CO Davis to the DPRC. (Tr. 720; Ex. C-8 at 309-310.) According to Mr. Moline, CO Davis stated that she "was here for the last issue with the – with the EPPS." (Tr. 892.) Mr. Moline also testified that CO Davis claimed that "she was there under the December 3rd complaint which involved training." (Tr. 892.) Mr. Moline testified that he asked her where she wanted to go, that she indicated that she wanted to see the DPRC, and that he then walked her to that piece of equipment. (Tr. 892-893.) Once at the DPRC, which was locked out, CO Davis saw a machine guard cover on the ground, with remnants of a bearing and shaft inside of it. (Tr. 720-726; Ex. C-45 at 1520, 1524, 1525, 1526.)

## V. Discussion

### A. Threshold Issue – Probable Cause

Respondent claims that OSHA had no probable cause basis to inspect outside of the K-Row per Mr. Drain's online complaint, that OSHA entered into Respondent's facility under the guise of K-Row machinery, but intentionally inspected and requested documentation regarding machinery outside of the K-Row, and therefore OSHA violated Respondent's Fourth Amendment rights in this matter. (Resp't Br. 2, 18-22.) Respondent insists that "[d]ismissal and a written sanction of or referral of the Area Director are appropriate." (Resp't Br. 21.) The Secretary has

not addressed this issue in her post-hearing brief; however, the Court had addressed a similar claim in this matter prior to the hearing. For the following reasons, the Court rejects Respondent's Fourth Amendment claim.

On February 10, 2023, Respondent filed a Motion to Dismiss Complaint for Failure to Comply with the Statute of Limitations, claiming in part that OSHA failed to comply with 29 U.S.C. § 657(f)(1) and the corresponding agency regulation found at 29 C.F.R. § 1903.11 by failing to provide a copy of Mr. Drain's original complaint to Respondent at the time of the inspection.[11] The Secretary filed a response arguing that "OSHA inspections under Section 8(f) do not need to be limited in scope to the precise problems identified in employee complaints." *See* Sec'y of Labor's Response to Respondent's Motion to Dismiss; Declarations of CSHO Casandra Davis and Luis A. Garcia in Support Thereof at 7-9 (Feb. 23, 2023) citing *Reich v. Montana Sulphur & Chem. Co.*, 32 F.3d 440, 446 (9th Cir. 1994) ("*MSCC*").

By Order issued on March 20, 2023, the motion to dismiss was denied with the note that "the Court will allow Respondent some latitude in examining the CSHO on what constituted the

[11] Section 657(f)(1) of the Act states the following in pertinent part:

> Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section.

29 U.S.C. § 657(f)(1). Similarly, 29 C.F.R. § 1903.11(a) provides in pertinent part:

> Any employee or representative of employees who believe that a violation of the Act exists in any workplace where such employee is employed may request an inspection of such workplace by giving notice of the alleged violation to the Area Director or to a Compliance Safety and Health Officer. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or representative of employees. A copy shall be provided the employer or his agent by the Area Director or Compliance Safety and Health Officer no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available by the Department of Labor.

29 C.F.R. § 1903.11(a).

notice received by OSHA prior to the inspection, subject to any objections based on legal privileges." Order on Respondent's Motion to Dismiss (No. 22-0742, Mar. 20, 2023.)

In its post-hearing brief, Respondent appears to have abandoned the specific claim that OSHA technically failed to comply with the Act by not presenting Mr. Drain's original complaint to Respondent at the initial opening conference.[12] Instead, Respondent claims that OSHA wrongfully expanded the scope of the inspection by inspecting outside of the K-Row without proper basis or disclosure to Respondent, and thereby violated Respondent's Fourth Amendment[13] rights.[14] (Resp't Br. 2, 18-22.)

This case arises in the Ninth Circuit and so *MSCC* applies.[15] The *MSCC* court found that a complaint about welding provided a sufficient basis for OSHA to inspect the employer's welding procedures. *MSCC*, 32 F.3d at 446; *see also Hern Iron Works, Inc. v. Donovan,* 670 F.2d 838, 841 (9th Cir. 1982). The court then concluded that "OSHA's investigation is not a prisoner of the precise terms of the complaint filed." *MSCC*, 32 F.3d at 446 n.7. Similarly here, Mr. Drain's complaint related to lockout/tagout training, and this Court therefore finds that Mr. Drain's

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[12] This argument was rejected for various reasons in the Order as part of the denial of the Motion to Dismiss. The reasoning and legal conclusions in that Order are hereby incorporated by reference.

[13] As noted in the March 20, 2023 Order, neither party has addressed whether Respondent, a public agency, has any reasonable expectation of privacy and thus whether it is afforded protections as a "person" under the Fourth Amendment. The Court has been unable to locate case law on this issue, but other courts have not raised such concerns when addressing related issues involving another public agency. *See, e.g., Nat'l Eng'g & Contracting Co. v. Occupational Safety & Health Admin., U.S. Dep't of Lab.*, 928 F.2d 762, 765 (6th Cir. 1991) (finding Army Corp of Engineers "could validly consent to OSHA's inspection" in the context of being "the contractor of a multi-employer construction site."). As neither party raises the issue, the Court has not found contrary law, and the end result is the same per this Decision, the Court does not address this issue.

[14] This new claim is adjudicated herein, but Respondent's previous claim within its Motion to Dismiss is hereby deemed abandoned. *L&L Painting Co.*, 23 BNA OSHC 1986, 1989 n.5 (No. 05-0055, 2012) (item not addressed in post-hearing briefs deemed abandoned); *Midwest Masonry Inc.*, 19 BNA OSHC 1540, 1543 n.5 (No. 00-0322, 2001) (argument not raised in post-hearing briefs deemed abandoned).

[15] 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).

complaint provides a sufficient basis for OSHA to inspect Respondent's lockout/tagout procedures.

Respondent, however, cites *Donovan v. Sarasota Concrete Co.,* 693 F.2d 1061, 1068-1069 (11th Cir.1982) ("*Sarasota*") in support of its argument that the Commission has the "authority to find an expanded search to be unreasonable and also apply the exclusionary rule to suppress evidence obtained in that fashion." (Resp't Br. at 21.) The *Sarasota* court took a narrower view than the *MSCC* court and held that probable cause for an inspection under the OSH Act prompted by an employee complaint is established if the inspection "bears an appropriate relationship to the violation alleged in the complaint." *Sarasota,* 693 F.2d at 1068-1069. " 'Reasonableness' remains the ultimate standard in evaluating the propriety of an administrative search." *Id*. at 1069-1070. For the following reasons, the Court finds that even under *Sarasota*, the walk-around inspections at issue in this matter, as well as the document requests, were appropriately related to the alleged hazard of lack of lockout/tagout training at Respondent's worksite.

Respondent's argument is based in part on the claim that it is "undisputed" that "Respondent was never told prior to granting consent to inspect on December 3, 2021 that OSHA had already expanded the footprint of the inspection from 15% to 100% of the facility." (Resp't Br. 2.) First, the number 15% came from Mr. Drain's answer to the stand-alone question, "if you were looking at the map from up above or sort of a bird's eye view of the building, that entire workroom floor what percent would encompass the K row?" (Tr. 164.) The number "15%" is misleading because: (1) Mr. Drain's initial complaint also included the EPPS – which is the size of a "football field" – and not part of the K-Row; (2) Mr. Drain's December 1, 2021 email states that his complaint is not limited to the machines in the K-Row; and (3) the hazard alleged (lockout/tagout training) could potentially "permeate" throughout the facility given the sheer

number of pieces of equipment throughout the facility. (Tr. 126; Ex. C-73 at 223 ("*One of the many areas* the workers in question are being exposed to is the 'K-Row' area")(emphasis added)); *Sarasota,* 693 F.2d at 1069 ("a specific complaint may allege a violation which permeates the workplace so that a full scope inspection is reasonably related to the complaint.").

Second, both AD Tipton and CO Davis disputed the allegation that the scope of the inspection was enlarged from 15% to 100% of the facility. (Tr. 583-583, 747-748, 751-752, 754.) They both testified that the Notice was drafted as a direct result of consulting with [redacted] to understand what his concerns were at the worksite. Respondent points out that [redacted] did not intend OSHA to inspect the "the entire building," however his area of focus "was indeed the K row and the EPPS." (Tr. 163; Resp't Br. 20.) Respondent cites no authority that the online submission through OSHA's website was absolute and final such that only the online submission could constitute the "Notice" as defined by the OSH Act. [redacted] did not testify that (nor was he asked whether) the Notice – which he recalled seeing – given to Respondent management at the opening conference exceeded his concerns. (Tr. 198-199, 201-202.) The Court thus rejects this claim.

Respondent next argues that the search of the DPRC (which it is undisputed is not in the K-Row) on May 18, 2022 was improper because it concerned a machine outside of the K-Row. (Resp't Br. 19-21.) CO Davis testified that the May 18, 2022, search of the DPRC fell under the Notice's alleged training violations because:

> the allegation on the 18th was that the lock had been removed, which fell under training because there's proper requirements to remove an employee's lock, and that is covered under the training program.

(Tr. 776.) Respondent does not address CO Davis's explanation and maintains only that the search was invalid due to the location of the DPRC. The Court accepts CO Davis's explanation as

reasonable because it is related to the initial alleged violation – lack of lockout/tagout training. *Sarasota,* 693 F.2d at 1068-1069. Similarly for the document requests, CO Davis testified:

> And as I understand, the mechanics are assigned to a variety of different machinery throughout the plant. So to get an accurate list of training records, had we limited it just to the K row, with some of the machines identified in the complaint are outside of the K row, we would not have had an accurate accounting of the training for the employees.

(Tr. 794.) The Court also finds that the requests for training documentation related to lockout/tagout were properly within the scope of the initial alleged violation.

Finally, the Court rejects Respondent's claims that AD Tipton made "knowing and false" statements under oath and "continued his lies" while on the witness stand. (Resp't Br. 18.) The questions posed to AD Tipton presumed the incorrect conclusion that OSHA improperly expanded the scope of the inspection. AD Tipton's responses reflected his opinion that the search was proper given the nature of the alleged hazard. (Tr. 583-584.) As such, Respondent's request that AD Tipton be sanctioned or "referred" is denied. (Resp't Br. 21-22.)

The Court rejects Respondent's Fourth Amendment claims and continues to the merits of the alleged violations.

**B. Applicable Law**

To establish a prima facie violation of section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *Hartford Roofing Co*., 17 BNA OSHC 1361, 1365-66 (No. 92-3855, 1995). Preponderance of the evidence has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

*Preponderance of the evidence*, Black's Law Dictionary, (11th ed. 2019).

### C. Citation 1, Item 1 – The Alleged Lockout/Tagout Device Removal Violation

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1910.147(e)(3), which provides:

> (3) ***Lockout or tagout devices removal.*** Each lockout or tagout device shall be removed from each energy isolating device by the employee who applied the device. *Exception to paragraph (e)(3):* When the authorized employee who applied the lockout or tagout device is not available to remove it, that device may be removed under the direction of the employer, provided that specific procedures and training for such removal have been developed, documented and incorporated into the employer's energy control program. The employer shall demonstrate that the specific procedure provides equivalent safety to the removal of the device by the authorized employee who applied it. The specific procedure shall include at least the following elements:
>
> (i) Verification by the employer that the authorized employee who applied the device is not at the facility;
>
> (ii) Making all reasonable efforts to contact the authorized employee to inform him/her that his/her lockout or tagout device has been removed; and
>
> (iii) Ensuring that the authorized employee has this knowledge before he/she resumes work at that facility.

29 C.F.R. § 1910.147(e)(3). The Secretary alleges that Respondent violated section 1910.147(e)(3) in the following manner:

> [o]n or about May 17, 2022 maintenance employees working on and near the Dual Pass Rough Cull (DPRC #2) at the USPS P&DC facility were exposed to electrocution, electrical burns, and electric shock when the lockout device was removed by the employer and not by the employee who applied the device.

(Citation at 6.)

**1. Relevant Facts**

This citation item and the machine guarding citation item (Citation 2, Item 2) arise out of the same set of facts.

**a. May 14, 2022**

On Saturday, May 14, 2022, Vladimir Kratochvil was servicing the DPRC – a machine of which he is an "authorized employee" as deemed by Respondent – when he heard a screeching noise and saw a belt jerk. (Tr. 256-267, 265.) Mr. Kratochvil stopped the DPRC, put on his lock and tag, took off a machine guard and discovered a broken bearing and shaft. (Tr. 266-267.) Since it was near the end of his shift, he called his supervisor David Hamlin and left a voice message notifying him that the DPRC "was broken and I put a lock on it and take it out of service." (Tr. 273-274.) He also testified that he said in the voicemail that he had to leave for the day soon and he needed to remove his lock. (Tr. 274.) Mr. Hamlin testified that he received no such voicemail from Mr. Kratochvil and if he had he would have "gone out onto the floor to investigate and ask him what he was referring to to get specifics." (Tr. 871-872, 877-878.)

At that point, Mr. Kratochvil ran into [redacted] and told him his situation – that he had to leave and remove his lock and "I couldn't get anybody on the phone." (Tr. 275.) Mr. Kratochvil explained that he was not authorized overtime and he "only had about ten minutes to put my tools away, get off the clock." (Tr. 275, 304.) Mr. Kratochvil testified that [redacted] told him that he would put his own lock on the DPRC. (Tr. 275.) Mr. Kratochvil then removed his lock, put his tools away and went home. (Tr. 276.) He did not return to the worksite until Tuesday, May 17, 2022.

[redacted] testified that he did not put on a lock on the DPRC at that time on May 14. (Tr. 372, 380-382.) [redacted] explained that he told Mr. Kratochvil, "Well, if Dave [Hamlin's]

coming over there, I'll let him deal with it, because I [don't] want to have to deal with Dave Hamlin." (Tr. 372.) [redacted] knew then that Mr. Kratochvil had removed his lock from the DPRC. (Tr. 372-373.) [redacted] 's tour ended at 3 p.m., when he left for the day, and he also did not return to the worksite until Tuesday, May 17, 2022. (Tr. 380-382.)

**b. May 17, 2022**

[redacted] testified that, on May 17, 2022, Mr. Kratochvil came to him around 7 a.m. and told him that the DPRC was still not locked out and was still broken, and that he [Kratochvil] was going to report it at their 7:45 a.m. safety meeting. (Tr. 382.) However, Mr. Kratochvil did not testify that he told [redacted] the DPRC was still not locked out and was still broken.[16] Mr. Kratochvil testified that after arriving at work at 5 a.m. on May 17, he did not inquire about the DPRC and the events on May 14. (Tr. 276-277.) He testified that he does not recall attending the morning safety meeting on May 17. (Tr. 279-280). He testified that he "might have" returned to the DPRC at the end of his shift that day. (Tr. 277.) He testified that to the best of his knowledge, on May 17, he believed the guard was "still on the ground" where he had left it on May 14. (Tr. 285-286.)

In any event, on the morning of May 17, [redacted] decided to lockout the DPRC himself with one of his own "extra locks" before the 7:45 a.m. safety meeting. (Tr. 382.) He turned off the machine, and locked and tagged it out as per its placard instructions. (Tr. 382-385; Ex. C-77.) [redacted] decided to lock out the DPRC himself because Mr. Kratochvil "didn't have an extra lockout/tagout. I did, so that's why…And since management [Supervisor Hamlin] failed to come

[16] In response to being asked about whether he spoke with Mr. King about the DPRC on May 17, Mr. Kratochvil testified that Mr. King approached him and told him that "they cut his lock and removed it" from the DPRC. (Tr. 277.) As Respondent points out, this statement is inconsistent with the stipulated facts that establish that Mr. King applied the first lock on May 17, and that lock was not cut off until tour 3 by Mr. Pulu after the end of both shifts of Mr. Kratochvil and Mr. King. (Resp't Br. at 6.) The Court therefore assigns no weight to this statement.

after an employee [Kratochvil] told them that the machine was broken, they never came and looked at it." (Tr 386.) [redacted] testified that he saw Supervisor William Bennet walk out of the 7:45 a.m. safety meeting directly to the DPRC and "looked at it," and looked "at the lockout and tagout on the power cabinet. He was at the power cabinet that we pointed out where the lights and everything were." (Tr. 386-388.)

Supervisor Bennett, however, testified that he was not at the first morning meeting, he arrived at 7 a.m., and may have attended the 7:45 a.m. safety talk. (Tr. 811.) He also testified that he did not go to see the DPRC that day. (Tr. 806-808.) [redacted] testified that he did not approach Mr. Bennett about his lock "because [Mr. Kratochvil] was reporting it again. So I was letting [Mr. Kratochvil] take the lead on that. I just put my lockout/tagout on it to do what management should have done on the 14th." (Tr. 388.) He further testified that he did not notify anyone else – including "management, supervisors, managers or otherwise" – that he locked out the DPRC because "it had totally spaced my mind[.]" (Tr. 391.) [redacted] testified that his lock was still on the DPRC when he left for the day at 3 p.m. (the end of Tour 2) to the best of his knowledge. (Tr. 392.)

During Tour 3, electronic technician Gregory Johnson arrived at work and went to the daily meeting where "pertinent information that needs to be relayed to the next tour" takes place. (Tr. 481-483.) Mr. Johnson testified that he does not recall any discussion about the DPRC during that meeting. (Tr. 483-484.) He testified that he discovered that the DPRC was locked out when he was in the area during his normal duties. (Tr. 483, 486.) He testified that his supervisor is Justin Pulu. (Tr. 489.)

Supervisor Pulu testified that Mr. Johnson called him around 5 p.m. and asked about the DPRC "being locked out by the previous tour." (Tr. 819, 821.) Mr. Pulu testified that he received

no information from previous tour management about the DPRC. (Tr. 819-820.) Mr. Pulu instructed Mr. Johnson to inspect the DPRC to make sure it was safe and functional. (Tr. 492, 501, 824-825.) Mr. Johnson testified that he did not find anything abnormal – "I didn't hear any really loud bearings or anything like that or everything – all the guards were on and the thing was operational." (Tr. 511.) Mr. Johnson testified, "on the day that I was to check out the machine, no, I did not see a cover [as it appeared in Ex. C-45 at 1524] like that. That would have been a big red . . .", and he would not have authorized the start of the machine. (Tr. 511-512, 825-827.) Mr. Pulu testified that the cover did not look like the "torn apart" cover pictured in Ex. C-77 [the photograph sent by [redacted] to OSHA on May 18th] or he "would have reported out something like that." (Tr. 837.)

Mr. Pulu testified that he followed "protocol" after checking out the lock. (Tr. 820.) He identified the lock as [redacted] 's and then called him over the radio and then over the PA system. (Tr. 820-821.) However, Mr. Pulu knew [redacted] was a worker for the previous tour and had left the worksite for the day. (Tr. 821-822.) Mr. Pulu then called [redacted] 's "listed number[17]" under Respondent's employee resource management system and got no answer. (Tr. 822-822, 847.) Mr. Pulu did not leave a voice message for [redacted] . (Tr. 822, 848.) [redacted] testified that he received no such telephone calls from Mr. Pulu. (Tr. 398-399). Mr. Pulu testified that [redacted] did not follow "proper shift change" procedure by leaving for the day without contacting someone about his lock. (Tr. 841; Ex. C-49 at 226.)

After that, Mr. Pulu contacted his own supervisor, Max Anguiano, and notified him of the situation – including inspecting the DPRC with Mr. Johnson and discovering no issues. (Tr. 823-825.) Mr. Pulu testified that Mr. Anguiano said he was going "to contact his boss," who was "most

[17] There are no telephone numbers in the record.

likely Jeff Moline." (Tr. 825.) Mr. Anguiano then got back to Mr. Pulu and directed him to "cut the lock. He said if there's no prior knowledge he said to run it and see if there's any problems with it, any issues. And, you know, if there's no issues then process. Of course, he asked me whose lock was it." (Tr. 826.). Mr. Pulu told Mr. Anguiano that it was [redacted] 's lock and that Mr. Pulu had attempted to contact him. (Tr. 826.) Mr. Pulu then cut the lock. (Tr. 826; JSS ¶ 22.)

When Mr. Pulu then ran the machine, he made sure Mr. Johnson was there to observe in accordance with proper procedure. (Tr. 827-828, 841-842; Ex. C-49 at 226-227.) That evening, the DPRC ran with no "crazy" problems. (Tr. 513, 829, 854.) Mr. Pulu testified that had the DPRC ran with "a bad roller or bearer," "we would have most likely heard it squealing and screaming and there might have been an issue with it." (Tr. 865-866.)

Mr. Pulu placed [redacted] 's cut lock on [redacted] 's supervisor's desk. (Tr. 833-834.) Mr. Pulu testified that [redacted] 's supervisor [Dennis Erickson] should have notified [redacted] about his lock the next time [redacted] came into the worksite. (Tr. 824, 850.) Mr. Pulu sent an email documenting the situation to his management and left the worksite that evening at 11 p.m. (Tr. 829, 851; Ex. C-47.)

**c. May 18, 2022**

The next morning, on May 18, [redacted] arrived at the worksite at 6:15 a.m. and walked over to the DPRC and saw that his lock had been cut off from the DPRC and that it had been operated the prior night. (Tr. 400, 403.) He also saw the "guard with the pieces of the broken metal on the ground" where he had observed it the prior day. (Tr. 416.) He then went to his supervisor, Mr. Erickson, and asked him about his lock and tag. (Tr. 403.) Supervisor Erickson told him it was on his desk and that he would give it to him after the 6:30 a.m. safety meeting. (Tr. 403.) [redacted] testified that Supervisor Erickson said that [redacted] "caused [management] to

be aware that everybody didn't have up-to-date tags and they were going to get everybody on the same page." (Tr. 408.)

[redacted] told Mr. Erickson that he was "supposed to be called," when his lock was cut, to which Mr. Erickson replied, "[w]ell, you're being told now." (Tr. 408.) [redacted] testified that it was evident that Mr. Erickson was "in the dark" about his lock and did not know why [redacted] 's lock was cut. (Tr. 409-410.) [redacted] also testified that had someone asked him, he would have explained why he placed the lock on the DPRC on May 17. (Tr. 411.) [redacted] then went to the morning meetings and went back to his work area. (Tr. 413.)

Later that day, Supervisor Erickson collected all improper locks and tags from employees, including [redacted] . (Tr. 413-414.) Right before he left for the day at the end of his shift, [redacted] obtained another lock from the parts room, wrote "J. King" on it, and locked out the DPRC again. (Tr. 414-415; Ex. C-47 at 5; JSS ¶ 23.) He did not notify anyone that he had again locked out the DPRC before leaving for the day, but he testified that he should have under proper procedure. (Tr. 417.) [redacted] left for the day at 3 p.m. and subsequently sent CO Davis the email that prompted OSHA's May 18 visit of the worksite. (Tr. 418-419; Ex. C-77.)

During Tour 3, Mr. Johnson and Mr. Pulu discovered the DPRC was again locked out. Mr. Johnson testified that he saw and heard Mr. Pulu have a conversation on the telephone about cutting the lock. (Tr. 491, 504.) Mr. Pulu made no attempt to contact [redacted] . (Tr. 422-424, 831.) Mr. Johnson watched Supervisor Pulu cut off the lock with a bolt cutter and remove the tag[18]. (Tr. 489-490; JSS ¶ 24.) At the direction of Mr. Pulu, Mr. Johnson put his lock on the DPRC immediately after he saw Mr. Pulu cut off the lock. (Tr. 489, 493, 495, 835-836, 864; Ex. C-45;

[18] This testimony – that Mr. Johnson saw Mr. Pulu remove Mr. King's tag – is inconsistent with the record evidence that Mr. King's second lock was not accompanied by a tag. (Ex. Tr. 414-415; Ex. C-47 at 5.)

JSS ¶ 25.) About 15 minutes later, at 7:30 p.m., CO Davis arrived at the worksite to inspect the DPRC. (Tr. 494-495, 719; Ex. C-8 at 308.)

**2. The Secretary Failed to Establish that the Cited Standard Applies**

> The general industry LOTO standard, effective January 2, 1990, "covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees." 29 C.F.R. §1910.147(a)(1)(i). The LOTO standard defines servicing and/or maintenance as "workplace activities" exposing an employee to the possibility of unexpected energization such as "constructing, installing, setting up, adjusting, inspecting" as well as "cleaning or unjamming" machines or equipment. 29 C.F.R. § 1910.147(b).

*Gen. Motors Corp., CPCG Oklahoma City Plant*, 22 BNA OSHC 1019 (Nos. 91-2834E & 91-2950, 2007) ("*CPCG*"). As the Secretary points out, "lockout and tagout devices must be affixed to each energy-isolating device by *authorized employees*." (Sec'y Br. 14) (emphasis added); *see also* 29 C.F.R. §1910.147(d)(4)(i) ("Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.")

OSHA has defined an "authorized person" as:

> A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section.

29 C.F.R. § 1910.147(b). At issue in this case, OSHA also requires certain procedures to be followed *if the authorized person* who affixed the lockout/tagout device is not available to remove it. 29 C.F.R. § 1910.147(e)(3) (the cited standard) (emphasis added). The Secretary claims that Respondent violated these required procedures when Mr. Pulu removed [redacted] 's lock and [redacted] was not notified about it. (Sec'y Br. 6-7, 15.)

Therefore, to establish a violation of the cited standard, the Secretary must first establish that [redacted] was an "authorized person" with regard to the DPRC in May of 2022. The Secretary

has skipped over this analysis in her post-hearing brief. Respondent, however, claims that [redacted] was not an authorized employee of the DPRC in May of 2022. (Resp't Br. 2-6.) In fact, it is undisputed that Respondent did not consider [redacted] an "authorized person" for the DPRC. Even CO Davis knew that Respondent did not consider [redacted] an "authorized person" for the DPRC. (Tr. 776-779.)

[redacted] testified that his training on the DPRC had expired by May 14, 2022. (Tr. 362-363.) As such, according to Supervisor Hamlin, [redacted] was not an authorized employee of the DPRC on May 17, 2022. (Tr. 877-878, 880-881, 888.) This fact is consistent with his work schedule and the DPRC's operating hours. [redacted] 's tour hours were 6:30 a.m. – 3 p.m. and he worked the "AFCS area." (Tr. 359.) The DPRC, while in that area[19], only operates at night, as it is the machine that runs mail and the mail "usually arrives around 4:00 or 5 o'clock in the afternoon up until 1 or 2 o'clock in the morning." (Tr. 954-956); *see also* Tr. 284. The DPRC only runs in the morning if maintenance is being performed on it. (Tr. 956.) [redacted] testified that the DPRC is "not part of my daily routine." (Tr. 391.)

What is also relevant here for the applicability analysis is whether the record supports a finding that [redacted] was an "authorized person" as OSHA has defined that term. As noted above, OSHA considers someone to be an "authorized person" as "a person who locks out or tags out machines or equipment *in order to perform servicing or maintenance on that machine or equipment*." 29 C.F.R. § 1910.147(b) (emphasis added). The facts of the case establish that although [redacted] may have wanted servicing to be performed on the DPRC from May 14 – May 18, it is undisputed that the DPRC was in operation until late May 18, and underwent repairs only after Mr. Johnson affixed his lock to the DPRC after Mr. Pulu removed [redacted] 's lock.

[19] Mr. King testified that the DPRC is "probably 45, 50 feet" from the "ESS 3 and 4" in the AFCS area, which is where he was stationed on May 14, 2022. (Tr. 379.)

(JSS ¶ 26 ("The DPRC #2 was in operation at the Portland Plant on May 14, 2022, through May 18, 2022, until locked out by Mr. Johnson at the behest of Supervisor Pulu to conduct repairs to a roller and bearing.").) Indeed, the record shows that [redacted] acted *because* no servicing was being performed on the DPRC.

The record also supports the finding that [redacted] did not intend to perform servicing or maintenance on the DPRC himself. He intended only to stop the machine from operating out of a perceived issue with the DPRC, not to perform servicing on it. In fact, even CO Davis testified that [redacted] 's purpose of locking out the machine was not to perform servicing of the DPRC, but to keep the DPRC from running out of concern for the safety of other employees. (Tr. 778-779.)

These facts fail to establish that [redacted] was an "authorized person" for the DPRC as OSHA has defined that term. As he was not an "authorized person," then the cited standard cannot apply to the facts of this case. The Secretary has failed to establish applicability of the cited standard.

Citation 1, Item 1 is VACATED.

**D. Citation 2, Item 1 – The Alleged Lockout/Tagout Training Violation**

Citation 2, Item 1 alleges a serious violation of 29 C.F.R. § 1910.147(c)(7)(i), which provides:

> (i) The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. The training shall include the following:
>
> (A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.

> (B) Each affected employee shall be instructed in the purpose and use of the energy control procedure.
>
> (C) All other employees whose work operations are or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out.

29 C.F.R. § 1910.147(c)(7)(i). The Secretary alleges that Respondent violated section 1910.147(c)(7)(i) in the following manner:

> On or about December 3rd, 2021, and at times prior thereto, the U.S. Postal Service did not provide the required machine-specific training to ensure that employees acquired the knowledge and skills required for the safe application, usage, and removal of energy control devices. Maintenance employees who were performing routine, preventative, and non-scheduled maintenance and repairs on post and parcel processing equipment at the Portland, OR, P&DC location were exposed to electrocution, entanglement, electrical shock, caught in, and pinched by hazards in the event of unexpected energization.

(Citation at 7.)

Here, based on Respondent's internal management directives, the Secretary claims that all of Respondent maintenance employees ("level 7 and above") are "authorized employees" as defined by OSHA and "subject to the LOTO training requirement of 29 C.F.R. § 1910.147(c)(7)(i)(A)." (Sec'y Br. 18-19.) Respondent claims that the Secretary "never identified a specific employee that was performing a maintenance task for which a lock out was required that they were not trained or certified to perform." (Resp't Br. 7-8.) Respondent's argument is consistent with Commission precedent.

In *CPCG*, the Commission stated:

> To determine applicability of the standard's initial training requirements in this case, we evaluate below the evidence of each citation item individually, examining whether the record establishes that each employee was assigned to perform servicing or maintenance during the limitations period on equipment at the GM plant which poses the hazard of unexpected energization.

*CPCG*, 22 BNA OSHC at 1030. The record overwhelmingly supports a finding that the machinery at the worksite each have their own ECPs, that Respondent's employees work near the machinery, that some of Respondent's workers service and maintain that equipment, and that Respondent required additional specific lockout/tagout training in those procedures for those workers who perform service and maintenance on specific pieces of machinery. *See, e.g.*, JSS ¶¶ 8-20. This finding is consistent with OSHA's definition of those employees who must be trained under the cited standard: authorized, affected and all other employees.[20] 29 C.F.R. § 1910.147(c)(7)(i).

The Court, however, finds that the Secretary has failed to establish the applicability of the cited standard to individual workers. *CPCG*, 22 BNA OSHC at 1030. The Commission looks at the precise testimony of a witness to determine the applicability of the training standards to determine whether that employee was an "authorized" person as defined by OSHA (not the employer). *Id.*at 1033-1039. Each of the mechanic/technician witnesses here knew what training was required to be an "authorized" person, as defined by the USPS, and they had received the specialized lockout/tagout training to work on assigned equipment. (Tr. 32-33, 40, 45 (Ashby);

[20] Definitions in this section include:

> *Authorized employee.* A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section.
>
> *Affected employee.* An employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed.
>
> *Servicing and/or maintenance.* Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

29 C.F.R. § 1910.147(b) ("Definitions applicable to this section").

63-65 (Dillard); 94-97, 100, 127 (Drain); 210-213 (Adams); 256-257, 262-263 (Kratochvil); 321-322 (Fox); 357-359 (King); 477-478, 480 (Johnson)). This supports a finding there was sufficient training for "authorized employees" in their job tasks. 29 C.F.R. §§ 1910.147(c)(7)(i)(B), (C). This also supports a finding of sufficient training for "affected" employees, as defined by OSHA, which requires less training than an authorized employee but more than "all other employees."

The Court, however, has not located testimony in the record to determine whether any of the witnesses performed a specific task without the necessary lockout/tagout training during the applicable citation period. There is testimony that Mr. Dillard was "assigned" to a machine prior to training, but the record does not elucidate the assigned task that was at issue at the time. (Tr. 64, 78-79, 83.) The Secretary points to [redacted] complaint for those working on the K-Row, but the Secretary does not connect the complaint to whether "each employee was assigned to perform servicing or maintenance during the limitations period on equipment [on the K-Row] which poses the hazard of unexpected energization." *CPCG*, 22 BNA OSHC 1030. Respondent also points out that some tasks are performed daily under a group lockout/tagout situation, which would not require "authorized employee" status because there would be no risk of unexpected energization to that employee under a group lockout. (Tr. 919-920.) The Secretary does not address the possibility that the instances raised in her brief might fall under a group lockout situation.

The Secretary argues that the "woefully insufficient" and "glaring absence of legible" training documentation – despite multiple requests from OSHA – warrants an adverse inference that no such training occurred. (Sec'y Br. 24.) Mr. Adams, however, testified that Respondent's training document recordkeeping has been inconsistent for the past two years. (Tr. 234-236.) The Secretary has not addressed this testimony. Other evidence in the record suggests that Respondent is challenged to keep up with administrative tasks – such as when Mr. Erickson collected all

"improper" locks and tags, and when Mr. Chiniewicz testified that "things get lost." (Tr. 408, 413-414, 540.) The Secretary also did not cite Respondent for a recordkeeping violation. As such, there is enough evidence in this record to not make an adverse inference based on inadequate training records. *Fluor Daniel*, 19 BNA OSHC 1529, 1531 (No. 96-1729, 2001) (consolidated) ("Although the Commission may draw reasonable inferences from the evidence, we do not think that the evidence in this case supports such an inference."), *aff'd*, 295 F.3d 1232 (11th Cir. 2002).

The Court therefore finds that the Secretary has failed to establish applicability and non-compliance for this citation item. Citation 2, Item 1 is VACATED.

**E. Citation 2, Item 2 – The Alleged Machine Guarding Violation**

Citation 2, Item 2(b) alleges a repeat-serious violation of 29 C.F.R. § 1910.212(a)(1), which provides:

> (a) **Machine guarding** —
>
> (1) ***Types of guarding.*** One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.

29 C.F.R. § 1910.212(a)(1). The Secretary alleges that Respondent violated section 1910.212(a)(1) in the following manner:

> On or about May 18, 2022, and at times prior thereto, employees working on and near the Dual Pass Rough Cull (DPRC #2) at the USPS P&DC facility were exposed to broken bones, lacerations, and mild transient loss of function when a broken bearing and shaft were left exposed.

(Citation at 9.) Respondent claims that the Secretary did not establish that the DPRC ever operated without the guard in place. (Resp't Br. 13-14.) The Court agrees with Respondent. The Secretary has failed to establish non-compliance with the cited standard.

As noted above, it is undisputed that the "DPRC was in operation at the Portland Plant on

May 14, 2022, through May 18, 2022, until locked out by Mr. Johnson at the behest of Supervisor Pulu to conduct repairs to a roller and bearing." (JSS ¶ 26.) What is in dispute is whether the DPRC operated without the guard in place during that timeframe. 29 C.F.R. § 1910.212(a)(1). The evidence in the record related to this fact is sparse. In fact, the Secretary cites only to pictures taken during CO Davis's inspection, and Mr. Kratochvil and [redacted] 's testimonies that the inspection pictures "capture the condition of the [DPRC] that they witnessed days earlier on May 14th[.]" (Sec'y Br. 28-29.) This evidence does not establish that the DRPC operated without the guard in place; the evidence establishes only that the guard was not in place during OSHA's inspection and when Mr. Kratochvil and Mr. Johnson saw it after Mr. Kratochvil removed it from lockout. As noted above, the DPRC does not run during Tour 2, and so Mr. Kratochvil and [redacted] (both Tour 2 employees) did not testify that they saw the DPRC run without the guard in place.

The Secretary claims that Mr. Johnson saw the unaffixed guard on the ground as well. (Sec'y Br. 27 citing Tr. 499.) Mr. Johnson, however, was actually testifying about when he saw the guard on the ground after OSHA's inspection:

> Q. And specifically from May 17 to May 18 up until the date -- up until the time you put your lock on, did you ever observe the guard shown on this photo on the ground by the DPRC number 2?
>
> A. There was the one incident and I don't remember if it was the day that OSHA showed up or if it was the day the -- the next day, I don't recall. *But they actually had it locked out and they had torn apart and they were starting to do repairs on it on that day.*
>
> Q. Okay. *So isn't it true that repairs were commenced after OSHA showed up on May 18th*?
>
> A. I mean, I guess at some point there would have to be repairs and either that cover was off that day or it was taken off the next day and relocked out to do repairs.

(Tr. 499) (emphasis added). Instead, Mr. Johnson testified that when he inspected the DPRC on May 17, the DPRC operated normally, and all the guards were in place. (Tr. 511.) This testimony corroborates the only other probative evidence on this issue. Mr. Pulu and Mr. Moline testified that they never saw any guards out of place when they looked at the DPRC on May 17 and May 18. (Tr. 837, 897, 957.) Mr. Pulu also testified that the DPRC ran during his tour (Tour 3) with no incident on the dates in question. (Tr. 827, 865-866.) The Secretary claims that Supervisor Bennett should have seen the violative condition when he walked to the DPRC on May 17. (Sec'y Br. 28.) Supervisor Bennett, however, testified that he did not go to see the DPRC that day. (Tr. 806-808.)

The Court finds that the record does not establish non-compliance with the cited standard. Citation 2, Item 2(b) is VACATED.

## ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1, Citation 2, Item 1, and Citation 2, Item 2 are VACATED.

SO ORDERED.

/s/Christopher D. Helms

Date: February 27, 2024
Denver, Colorado

Christopher D. Helms
Judge, OSHRC