United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. ANTHONY MARANO CO., and its successors, Respondent.	OSHRC Docket No. 19-0622

Appearances:

Mark H. Ishu, Esq. & Bruce Canetti, Esq., Department of Labor, Office of the Solicitor, Chicago, Illinois
For Complainant

Mark W. Horn, Esq. & Michael F. Cocciemiglio, Esq., Smith Amundsen, LLC, Chicago, Illinois
For Respondent

Before: Judge Peggy S. Ball – U. S. Administrative Law Judge

DECISION AND ORDER

On October 30, 2018 one of Respondent's employees was seriously injured while cleaning a running conveyor belt with a hand towel. After conducting an inspection, Complainant issued a Citation and Notification of Penalty alleging, amongst other things, Respondent's failure to properly implement its Lock-out/Tag-out program with respect to the conveyor belt where the employee was injured. In response, Respondent claims the LOTO standard does not apply to cleaning the conveyor belt in question. Alternatively, Respondent argues the activity falls under the minor servicing exception to the standard. After reviewing the record evidence, as well as the parties' respective briefs, the Court finds Respondent violated the standard as alleged, because the

extensive nature of the cleaning, its timing, and the level of exposure far exceed what was envisioned by the minor servicing exception, as well as the case law interpreting that provision.

I. JURISDICTION

Respondent contends Complainant failed to establish the Commission has jurisdiction over this matter. Complainant asserts Respondent waived any jurisdictional arguments. Upon further review of the matter, the Court finds neither party has it entirely right. The Court finds Respondent invoked the Commission's jurisdiction when it filed a Notice of Contest. *See Marshall v. Occupational Safety and Health Rev. Comm'n*, 635 F.2d 544, 549 (6th Cir. 1980) (citing 29 U.S.C. § 651(b)(3)). What Respondent is really disputing is whether Complainant established Respondent is "engaged in a business affecting commerce . . . ." 29 U.S.C. § 652(5). Respondent contends Complainant failed to put forth any evidence its business affects interstate commerce. The Court disagrees.

There are two pieces of evidence the Court finds persuasive. First, Respondent admits its activities are regulated by the Food and Drug Administration and the United States Department of Agriculture, whose own jurisdiction is predicated on a company's impact upon interstate commerce. (Tr. 601). *See, e.g.*, 21 U.S.C. Title 21, Food and Drugs. Second, and relatedly, Respondent is engaged in a business that, by its nature affects interstate commerce. Just like construction, the aggregate activities of food producers, regardless of their individual impact, has an effect on interstate commerce. *See Slingluff v. Occupational Safety and Health Rev. Comm'n*, 425 F.3d 861, 867 (10th Cir. 2005) ("Rather, *Lopez* recognized that if a federal "statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, 'the *de minimis* character of individual instances arising under that statute is of no consequence.'"

(quoting *Lopez,* 514 U.S. at 558, 115 S.Ct. 1624) (internal citation omitted)). Respondent packages fruits and vegetables to be inserted into the stream of commerce for distribution.

Based on the foregoing, Court finds the Commission has jurisdiction over this matter under section 10(c) of the Act. *See* 29 U.S.C. § 659(c). The Court also finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act. *See* 29 U.S.C. §§ 652(3), (5).

II. PROCEDURAL HISTORY

As noted above, this case was initiated when one of Respondent's employees, R.A., was injured while she was cleaning and drying a conveyor belt that remained energized and running during the cleaning process. Complainant was notified of the accident the same day by the Chicago Fire Department, which had responded to the initial report of an injury at Respondent's facility. (Tr. 248). Complainant sent Compliance Safety and Health Officer Victoria Cyprain to conduct an inspection of Respondent's facility on November 5, 2018.

As a result of CSHO Cyprain's inspection, she recommended, and Complainant issued, a Citation and Notification of Penalty alleging three violations of the Occupational Safety and Health Act ("the Act"). Two of the Citation Items allege serious violations of the LOTO standards found at 29 C.F.R. § 1910.147, and the remaining other-than-serious violation alleges a violation of the recordkeeping standard found at 29 C.F.R. § 1904.29. Complainant has proposed a total penalty of $28,415 for all three. In response to the Citation, Respondent filed a Notice of Contest, which brought the matter before the Commission.

During pre-trial litigation, a dispute arose over Respondent's refusal to provide documentation from an inspection conducted by its worker compensation and casualty insurers. Complainant filed a motion to compel seeking production of factual materials resulting from

Respondent's insurer's (Travelers) investigation of the incident and conveyor operation at issue in this case. Respondent claimed production was precluded by work-product and Insured/Insurer privileges (Respondent's Objection to the Secretary's Request for Issuance of Subpoena), but the Court found Respondent's claims, at least with respect to facts and data stemming from the investigation, were without merit. *See Order Regarding Request for Subpoena Duces Tecum (March 10, 2021)*; *Order Granting Motion to Compel* (July 6, 2021). Respondent failed to comply with the Court's Orders.

On the Friday before trial began on, Respondent filed a Petition for Interlocutory Review (PIR) with the Commission seeking review of this Court's Order Granting Motion to Compel. Though the PIR was pending before the Commission at the time of the trial, it had not been (nor was it ever) accepted by the Commission. During the pendency of the PIR, the Court was not obligated to stay the proceedings, especially mere days prior to the trial. The Court continued to have jurisdiction to provide the parties a full and fair opportunity to present their evidence. Notwithstanding Respondent's failure to comply with the Order, the Court still provided Respondent with an opportunity to provide the documents for an *in camera* review during the trial. Respondent continued to refuse to provide the documents to Complainant or to the Court for *in camera* review. Respondent has not filed a privilege log, nor did it assert a specific privilege; rather, at trial Respondent's counsel asserted some ephemeral, unnamed privilege purportedly predicated on his duty as attorney for the Respondent under the rules of professional conduct. (Tr. 183). Due to Respondent's failure to comply with the Court's orders, the Court sanctioned Respondent by affirming Citation 1, Item 1, and its associated penalty. Both parties continued to pursue the matter after the close of trial, seeking further subpoenas and sanctions, but all such requests were denied by the Court.

The trial was held on July 13-15, 2021, in Chicago, Illinois. Both parties submitted post-trial briefs for the Court's review. Based on the evidence at trial, and the parties' respective briefs, the Court issues the following Decision and Order.

III. FACTUAL BACKGROUND

A. Respondent's Business

Respondent is a family-owned, wholesale produce company located in Chicago, Illinois. According to Respondent, it employs approximately 150 produce repackers, who sort produce on a conveyor for packaging and shipment. (Tr. 603-604, 720). The repackers' shifts typically start at 5:00 a.m. and last 10-12 hours during the week and 8-10 hours on Saturdays. Although Respondent has 17 conveyor lines in various configurations, the repacking process is, in the words of Respondent the same all day, every day. (Tr. 185).

B. Sorting and Repacking

The primary responsibility of the repackers is sorting produce as it travels along the conveyor to be packaged: they remove produce from boxes, place it on the conveyor, and remove any produce from the line that does not meet quality standards. (Tr. 604, 619). During this process, the repackers stand on either side of the conveyor as it moves produce towards the repackaging machine. (Tr. 117, 619). The repackers will touch the moving conveyor belt as they remove and/or place fruit on it. (Tr. 530, 605; Ex. R-5). Both CSHO Cyprain and Complainant's expert, Aaron Priddy, agreed the sorting process did not require lock-out/tag-out, nor did they identify a hazard associated with the sorting process. (Tr. 412-413, 528-530).

C. Cleaning

In addition to sorting produce, repackers are also responsible for cleaning the conveyors. (Tr. 674-676). There are two types of cleaning repackers perform: changeover cleaning and end-

of-shift cleaning. Changeover cleaning occurs during the work shift, where the produce is literally changed over from one type to another.[1] (Tr. 417-18). End-of-shift cleaning, as the name implies, occurs at the end of the workday. (Tr. 598). The primary purpose of these cleanings is to prevent cross-contamination of produce, which can result in the transmission of foodborne pathogens. (Tr. 598, 607, 676-678).

According to Respondent's description, there are many similarities between the two cleaning processes. First and foremost, the machine is energized and the belt is moving during the entire cleaning process. (Tr. 123). The belt on the cited conveyor had variable speed control, which ranged from one- to 31-feet/minute. (Tr. 180-81, 306; Ex. C-3 at 12). O'Brochta testified the belt had a "cleaning speed" of 5-10 feet/minute, but employee Maria Aza testified the belt was typically run at a higher speed while they were cleaning.[2] (Tr. 156-57, 256). Second, the purpose behind the cleaning is to prevent contamination, whether during the shift or at the end. (Tr. 418). Third, there is no food being sorted while the cleaning process is occurring. (Tr. 295).

According to Respondent, the primary difference between the two cleanings, other than the time at which they occur, is the depth of cleaning.[3] In a changeover cleaning, the concern is cleaning the area where the food touches, which is primarily the belt. During end-of-shift cleaning, however, the repackers are expected to clean the belt and frame, as well as dry the entire set-up to prevent pooling water, which can foster bacteria growth. (Tr. 52-54, 678, 797). Contrary to the representations of Respondent, however, the repackers testified there was no notable difference between changeover or end-of-shift cleanings. (Tr. 54-55, 171). The repackers testified they were

1. Such a changeover could include changing from broccoli to carrots or from non-organic to organic foods. (Tr. 597).
2. Respondent questions the hazard imposed by a belt traveling at this speed. This issue will be dealt with in more detail in Section IV.A.1.c. Notwithstanding that fact, the fact that an injury occurred is enough, in and of itself, to establish exposure to the hazard.
3. In reality, it appears the primary difference is the chemical Respondent uses to clean the conveyor.

required to clean the belt and frame of the conveyor thoroughly and that their supervisor, or "checker", would check their work to ensure the conveyor was cleaned properly and was "bone dry", regardless of whether it was a changeover or end-of-shift cleaning. (Tr. 71).

D. R.A. Was Injured During End-of-Shift Cleaning

Respondent contends R.A. was injured during a changeover cleaning, notwithstanding the fact that the repackers all testified the cleaning occurred at the end of R.A.'s shift at 1:30 p.m. on October 30, 2018. (Tr. 77). According to the repackers, they used soap, scrubbed, rinsed, and dried the entire conveyor, including the frame, while it was moving. (Tr. 69, 75, 123-125, 172-173). This is consistent with Respondent's characterization of the end-of-shift cleaning both in scope and in terms of the timing. The Court rejects Respondent's assertion to the contrary as inconsistent with the evidence.

According to R.A.'s testimony, she was drying an area of the conveyor or conveyor frame adjacent to a roller near the end of the conveyor. (Ex. C-3 at 9, C-4 at 1; Tr. 137, 185, 187, 189). She was using a rag to dry around the belt and frame of the conveyor when the roller pulled her rag and arm into the nip point, causing multiple fractures and nerve damage. (Tr. 81, 83, 137, 186; Ex. C-3 at 9). According to R.A. and her coworkers, they were cleaning the belt in the same manner they always do. (Tr. 148, 175). When R.A.'s arm was drawn into the conveyor, her coworker directed another repacker to hit the emergency stop button so R.A.'s arm could be removed from the pinch point. (Tr. 84). The fire department was called, and R.A. was transferred to a local hospital to treat her injuries. (Tr. 188).

E. The Inspection

CSHO Cyprain's inspection included a review of the conveyor involved in the incident, as well as interviews with the repackers who worked alongside R.A. and members of the management

team. According to CSHO Cyprain, Respondent's CFO and COO, Torre Palandri, and Respondent's Vice President of Facilities, Ryan O'Brochta, told her the conveyor was in the same condition at the time of the inspection it had been in on the date of the incident. (Tr. 263). Mr. O'Brochta also told CSHO Cyprain the system had to be locked out on the panel located on the wall opposite the conveyor. (Tr. 264). Indeed, the panel was locked out in this manner during this inspection. (Tr. 265).

The Court notes the foregoing statements by Mr. O'Brochta and Mr. Palandri are inconsistent with the testimony of the repackers, as well their own testimony at trial and in depositions. According to the repackers' trial testimony, as well as Mr. Palandri's and Mr. O'Brochta's deposition, two guards that appear in photographic exhibits were not present on the conveyor at the time of R.A.'s injury. (Tr. 73, 130, 646-653, 751; Ex. C-3, C-33, C-34, R-34). These guards included a yellow sweep guard and a metal guard with a red line on it. (Ex. C-3 at 5 to 10). Mr. O'Brochta testified at trial the yellow guard had always been present, but that the red line guard was added after the fact.[4] In either case, the evidence shows the conveyor had been altered, and its condition at the time of the accident was misrepresented to CSHO Cyprain.

This inconsistency also applies to Mr. O'Brochta's representations about the power source for, and the proper method of locking out, the conveyor system. According to CSHO Cyprain, Mr. O'Brochta told her the power source was located on a wall opposite the conveyor. At trial, however, Respondent attempted to show the conveyor was powered by a cord and plug drop that hung from the ceiling, even though Mr. O'Brochta testified the conveyor was powered by conduit. (Tr. 618, 667; Ex. C-3). In other words, notwithstanding Respondent's protestations about the

4. The Court is aware evidence of subsequent remedial measures is not admissible; however, in this instance, where Respondent made representations about the condition of the conveyor at the time of the accident that were untrue, the Court is not relying on the evidence to establish anything more than the condition of the conveyor at the time of the incident.

qualifications of CSHO Cyprain regarding her ability to properly identify power sources, it is clear to this Court that any misunderstanding on CSHO Cyprain's part is a direct result of the information provided to her and was not indicative of any lack of diligence or qualifications.

The inconsistency between the statements given to CSHO Cyprain, the testimony given at deposition, and the testimony provided at trial calls into question the credibility of the statements provided by Mr. O'Brochta and Mr. Palandri. As such, to the extent Mr. O'Brochta's or Mr. Palandri's testimony conflicts with otherwise credible and reliable evidence provided by CSHO Cyprain or the repackers who testified, it shall be discounted unless the facts as a whole compel a different result.[5] Along similar lines, the Court sees no reason to discount the testimony of either CSHO Cyprain or Complainant's expert, Mr. Aaron Priddy, based solely on the fact they do not possess college degrees as compared to Mr. O'Brochta or Respondent's expert, Brian Dudgeon. This critique rings hollow in a case such as this where an advanced education in mechanical engineering is not a prerequisite to understanding whether cleaning is an integral part of the repacking process and whether the LOTO standard applies to the conditions on the cited conveyor.[6]

5. Respondent suggests CSHO Cyprain's credibility should also be questioned based on statements she purportedly took from the repackers during her investigation. While there are some minor inconsistencies, the Court finds the repackers' explanation for being reluctant to use as an interpreter someone they perceived as adverse to their interests makes sense, as well as the fact they may not remember the circumstances surrounding the incident clearly considering the R.A. was a close friend and relative. The Court finds any inconsistency between the purported statements and Maria's testimony at trial is of little consequence to the resolution of this matter. First, Maria was not the individual who was injured; thus, her understanding of what happened to R.A. was speculative. Second, whether R.A. was injured because of her sleeve being dragged into the conveyor or because of the rag she was using does not prevent a finding that LOTO was required during the cleaning process, because causation is not an element of Complainant's burden of proof. *American Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated) ("Determining whether the standard was violated is not dependent on the cause of the accident."), aff'd in part, rev'd in part, 351 F.3d 1254 (D.C. Cir. 2003).

6. In fact, the Court placed very little reliance on the expert testimony from either side, as each expert was apparently proffered to tell the Court how to apply the standards in this case, instead of providing expert technical knowledge to help the Court understand the inner workings of the conveyor at issue. The information provided by the lay witnesses was sufficient to establish the basic facts for the Court to apply.

Finally, CSHO Cyprain also discovered Respondent's 300 logs, which track injuries occurring at the workplace, provided insufficient descriptions of the injuries being recorded [in violation of 29 C.F.R. 1904.29(b)(1)].

IV. LEGAL ANALYSIS

To establish a *prima facie* violation of a specific standard under Section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

The Secretary must establish his *prima facie* case by preponderance of the evidence. *See Hartford Roofing Co*., 17 BNA OSHC 1361 (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.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014).

A. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1910.147(d): The established procedure for the application of energy control (the lockout or tagout procedures) did not cover the actions listed in and was not done in sequence as required by 29 CFR 1910.147(d)(1)-(6):
>
> a) Warehouse, Galaxy Line 8 – On or about October 30, 2018, employees were exposed to machine hazards associated with moving parts and nip points when cleaning the infeed conveyor belt connected to the Harpak Ulma High Speed Wrapping Machine, Model Galaxy, Serial #2104536. The employer failed to implement energy control application steps as the conveyor was not shut down

> or turned off to perform the servicing work [per the 1910.147(d)(2) requirements]. As a result, the remaining applicable energy control elements, involving machine isolation [(d)(3)], LOTO device application [(d)(4)], dissipation of residual energy [(d)(5)], and verification of isolation [(d)(6)], were not implemented to protect employees from machine servicing hazards.

See Citation and Notification of Penalty at 7.

1. The Standard Applied and its Terms Were Violated

According to 29 C.F.R. § 1910.147(a)(1)(i), the LOTO standard "covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy, could harm employees." As such, Respondent contends it is incumbent upon Complainant to prove (1) the cleaning performed by the repackers qualifies as "servicing and maintenance"; (2) the repackers were exposed to the hazard of unexpected energization; (3) and could be harmed thereby. The Court shall address these elements below.

a. Respondent's Employees Were Performing Service and/or Maintenance

Respondent contends neither the changeover nor end-of-shift cleanings were servicing and maintenance as those terms are understood according to the standard but are instead part of "normal production operations", which are not covered by the standard except within the exceptions discussed below. *See* 29 C.F.R. § 1910.147(a)(2)(ii). Normal production operations are defined as "the utilization of a machine or equipment to perform its intended production function." *Id.* § 1910.147(b). Although the standard covers servicing and maintenance, those activities are only covered by the standard during normal production operations if "(A) an employee is required to remove or bypass a guard or other safety device; or (B) an employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or *where an associated danger*

zone exists during a machine operating cycle." *Id.* § 1910.147(a)(2)(ii)(A)-(B) (emphasis added). Section 1910.147(a)(2)(ii)(B) also contains an exception to the foregoing for minor servicing activities; however, the Court shall address this later in this section.

The Court finds Respondent's attempt to redefine what constitutes 'service and/or maintenance' runs afoul of the plain language in § 1910.147(b). According to the definition section, service and/or maintenance is:

> 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.

Id. § 1910.147(b) (emphasis added). Indeed, this plain language understanding of cleaning as service or maintenance is recognized in Commission case law. *See, e.g.*, *Burkes Mech. Inc.*, 21 BNA OSHC 2136 (No. 04-475, 2005) (finding LOTO standards found at 1910.147 and 1910.261, which is a paper industry specific LOTO standard, both apply to cleaning fuel wood debris from around and underneath a conveyor that was running during cleaning operations).

The Court sees no reason to depart from the standard's clear application to cleaning, especially where, as here, there is a Commission case directly on point in terms of its facts and holding. *See Burkes Mech, Inc.*, *supra*. Further, the Court finds Respondent's understanding of "normal production" operations strains the most generous understanding of that term. *See* 29 C.F.R. § 1910.147(b). Normal production operations are defined as "the utilization of a machine or equipment to perform its intended production function." *Id.* § 1910.147(b). This conveyor has a singular purpose: to move produce from one end to another. Repackers use the machine to perform the intended function of food sorting; allowing the food that is considered fit for consumption to travel along the conveyor to the repackaging machine. (Tr. 111, 589, 604-605).

The Court does not question that cleaning the conveyor is vital to food safety; however, the act of cleaning is not, in the words of the standard, a use of the machine to perform its intended function of food transport. The cleaning of the conveyor is an ancillary process to prevent cross-contamination and to ensure continued operation of the conveyor, but it is not performed in order to transport food for repackaging. Further, the court must consider both the nature of the work being performed and when the work occurs. *See Westvaco Corp.*, 16 BNA OSHC 1374 (No. 90-1341, 1993). Cleaning and drying of the conveyor frame around the underside and operative roller is not part of the production process to sort product as it moves into the high speed packer.

In *Westvaco*, where the employee had to adjust the machine to prepare for a production run and was thus arguably engaged in a part of its intended production function, the court found the process was part of set-up, which was not a part of *normal* production operations. *Id.* In this case, not only does the plain language of the standard indicate cleaning is considered service and/or maintenance, but the timing of these cleanings is no different than the adjustments being made by the assistant in *Westvaco*. The cleanings in this case occurred at the end of a product run, or at the end of the shift. The stated purpose of the cleanings is to prevent contamination of a subsequent product, or, in other words, were in preparation for a new production to be sent from one end of the conveyor to the other. Similarly, in *Westvaco*, the assistant who made machine adjustments did so multiple times throughout the day prior to the beginning of an individual and customer-specific production run. *Id.* Accordingly, the Court finds the activity of cleaning the conveyors while in operation constitutes service and/or maintenance according to 29 C.F.R. § 1910.147(b).

b. <u>The Conveyor Was Subject to Unexpected Energization</u>

Complainant contends Respondent's employees were performing a task that was governed by the LOTO standards irrespective of whether Respondent chose to have the conveyor belt running during the cleaning process. Respondent, on the other hand, contends the standard does

not apply because its employees were aware the belt was running and, therefore, were not exposed to an *unexpected* energization, start up, or release of stored energy. Although the repackers were aware the conveyor was running, the key question with respect to whether an employee is exposed to unexpected energization is whether the employee had "sufficient notice that energization could occur and cause injury." *Burkes Mech, Inc.*, 21 BNA OSHC 2136 (No. 04-1475, 2007).

As noted by Respondent, 'unexpected energization' is not defined under § 1910.147(b); however, the Commission has repeatedly and consistently held "[e]nergization is 'unexpected' in the absence of some mechanism to provide adequate advance notice of machine activation." *GM*, 22 BNA OSHC 1019, 1023 (No. 91-2483E, 2007); *accord Burkes Mech., Inc.*, 21 BNA OSHC at 2139 n.4. In other words, contrary to Respondent's characterization, unexpected energization has to do with the state of the machine, not whether Respondent's employees were already aware the machine was running. This understanding is reiterated time and again, including in those cases cited by Respondent.

Respondent appropriately cites *Reich v. Gen. Motors. Corp.*, wherein the Sixth Circuit stated:

> The standard is meant to apply where a service employee is endangered by a machine *that can start up* without the employee's foreknowledge. In the context of the regulation, use of the word "unexpected" connotes an element of surprise, and there can be no surprise when a machine is *designed and constructed* so that it cannot start up without giving a servicing employee notice of what is about to happen.

Reich v. Gen. Motors Corp., 89 F.3d 313, 315 (6th Cir. 1996) (emphasis added). Notwithstanding the appropriateness of the passage to the current case, Respondent's reading of the passage is incorrect. From the foregoing, Respondent concludes energization cannot be unexpected "where the employees are already aware of machine start up . . . ." *Resp't Br.* at 23. This is goes a step too far. The Sixth Circuit, as well as the Commission in the cases below, was focused on the *potential*

of a machine to unexpectedly energize. This is why the court's discussion is couched in terms of what is possible ("that can start up") and how the machine is designed to prevent unexpected energization ("designed and constructed"). *See Gen. Motors. Corp.*, 89 F.3d at 315, *supra*. As compared to this case, the machines in *General Motors* had built-in precautions designed to alert employees to an imminent start-up and provide them with adequate time to exit the zone of danger. *Id.*

The Commission has applied the foregoing principles to a situation nearly identical to the present case. In *Burkes Mechanical*, employees were sent to clean the area around and under a moving conveyor, which, due to a change in the system required cleaning on a regular basis. 21 BNA OSHC 2136. Referencing the decision in *General Motors*, the Commission found the offending conveyor "was neither deactivated nor 'designed and constructed' to eliminate unexpected energization. Rather, without providing notice to nearby workers, the running conveyor could have been stopped and restarted by simply pressing a button . . . ." *Burkes*, 21 BNA OSHC 2136 at n.4. The Commission also expressed concern "the BMI laborers cleaning in the bark pit were positioned in such a way that the conveyor could have unexpectedly caught hold of their tools, clothing, or body parts—all types of hazards § 1910.147 was intended to eliminate." *Id.* (citing Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,647). On the basis of the above, the Commission found Burkes' employees were exposed to the hazard of unexpected energization, notwithstanding the fact their work occurred while the conveyor was running.

The other cases cited by Respondent do not change the foregoing. First, they are both unreviewed ALJ decisions, which carry no precedential weight. Second, this Court finds ALJ Spies' discussion in *Townsend Tree Services* was more nuanced than what is suggested by

Respondent. There were two situations addressed by the ALJ: (1) physical changing of the belt and blades on a tree trimmer, and (2) testing of the newly installed blades. In the first instance, the ALJ found the machine was effectively locked out. *See Townsend Tree Svcs. Inc.*, 21 BNA OSHC 1356, 2005 WL 2329316 at *5 (No. 04-1157, 2005). As regards the testing, this Court disagrees with the ALJ's holding insofar as the controls the ALJ painstakingly recounted as constituting an effective LOTO system while the blades and belt on the trimmer were being replaced were not observed during the testing phase. *Id.*

The ALJ decision in *Alro Steel Corporation* is also more nuanced than suggested by Respondent. In *Alro*, the ALJ was confronted with a machine that was effectively locked out, albeit not in the manner sought by Complainant. *See Alro Steel Corp.*, 25 BNA OSHC 1839 (No. 13-2115, 2015). According to the ALJ, even though the "lock out" performed by Respondent was not done at the primary shut off but was instead shut down and locked out on the machine's control panel, Respondent's employees were not exposed to unexpected energization. *Id.* The ALJ made this determination based, in no small part, on Complainant's failure to present persuasive evidence to meet its burden of proof and overcome Respondent's expert testimony, which showed the controls used by Respondent would not subject its employees to unexpected energization, start up, or release of hazardous energy. *Id.*

The fact the repackers were aware the conveyor was running during the cleaning process is immaterial to whether repackers who were assigned to clean it were exposed to unexpected energization. Unlike the machines in *General Motors*, the conveyor did not have a series of warnings and systems to prevent employees from being exposed while in the zone of danger, nor did it have the functional equivalent as the ALJ found in *Alro*. Instead, Respondent had a conveyor that could be sped up, slowed down, turned off, or turned on again without warning to the repacker

employees responsible for cleaning it. This is the case regardless of whether the system was hard-wired, cord-and-plug, or some combination thereof.[7] In addition, one of the repackers specifically testified there have been occasions where the conveyor would start unexpectedly. (Tr. 49). Thus, the Court finds the conveyor was capable of unexpected energization.

c. Respondent's Employees Were Exposed to the Hazard of Unexpected Energization and Could be Harmed Thereby

As noted above, service and maintenance activities are only covered by the standard if "(A) an employee is required to remove or bypass a guard or other safety device; or (B) an employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed (point of operation) or *where an associated danger zone exists during a machine operating cycle*." 29 C.F.R. §§ 1910.147(a)(2)(ii)(A), (B) (emphasis added).

Respondent makes much of the fact that there were guards in place on the conveyor, albeit not all the guards identified in the exhibits submitted into evidence, that would prevent inadvertent contact with pinch- and nip-points on the conveyor during regular production operations. While the Court agrees there is no indication that guards were removed to clean the conveyor, the evidence shows repackers were expected to clean and dry the entire conveyor, inclusive of the belt and frame, during both changeover and end-of-shift cleanings. According to each of the repackers that testified, the entire conveyor needed to be washed clean and dried, else they would be required to clean it again until it was done to the satisfaction of their supervisor or a "checker", who would

7. Although the standard specifically states it does not apply to cord-and-plug equipment, it also limits that exception to equipment and situations where "the plug [is] under the exclusive control of the employee performing the servicing or maintenance." 29 C.F.R. § 1910.147(a)(2)(iii)(A). Even if the conveyor was powered by a drop cord, there was no policy requiring nor any observable practice where the cord was under the exclusive control of the person performing the maintenance.

review their work. (Tr. 52-53). Given the thoroughness expected of the repackers during the cleaning process, the Court finds it is entirely reasonable to expect the repackers would bypass the guards deemed sufficient for normal production operations, which is, in fact, what happened to R.A. in this case. This hazard is especially acute because the repackers were expected to use a rag/hand towel to dry the various parts of the conveyor, which negates any protection that might have been gained using brushes with extended handles.

Respondent argues its employees were expressly trained not to reach into areas of danger during the cleaning process; however, the Court finds two problems with this line of argument. First, Respondent has a training document that says conveyors "must be off while cleaning", but Respondent admits it requires the conveyor to be on during the cleaning process. (Ex. C-5). Thus, the Court is skeptical of the thoroughness of Respondent's training regime, which each of the repackers said was it was more or less nonexistent. (Tr. 54-56, 143). Second, reliance upon training/administrative controls alone is insufficient when Respondent requires the repackers to work around a moving conveyor. Because Respondent requires the conveyor to be running during cleaning, the likelihood of inadvertent contact with moving parts is heightened. Indeed, this was the concern in *Burkes*, where laborers were "cleaning near conveyor were positioned in such a way that conveyor could have unexpectedly caught hold of their tools, clothing, or body parts—all types of hazards § 1910.147 was intended to eliminate." *Burkes*, 21 BNA OSHC 2136 at n.4. The problem with a running conveyor or equipment, however, is not limited to inadvertent contact in the manner described in *Burkes* but also instinctual, reactive behavior, which was the case in *Otis Elevator Company*. *See Otis Elevator Co.*, 2011 WL 10604073 at *3 (No. 09-1278, 2011) (recognizing the potential for inadvertent contact but also considering the mechanic's instinctive reaction to grab a chain to prevent further damage to the equipment he was working on); *see also*

Trinity Indus., Inc., 15 BNA OSHC 1579, 1593-94 (No. 88-1545, 1992) ("Standards are intended to protect against injury resulting from an instance of inattention or bad judgment as well as from risks arising from the operation of a machine.").

Finally, Respondent appears to argue the speed of the conveyor made it unlikely its employees could be harmed by unexpected energization. This is similar to its argument that, because the repackers could see the conveyor running, they could easily avoid exposing themselves to the hazard and getting injured as a result. The simple fact is, R.A. was cleaning the conveyor in the manner she was trained and had been performing for 14 years. (Tr 170). Notwithstanding her training and experience, R.A. was placed in a position where she was expected to fully clean and dry the conveyor while it was running and managed to get caught in one of the rollers, suffering severe injuries as a result. *See Dayton Tire, Bridgestone/Firestone*, 23 BNA OSHC 1247 (No. 94-1374, 2010) (rejecting employer's argument that equipment was visible and moved slowly enough to allow employees to avoid injury). Based on the foregoing, the Court finds the standard applies.

d. The Minor Servicing Exception Does Not Apply

Within the cited standard, there is an exception for minor servicing and repairs, which states, "Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See subpart O of this part)." 29 C.F.R. § 1910.147(a)(2)(ii)(note). The Commission has restated the test as follows: "In order to prove a job task falls within this exception, an employer must show that (1) the tool changes and adjustments, or servicing activities, are minor; (2) they are conducted during normal production operations; and

(3) effective alternative protection is provided." *Westvaco Corp.*, 16 BNA OSHC at 1378, 1380. Respondent contends the cleaning process satisfies the requirements of being routine, repetitive, and integral to the use of the equipment. Based on the evidence, however, the Court finds Respondent failed to establish the exception applies. *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 207 (3rd Cir. 2005) (holding employer seeking exception to the rule has burden to establish it applies).

The repackaging process itself is clearly routine and repetitive. For that matter, so is the end-of-shift cleaning, insofar as it occurs at the end of every work shift. However, while cleaning the conveyor may be routine and repetitive in the colloquial sense, there are other conditions required to come under the exception. The preamble to the standard helps clarify what is intended to be covered: "OSHA's intention was to exclude from coverage those actions which would otherwise fit within the definition of 'servicing or maintenance,' but which are actually routine, repetitive actions which are integral to the operation of the equipment for production, *and which are necessary to allow production to proceed without interruption*. Control of Hazardous Energy Sources, 54 Fed. Reg. 36,644, 36,662 (September 1, 1989) (emphasis added). In other words, what the exception is really after are activities such as tool adjustments (as in the belt adjuster on the conveyor in question), speed adjustments to the conveyor, and lubrication insofar as those activities occur during normal production and effective, alternative protection is provided to those performing the service. Many of the cases discussing the exception often find the activity at issue does not qualify for the exception based on when the activity takes place. *See, e.g., Westvaco Corp.*, 16 BNA OSHC 1374 (holding adjustments to a machine during set-up, although integral to the operation of the equipment, could not be part of normal production operations); *J.C. Watson Co.*, 22 BNA OSHC 1235 (No. 05-0175 *et al.*, 2008) (holding set-up maintenance did not qualify

as occurring during normal production and also finding the activities at issue, including fixing air leaks and changing motors, were not minor).

Respondent also failed to show it had implemented an effective alternative measure to protect its employees while cleaning and drying the conveyor. Respondent took great pains to show how difficult it would be to reach the pinch point during normal operations; however, given the extent to which R.A. and her coworkers were expected to clean and dry the machine, the guards to prevent incidental contact while sorting were insufficient to provide meaningful protection while the conveyor was running.

In this case, the Court finds the cleanings (whether changeover or end-of-shift) were not minor activities, did not occur during normal production operations, and alternative protection was not provided by Respondent. The principal purpose of the conveyor, as noted above, is to convey the produce to the repackaging machine as Respondent's employees sort through what is acceptable and what should be discarded. This process stops when the repackers clean the conveyor. Thus, the production process is not allowed to continue uninterrupted. In this sense, cleaning does not occur during normal production operations, but is part of the set-up process for sorting different produce in the future, whether it occurs during the shift or at the end. Further, the process of cleaning itself took approximately 15-25 minutes each time and required every member of the crew to stop sorting and grab a brush or rag. (Tr. 177). Given the length of time these purported "minor" activities took, the number of people engaged in cleaning, and the fact that cleaning took place *after* a given produce run, the Court finds the exception does not apply.

Based on the foregoing, the Court finds the standard applies and was violated.

2. Respondent's Employees Were Exposed to the Hazard

Complainant must show "employees . . . will be, have been, or are in a zone of danger." *See Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072 (No. 93-1853, 1997). The Court has

already addressed the issue of exposure above because the exposure requirement is built into the language of the standard. Nevertheless, the Court would like to take this opportunity to address some additional arguments made by Respondent in this arena.

Respondent was particularly focused on *how* this particular accident happened. While R.A.'s injury is a serious matter, the question of whether a violation of the Act occurred does not depend on the peculiarities of her incident. *American Wrecking Corp.*, 19 BNA OSHC at 1707, *supra* ("Determining whether the standard was violated is not dependent on the cause of the accident."). For the purposes of exposure, it is sufficient that R.A. was injured while performing a job required by her employer in a manner dictated by her employer. Respondent expected a dry conveyor and would have the crew redo the job if it was not to satisfaction. As such, it is reasonably predictable R.A. and her coworkers would reach into areas they may not otherwise reach into during normal operations. Thus, the Court finds Respondent's employees were exposed to the hazard of unexpected energization.

Respondent called an expert witness, Brian Dudgeon, who copied significant portions of the report of Complainant's expert, Aaron Priddy., but opined the lockout\tagout standard in question does not apply to Respondent's operation because the probability of injury was too low. (Tr. 785, 802, 813). Complainant's expert witness, Mr. Priddy, disputed the inclusion of the element of probability as an element of the standard. (Tr. 879-882) The court does not find Respondent's argument regarding acceptable risk to be consistent with Commission case law, which focuses on whether it is reasonably predictable "employees . . . will be, have been, or are in a zone of danger." *See Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072 (No. 93-1853, 1997). As discussed at length above, the repackers were expected to thoroughly clean and dry the

conveyor belt and frame, which required reaching beyond guards deemed adequate for normal production.

3. Respondent Knew or Could Have Known of the Hazardous Condition

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of an employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The relevant facts have already been recounted above. Respondent admitted it directed and trained the repackers to clean the conveyor while it was running. (Tr. 605-606). In addition, O'Brochta testified any employee could energize the conveyor during the cleaning process. (Tr. 658). The policy directing cleaning to occur while the conveyor was running, on its own, is sufficient to find Respondent had knowledge of the violation. Further, the fact that Respondent's vice president of facilities was also aware of the practice is another basis upon which to establish knowledge. *See Dover Elevator Co.*, 16 BNA OSHC 1281, *supra*. As such, the Court finds Respondent had knowledge of the violative conditions.

4. The Violation Was Serious

A violation is classified as serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). Complainant need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010).

R.A. suffered serious injuries to her arm while cleaning the conveyor while it was in operation. This fact alone is sufficient to establish the seriousness of the violation.

Based on the foregoing, the Court finds Complainant established a violation of the cited standard. Citation 1, Item 2. Citation 1, Item 2 shall be AFFIRMED.

B. Citation 2, Item 1

Complainant alleged an other-than-serious violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1904.29: A log of all recordable work-related injuries and illnesses (OSHA Form 300 or equivalent), was not completed in detail as required by the regulation:
>
> Anthony Marano Company, Chicago, IL – On or about November 6, 2019, the employer failed to record the following workplace injuries in the detail required by the regulation on the OSHA 300 Log for calendar year 2018.[8]

See Citation and Notification of Penalty at 8.

Complainant alleges Respondent failed to complete the OSHA 300 logs in sufficient detail as required by 29 C.F.R. § 1904.29(b)(1). Specifically, Complainant argues Respondent failed to include a description of "the object that directly injured the employee." *See* Citation and Notification of Penalty at 8. Respondent contends its obligations extend no further than "a one or two line description for each recordable injury or illness", because that is the specific language used in the cited standard. *See* 29 C.F.R. § 1904.29(b)(1). Instead, Respondent argues it satisfied its obligation to record the specific details of the injuries in the 300 log by recording that information on the OSHA 301 Injury and Illness Incident report.

According to the cited standard, "You must enter information about your business at the top of the OSHA 300 Log, enter a one or two line description for each recordable injury or illness

8. Due to the number of specific instances identified, the Court will incorporate by reference the Citation and Notification of Penalty to avoid reproduction of an entire page's worth of incidents that are all connected by the same premise – the failure to complete Column F of the OSHA 300 Log with the requisite detail. *See* Citation and Notification of Penalty at 8.

and summarize the information on the OSHA 300A at the end of the year." 29 C.F.R. § 1904.29(b)(1). Section 1904.29(a) requires an employer to use an OSHA 300, OSHA 300A, and OSHA 301 forms or their functional equivalent. *See* 29 C.F.R. § 1904.29(a). An "equivalent form" is "one that has the same information, is as readable and understandable, and is completed using the same instructions as the OSHA form it replaces." 29 C.F.R. § 1904.29(b)(4). The OSHA 300 form specifically requires the following information: (1) injury or illness, (2) parts of body affected, and (3) the object or substance causing the injury or illness. Thus, while the plain language of the standard requires an employer to include a one- to two-line description of the injury, section 1904.29(a) indicates what the content of that one- to two-line description should include; namely, whatever the OSHA Form 300 requires, including the "object/substance that directly injured or made the person ill." (Ex. C-22).

As noted in the violation description, Respondent did not describe the object causing the injury. Instead, Respondent's form only reported a general summary, such as "thumb contusion", "low back strain", and "right ankle contusion". (Ex. C-22). This did not comply with the requirements of the standard. Thus, Complainant established a violation of the cited regulation. Citation 2, Item 1 is AFFIRMED.

V. Penalty

Under the Act, the Secretary has the authority to propose a penalty according to Section 17 of the Act. *See* 29 U.S.C. §§ 659(a), 666. The amount proposed, however, merely becomes advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441–42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). Ultimately, it is the province of the Commission to "assess all civil penalties provided in [Section

17]", which it determines *de novo*. 29 U.S.C. § 666(j); *see also Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

"Regarding penalty, the Act requires that "due consideration" be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations." *Briones Util. Co.*, 26 BNA OSHC 1218, 1222 (No. 10-1372, 2016) (*citing* 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). Rather, the Commission assigns the weight that is reasonable under the circumstances. *Eric K. Ho,* 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003) (Consol.), *aff'd sub nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005). It is the Secretary's burden to introduce evidence bearing on the factors and explain how he arrived at the penalty he proposed. *Valdak Corp*., 17 BNA OSHC at 1138. The gravity of the violation is the 'principal factor in a penalty determination. Assessing gravity involves considering: (1) the number of employees exposed to the hazard; (2) the duration of exposure; (3) whether any precautions have been taken against injury; (4) the degree of probability that an accident would occur; and (5) the likelihood of injury. *See, e.g.*, *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. Appx. 152 (5th Cir. 2002) (unpublished).

Complainant proposed a $13,260 penalty for Citation 1, Item 2. The injuries suffered by R.A. illustrate the gravity of an injury resulting from a failure to implement LOTO procedures. Respondent relied on general warnings and guards designed for normal production operations and exposed virtually all of its repacker employees to pinch- and nip-point hazards. Accordingly, the Court finds the penalty proposed by Complainant is appropriate.

Complainant proposed a $1895 penalty for Citation 2, Item 1. While Respondent failed to comply with the standard, this failure was relatively minor. The OSHA 300 log was filled out;

it only had one piece of missing information, which, as noted by Respondent, was memorialized in the OSHA 301 incident form. Since this violation was of a technical nature and not a complete failure to document, the Court finds a penalty of $500 is appropriate.

ORDER

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

1. Citation 1, Item 1 is AFFIRMED as serious, and penalty of $13,260 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED as serious, and a penalty of $13,260 is ASSESSED.
3. Citation 2, Item 1 is AFFIRMED as other-than-serious, and a penalty of $500 is ASSESSED.

SO ORDERED

/s/ Peggy S. Ball
Peggy S. Ball
Judge, OSHRC

Date: December 20, 2021
Denver, Colorado