



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

Secretary of Labor,
Complainant

v.

Donghee Alabama, LLC,
Respondent.

OSHRC Docket No.: 19-1061

Appearances:

Kristin R. Murphy, Esq.
Office of the Solicitor, U.S. Department of Labor, Atlanta, GA
For Complainant

John H. Coleman, Esq.,
Burr & Forman, LLC, Birmingham, AL
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

At its facility in Auburn, Alabama, Respondent, Donghee Alabama, LLC (“Donghee”), manufactures gas tanks, which are later installed in motor vehicles. (Exhs. J-1 ¶ C(5); C-3; Tr. 35-36, 66). In the process of manufacturing and testing these gas tanks, Donghee utilizes at least three types of machines relevant to this case. One type of machine is a Blow Mold Machine, a mainly automated machine which diecasts the plastic gas tanks. (Exhs. C-2, C-3, R-1; Tr. 52, 63-66). A second type of machine is a Helium Test Machine, which injects the finished gas tanks with helium and measures levels of escaped helium to detect any leaks present in the tanks. (Exhs. C-6, at 1-5; C-7, C-8, R-11, R-12A, R-12B, R-13, R-14; Tr. 37, 122). A third type of machine is a Pad Check Machine, which senses whether a number of rubber pads have been properly attached to the finished and tested gas tanks. (Exhs. C-9, C-10, R-6, R-8, R-9; Tr. 37-38, 124, 387-88). The Helium Test Machines and the Pad Check Machines are named for their “lines,” which refer to the make and model of the vehicle in which they are to ultimately be installed. (Tr. 38, 209). At issue here are two Helium Test Machines, the TMA Line and UMA Line Helium Test Machines (“TMA

Helium Test Machine” and “UMA Helium Test Machine”), and two Pad Check Machines, the ADA and LFA Line Pad Check Machines (“ADA Pad Check Machine” and “LFA Pad Check Machine”). (Citation, at 7 & 8). If there are multiple Blow Mold Machines present in Donghee’s Auburn facility, only “Blow Mold Machine #1” is relevant for purposes of this case. (*Id.* at 6).

The Helium Test Machines are equipped with manufacturer-installed “light curtains” on the front and sides of the machine. (Exh. C-6, at 1-4; Tr. 42-44, 48-50, 88-89, 98-100). A light curtain is a bar with a “transmitter” and a “receiver” between which invisible light beams run. (Tr. 48-49). If something breaks the plane of the light curtain, an employee’s hand for instance, the Helium Test Machines immediately stop mid-cycle. (Tr. 48-49, 238-39). In a similar fashion, the Pad Check Machines are equipped with “laser safety scanners,” which create a perimeter of invisible light beams around the machines, and which stop the Pad Check Machines if the perimeter is disrupted. (Exh. C-9, at 2; Tr. 49, 124-25).

In early 2019, the Occupational Safety and Health Administration (“OSHA”) received a complaint indicating the light curtains on the Helium Test Machines and the laser safety scanners on the Pad Check Machines in Donghee’s Auburn facility were not functioning properly. (Exh. J-1 ¶ C(6); Tr. 36-37). On February 5, 2019, OSHA sent a Compliance Safety and Health Officer (“CSHO”) to investigate this complaint. (Exh. J-1 ¶ C(7); Tr. 50). After inspecting Donghee’s facility and its manufacturing equipment and conducting interviews with employees, managers, and safety personnel, the CSHO learned the following:

Regarding the Helium Test Machines, the CSHO learned the light curtains installed on the TMA and UMA Helium Test Machines were either not functional or only partially functional at the time of his inspection and had been that way for several months. (Exhs. C-6, at 6; C-14; Tr. 42-44, 51, 95-96, 111-12, 116). He learned the laser safety scanner on the LFA Pad Check Machine had similarly not been functional for a number of months. (Tr. 51-52, 134, 140-41, 211, 304-05). Regarding the ADA Pad Check Machine, the CSHO learned its laser safety scanner had been deliberately disabled by Donghee’s maintenance manager approximately three years prior to the inspection. This was done expressly for the purpose of increasing production efficiency because a number of “false alarms” had halted the cycling of the machine. (Tr. 130-33, 300-04). This laser safety scanner was still disabled at the time of the CSHO’s inspection. (Tr. 130-33, 300-04).

Over the course of his investigation, the CSHO also learned of an incident involving the Blow Mold Machine which had occurred earlier that year. On January 23, 2019, a Donghee

production manager had entered the Blow Mold Machine to observe it in motion in an attempt to address quality issues with the gas tanks being produced by the machine. (Exhs. C-2A, C-2B, R-3, R-3A, R-4, R-5; Tr. 55, 209, 272-74, 348-49). As the machine was completing its cycle, a portion of the machine struck and broke the observing manager's foot. (Exhs. C-2A, C-2B, C-3 at 00:35 to 00:41; Tr. 41, 63-64, 67-73).

Following his investigation, the CSHO concluded Donghee had violated three of OSHA's general industry safety standards promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.* ("the Act"). OSHA therefore issued a two-item serious Citation and Notification of Penalty ("Citation") and a one-item willful Citation to Donghee alleging as follows:

Citation 1, Item 1 alleged a serious violation of 29 C.F.R. § 1910.147(f)(1)(ii) for the incident with the employee injured in the Blow Mold Machine for Donghee having failed to ensure employees were removed from the machine during testing or positioning.

Citation 1, Item 2 alleged two instances of a serious violation of 29 C.F.R. § 1910.212(a)(1) for failing to ensure proper guarding on the Helium Test Machines based on the light curtains on the machines not being functional at the time of the inspection.

Citation 2, Item 1 alleged two instances of a willful violation of 29 C.F.R. § 1910.212(a)(1) for failing to ensure proper guarding on the Pad Check Machines based on the laser safety scanners on the machines not being functional at the time of the inspection.

The Citations proposed a total penalty of \$135,019.

Donghee filed a timely Notice of Contest thereby bringing this matter before the Occupational Safety and Health Review Commission ("Commission") and this Court. The Court held a hearing on this matter on March 21 and 22, 2022 in Montgomery, Alabama. The parties have filed post-hearing briefs. For the reasons laid out in detail below, the Court makes the following determinations:

Citation 1, Item 1 is **AFFIRMED** as a serious violation of 29 C.F.R. § 1910.147(f)(1)(ii) and the proposed penalty of \$13,127 is assessed.

Both instances of Citation 1, Item 2 are **AFFIRMED** as serious violations of 29 C.F.R. § 1910.212(a)(1) and the proposed penalty of \$9,377 is assessed.

Both instances of Citation 2, Item 1 are **AFFIRMED**, although only instance (a) is affirmed as a willful violation of 29 C.F.R. § 1910.212(a)(1). Instance (b) is reclassified as a serious

violation. However, the total proposed penalty of \$112,515 is assessed for Donghee’s willful violation.

JURISDICTION AND COVERAGE

The parties agree Donghee timely contested the Citations (Exh. J-1 ¶¶ C(3) &(4)). The parties further agree the Commission has jurisdiction over this action and Donghee is a covered employer under the Act (Exh. J-1 ¶¶ C(1)-(2)). Based on these stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and Donghee is a covered employer under § 3(5) of the Act.

BACKGROUND¹

Donghee Alabama

Donghee manufactures “automotive parts” at a facility located in Auburn, Alabama where it employs approximately 105 people. (Exh. J-1 ¶ C(5); Tr. 87). Certain people working in the facility are employed by Donghee directly while others work for two other companies, “Jian” and “J&C,” which supply temporary workers to operate Donghee’s machines on certain occasions. (Tr. 46-47, 117, 208, 235, 240-41).

Among the automotive parts Donghee produces and tests at its facility in Auburn are gas tanks for Hyundai and Kia-brand motor vehicles. (Exhs. J-1 ¶ C(5); C-3; Tr. 35-36, 66). At least three different types of machines are involved in the production and testing of gas tanks at

¹ In an introductory section of the argument portion of its brief, Donghee devotes a substantial footnote in support of the assertion that “[OSHA] must adopt 30(b)(6) witness testimony.” Resp’t’s Br. 8 n.62. In this regard, Federal Rule of Civil Procedure 30(b)(6) governs notices of depositions directed to, among other entities, corporations and governmental agencies. Fed. R. Civ. P. 30(b)(6). For such notices, the serving party “must describe with reasonable particularity the matters for examination.” *Id.* The named party must then “designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf.” *Id.* “The persons designated must testify about information known or reasonably available to the organization.” *Id.* Here, CSHO David Tisdale, who later became an Assistant Area Director, was designated as the Secretary’s 30(b)(6) witness, and Donghee submitted certain portions of his deposition testimony into evidence, cited herein as the “Tisdale Deposition.” (Exh. R-17).

Rule 30(b)(6) “was designed to “curb the ‘bandying’ by which officers or managing agents of a corporation [or agency] are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.” Wright & Miller, *Persons Subject to Examination—Corporations and Other Organizations*, 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed.). Thus, an agency would be bound by a “legitimate lack of knowledge response” from a designated 30(b)(6) witness and may be precluded from introducing evidence on such a topic at trial to avoid unfair surprise. *See, e.g., QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 690 (S.D. Fla., Jan. 30, 2012). However, an agency “is no more bound [by a 30(b)(6) witness’s deposition testimony] than any witness is by his or her prior deposition testimony. A witness is free to testify differently from the way he or she testified in a deposition, albeit at the risk of having his or her credibility impeached by introduction of the deposition.” *R & B Appliance Parts, Inc. v. Amana Co., L.P.*, 258 F.3d 783, 786 (8th Cir. 2001); *see also* Wright & Miller, § 2103 (“[A]s with any other party statement, [Rule 30(b)(6) deposition statements] are not “binding” in the sense that the corporate party is forbidden to call the same or another witness to offer different testimony at trial.”). Thus, Donghee’s extensive citations to CSHO Tisdale’s deposition statements throughout its brief are considered only to the extent normal deposition testimony would be considered, not as statements by which OSHA is “bound” as Donghee seems to suggest.

Donghee's facility in Auburn: the Blow Mold Machine, the Helium Test Machines, and the Pad Check Machines. The Court will detail each type of machine, including how it is operated by Donghee's employees and any safety hazards associated with the machine.

The Blow Mold Machine

The Blow Mold Machine produces the gas tanks at Donghee's Auburn facility through a diecasting process. (Exhs. C-2, C-3, R-1; Tr. 52, 66). The machine is caged off from the rest of the facility. (Exhs. C-2, C-2A, C-2B, C-3, R-1; Tr. 60-62). The machine consists of several moving parts and typically operates in automatic cycles. (Exh. C-3; Tr. 52, 66, 288, 347). A cycle of the Blow Mold Machine proceeds as follows: the two halves of the gas tank mold are pressed together, and the mold is injected with molten plastic. (Exh. C-3 at 00:20-00:36; Tr. 66). A longer "shuttle" then travels the length of the caged-off area and thereby extracts the finished gas tank from the mold. (Exh. C-3 at 00:36 to 00:40; Tr. 66).

The Accident Involving the Blow Mold Machine

On January 23, 2019, one of Donghee's production managers, Woong Gi Park, noticed an issue with the quality of the tanks being produced by the Blow Mold Machine: the tanks were not sealing properly. (Tr. 72-73). To address this issue, Park planned to enter the caged-off area of the Blow Mold Machine and observe the machine in motion while it cycled. (Exhs. C-2A & C-2B; Tr. 58-61, 67-69, 71-73). Per Donghee's policy on observing active machines, Park filled out a "Nonstandard Work Safety Analysis" form, in which he addressed, among other issues, how he intended to abate the hazards associated with being in proximity to the Blow Mold Machine while it cycled. (Exh. C-4; Tr. 75-78, 272, 344-48, 359-60). To abate these hazards, Park simply wrote "communication," which ultimately translated into him stationing a second employee by the Blow Mold Machine's emergency-stop button to halt the machine if necessary. (Exh. C-4; Tr. 78-80, 346-47). Donghee's safety manager, Michelle Blankenship, signed this form and thereby approved Park's plan to enter the Blow Mold Machine. (Exh. C-4; Tr. 75, 80-81, 272).

Park entered the caged-off area of the Blow Mold Machine and stood on a small, grated surface adjacent to the moving shuttle. (Exhs. C-2A & C-2B; Tr. 52, 56-62, 66, 71-72). Donghee's written lockout/tagout ("LOTO") policy required Park to put the Blow Mold Machine into "manual" mode and operate it with a handheld "pendant" when observing it in motion. (Exh. R-3, at 3; Tr. 288, 346-48, 355). Instead, Park left the machine in "automatic" mode. (Tr. 288, 348-49). As the machine was completing a cycle, the moving shuttle portion of the machine was traveling

the length of the caged-off area to extract a finished gas tank and, in doing so, struck Park's foot and broke it. (Exh. C-3, at 00:04 to 00:10; Tr. 64, 69-71, 209, 348). Following its investigation of the accident, Donghee concluded Park had violated the company's LOTO policy, and Park received both a verbal and written warning as a result.² (Exhs. R-3, R-3A, R-4; Tr. 189, 288-89).

The Helium Test Machines

Donghee utilizes "Helium Test Machines" in its Auburn facility, two of which are implicated in this case: the TMA Helium Test Machine and the UMA Helium Test Machines. (Exh. J-1 ¶ C(5); Citation at 7; Tr. 36-37). Both machines cycle 300 times a shift, two shifts a day. (Exh. J-1 ¶¶ C(10) & (11)). As a general matter, the two machines serve the same purpose. Both of the machines have testing chambers wherein a finished gas tank is filled with helium. (Tr. 37). The machines have sensors to detect whether any helium escapes into the testing chamber, thereby detecting whether there are any leaks in the finished tanks. (Tr. 37). As a practical matter, employees operate the two Helium Test Machines differently and so are exposed to distinct hazards from each.

The TMA Helium Test Machine

In operating the TMA Helium Test Machine, a Donghee employee places the gas tank on a flat metal plate, which is approximately at waist height, and connects a hose to the tank. (Exh. C-7, at 00:00 to 00:13; Tr. 37, 109-10, 122). The employee then presses the machine's start button, which causes the metal plate on the machine to lift up into a vacuum testing chamber. (Exhs. C-6, at 1; C-7, at 00:13 to 00:22; Tr. 37, 109-10, 122). No evidence was offered on the exact height of this chamber; however, in the video clip of the machine's operation, the chamber is located above the head of the employee operating the machine. (Exh. C-7, at 00:00 to 00:05; *see also* Tr. 181 (CSHO stating the chamber was "above my head")). After the machine completes its testing of the gas tank, the metal plate is lowered back to its starting position. (Exhs. C-8, R-12A). The lowering of the metal plate occurs automatically when the machine has finished its testing of the gas tank.³

² Donghee entered into evidence two disciplinary notices issued to Park in connection with this accident. (Exhs. R-3, R-3A, R-4). Although the difference between these two notices was never explained at the hearing, one of the notices appears to have been issued by Donghee's corporate office in South Korea while the other was issued by management from Donghee's office in Alabama. (*Compare* Exh. R-3, *with* Exh. R-4).

³ Both parties entered two video clips of the operation of the TMA Helium Test Machine into evidence. (Exhs. C-7, C-8, R-12A, R-12B). The parties entered the same video clip of an employee loading a tank onto the machine, stepping away from the machine, starting the machine (although the start button is not visible in the clip), and the metal plate thereafter lifting into the testing chamber. (Exhs. C-7, R-12B). This clip stops before the metal plate lowers. The parties entered separate and different video clips depicting the metal plate lowering. (Exhs. C-8, R-12A). Because these videos are separated from the video of the plate ascending to the testing chamber, and because neither video

The operation of the TMA Helium Test Machine exposes workers to several potential hazards. First, on either side of the moving metal plate are pinch points where the plate meets flush with a flat, metal surface on the machine. (Exhs. C-8, R-12B; Tr. 109-11, 296-98). The manual for the TMA Helium Test Machine acknowledges the existence of these pinch points. (Tr. 296-98).⁴ Second, the metal plate applies approximately 87 pounds of pressure in the process of lifting and lowering the gas tanks into the testing chamber and therefore poses a crush hazard, especially for someone who may be standing below the plate as it lowers. (Exhs. C-8, R-12B; Tr. 89-92, 109).

To address these hazards, the TMA Helium Test Machine is equipped with manufacturer-installed light curtains. (Exhs. C-6, at 1 & 2; C-14, at 2; Tr. 48-50, 88-89, 218-19, 258). A light curtain consists of a transmitter and receiver which emit invisible light between them. (Tr. 48-49, 258). If something disrupts the plane of light between the transmitter and receiver, an employee's hand for example, the machine automatically stops mid-cycle. (Tr. 48-49, 218, 258). The TMA Helium Test Machine has two light curtains on the front of the machine and one on each side. (Exh. C-6, at 1 & 2; Tr. 50, 88-89). At the time of OSHA's inspection, the light curtains on the TMA Helium Test Machine had been either inoperative or only partially operative for approximately three to six months. (Exhs. J-1 ¶ C(6), C-14, at 2; Tr. 95-96, 218, 259-60). Donghee's managers were aware of the issue regarding the TMA Helium Test Machine's light curtains. (Tr. 50-51, 95-96, 116, 259-60). Nonetheless, employees continued to operate the machine without functioning light curtains. (Tr. 95-96).

In lieu of functional light curtains, tape had been placed on the ground approximately 3 to 4 feet in front of the TMA Helium Test Machine, and Donghee instructed some of its employees to stand behind this tape while the machine cycled. (Tr. 116, 122; Tisdale Dep. 73, 80, 93).

depicts the employee operating the machine, they are somewhat inconclusive on the issue of whether the plate lowers automatically following a cycle or whether some employee action is required to lower the plate. Other evidence in the record suggests the lowering of the plate occurs automatically, however. Particularly, the CSHO described the operation of the TMA Helium Machine and stated once an employee steps back from the machine and activates the cycle with the start button, they simply wait for the machine to finish its testing cycle before having to reapproach the machine and detach the hoses from the gas tank. (Tr. 117, 122, 180). Additionally, although the UMA Helium Test Machine operates differently from the TMA Machine, it only requires an employee to start the cycle; its drawer slides out automatically once the cycle has finished. (Exhs. C-6, at 4; R-14, at 02:24 to 02:32; Tr. 103). Based on this evidence, the Court concludes the lowering of the metal plate on the TMA Helium Test Machine occurs automatically when the machine has finished testing the gas tanks. As discussed below in more detail, the Court attaches significance to this fact for identifying the seriousness of the hazard employees are exposed during the operation of the machine.

⁴ Although Wills testified to the content of this manual, the manual itself was not offered as an exhibit. (Tr. 296-98).

However, many employees did not know the purpose of the tape or simply “forgot” to stand behind it while the machine cycled. (Tr. 117-18).

The UMA Helium Test Machine

The UMA Helium Test Machine is operated altogether differently from the TMA Machine. First, employees load a gas tank into a large metal “drawer” by sliding it off a metal surface adjacent to the open drawer. (Exhs. C-6, at 3 & 4; R-14, at 00:12 to 00:26; Tr. 100-01, 107, 109, 190). The employees must then reach into the drawer to attach hoses to the gas tank, hoses which will ultimately fill the tank with helium to test for leaks. (Exh. R-14, at 00:26 to 00:37; Tr. 37, 107, 109-10, 261-62). An employee then starts a cycle by “swiping” a button in front of the machine. (Exhs. C-6, at 3 & 4; R-14, at 00:37 to 00:40; Tr. 108, 190-91). This causes the drawer to slide into the testing chamber. (Exh. R-14, at 00:40 to 00:44; Tr. 108, 190). After the machine finishes testing the tank, the drawer then automatically slides back out. (Exhs. C-6, at 4; R-14, at 02:24 to 02:32; Tr. 103). Employees must then reach back into the drawer to remove the hoses from the tested tank and slide it out from the drawer. (Exh. R-14, at 02:32 to 02:44; Tr. 108, 261-62).

The sliding of the drawer on the UMA Helium Test Machine exerts approximately 125 pounds of pressure and thereby creates pinch and crush points when the machine is cycling. (Tr. 105-06). One particular pinch or crush point exists between the sliding drawer and an aluminum “stop” located halfway on the front of the surface on which the drawer slides. (Exh. C-6, at 3, 4, 6; Tr. 100-04, 111-13). This pinch point is clearly labeled by stickers on the machine. (Exh. C-6, at 5). Additionally, the sliding of the drawer into and out of the testing chamber creates pinch points between the side of the drawer and adjacent metal surfaces, pinch points which are also clearly labeled by stickers on the machine. (Exh. C-6, at 3 & 4; Tr. 100-04, 107, 111-13, 260-61).

To address these potential hazards, the UMA Helium Test Machine, like the TMA Machine, is equipped with manufacturer-installed light curtains on the front and sides. (Exh. C-6, at 3; Tr. 48-49, 89, 98, 210-11). These light curtains were not fully functional at the time of the CSHO’s inspection, with the side curtains being completely inoperative and the front curtains functioning only intermittently. (Exhs. C-6, at 6; C-14, at 2; Tr. 97, 100, 218, 259-60). Donghee’s managers were aware of the issue regarding the UMA Helium Test Machine. (Exh. C-6, at 6; Tr. 50-51, 116, 259-60, 270-71). Nonetheless, Donghee employees continued to operate the UMA Helium Test Machine with partially functional and completely inoperative light curtains. (Exhs. C-6, at 6; C-14, at 1; Tr. 113). Finally, like the TMA Machine, tape had been placed in front of the UMA Helium

Test Machine. Some employees had been instructed to stand behind this line while the machine cycled, while others had not been trained on the tape's purpose. (Tr. 117-18; Tisdale Dep. 93).

The Pad Check Machines

The two Pad Check Machines at issue, the LFA and ADA Pad Check Machines, are both operated similarly. (Exhs. C-10, R-9; Tisdale Dep. 173). The main purpose of the Pad Check Machines is to ensure the attachment of four or five rubber pads, which are attached to the tanks to decrease the amount of vibration and rubbing against the frame of the motor vehicles in which the tanks are installed. (Tr. 37-38, 221, 387-88).

To operate a Pad Check Machine, a Donghee employee slides a tank from the line onto a flat metal surface of the machine and up against a T-shaped "stopper" on the far end of the metal surface. (Exhs. C-10, at 00:00 to 00:06; R-9, 00:03 to 00:10; Tr. 124, 138, 225-26). The distance between the employee and the gas tank at this point in time is approximately eight inches. (Tr. 162; Tisdale Dep. 48-49, 51). The employee then scans a bar code on the tank and activates the Pad Check Machine by pressing the start button. (Exhs. C-10, at 00:06 to 00:12; R-9, at 00:12 to 00:13; Tr. 124, 140). This causes a metal "arm" to swing down toward the gas tank, which is lifted from the surface of the machine by what appear to be plastic lifts. (Exhs. C-10, at 00:13 to 00:20; R-9, at 00:13 to 00:17; Tr. 124).

Attached to the arm is a half-inch thick, aluminum plate, and attached to the plate are a number of three-pound rated springs or "plungers" situated in the same pattern as the rubber pads on the gas tanks. (Exhs. C-9A & 9B; C-10, at 00:19; R-18; Tr. 125, 320-21, 374, 384-90). The three-pound rating on the springs does not represent the actual amount of force exerted by the metal arm when it moves up or down, or the amount of pressure the arm is capable of exerting. (Tr. 387-88, 390-91). Rather, as the arm presses down on the gas tank, the springs are designed to sense the amount of pressure being exerted on them, and once that level of pressure reaches three pounds on each spring, the Pad Check Machine is designed to recognize all the rubber pads have been attached to the tank. (Tr. 320-21, 387-88, 391). After the springs determine the attachment of the pads to the tank, the metal arm then swings back up to its starting position. (Exhs. C-10, at 00:20 to 00:25; R-9, at 00:19 to 00:21).

The entire testing process takes a little over ten seconds from the time the employee activates the machine. (Exhs. C-10, at 00:12 to 00:24; R-9, at 00:12 to 00:23). Once the process is complete, assuming the rubber pads have all been properly installed, the employee then places

plastic bags over certain parts of the tank and removes the tank from the metal surface of the Pad Check Machine. (Exh. C-9, at 00:24 to 00:34; Tr. 163). This process occurs at both Pad Check Machines 300 times per shift, two shifts a day. (Exh. J-1 ¶¶ C(8) & (9); Tisdale Dep. 66).

The operation of the Pad Check Machines exposes employees to several hazards. First, although the parties dispute whether the plungers actually present a hazard, they have stipulated to the existence of pinch points where the springs on the arm of the machine meet the surface of the gas tank. (Exh. J-1 ¶¶ C(8) & (9); Tr. 166; Tisdale Dep. 36). Second, the metal arm of the machine swings up and down as the machine operates while the operator is merely inches away, posing a struck-by hazard to the operator from the half-inch aluminum plate attached to the arm. (Exhs. C-10, at 00:13 to 00:26; R-6, R-9, at 00:12 to 00:21; Tr. 125-27). Finally, as evidenced by an injury occurring on the ADA Pad Check Machine three to four months prior to the CSHO's inspection,⁵ the raising and lowering of the metal stopper at the end of the machine can pose a struck-by hazard to an employee reaching over the machine. (Exhs. C-14, at 1; C-15, at 2; Tr. 210, 221, 225, 244-45, 263, 283-84).

Both Pad Check Machines came equipped with laser safety scanners to address the hazards posed when operating the machines.⁶ (Exh. C-9, at 2; Tr. 49, 124, 211-12, 219-20). Similar to a light curtain, a laser safety scanner creates a perimeter of invisible light, and if something disrupts the perimeter, the machine immediately shuts off. (Tr. 49, 140-42, 211-12). Regarding the LFA Pad Check Machine, the laser safety scanner had not functioned properly for two or three months before the CSHO's inspection. (Tr. 51-53, 304-05). Donghee's managers were aware of this issue. (Tr. 51, 304-05). Nonetheless, employees were instructed to continue to operate the machine. (Tr. 211-12).

⁵ Multiple witnesses described an incident involving an individual operating the ADA Pad Check Machine. Apparently, on a date approximately three to four months prior to the CSHO's inspection, this employee was operating the ADA Pad Check Machine and reached over the metal surface of the machine, either to retrieve something he dropped on the ground or to address an issue with the T-shaped stopper on the far left of the machine. (Exhs. C-14, at 1; C-15, at 2; Tr. 127, 210, 221, 225, 244-45). As the employee was doing this, the stopper deployed quickly (i.e., "popped up") and struck the employee in the mouth. (Exhs. C-14, at 1; C-15, at 2; Tr. 210, 221, 225, 244-45, 263, 283-84). The employee suffered a minor injury to his lip and was treated only with ice. (Exh. C-15, at 2; Tr. 210, 221).

⁶ According to Jacob Wills, Donghee's maintenance manager, the laser safety scanners installed on the Pad Check Machines were not connected to the stopper that struck its employee three to four months before the CSHO's inspection. (Tr. 329-30). However, it is undisputed the laser safety scanners, if functional, would stop the moving arm of the machine and thus address any hazards associated with that part of the machine.

Regarding the ADA Pad Check Machine, two or three *years* prior to the CSHO's inspection, Donghee's maintenance manager at the time, an individual named Chris Kim, deliberately disabled the laser safety scanner on the machine. (Tr. 53, 130-33, 300-04). Kim disabled the safety scanner because it was creating too many "false alarms" and hindering production on the machine. (Tr. 133-34, 302-03). In other words, the scanner was disabled to promote production efficiency on the machine. (Tr. 303). The deliberate disabling of the safety scanner on the ADA Pad Check Machine was performed in front of Wills, who succeeded Kim as the maintenance manager at Donghee's Auburn facility. (Tr. 300-04). Wills thus knew the safety scanner had been deliberately disabled. However, he did not reassess Kim's decision to disable the scanner; instead, he "put faith in the company's decision" it was safe to run the ADA Pad Check Machine without it. (Tr. 302). Donghee employees continued to operate the ADA Pad Check Machine despite it not having a functioning laser safety scanner. (Tr. 209-10, 238-39, 262-64, 301).

Safety Culture at the Auburn Facility

Two Donghee employees testified at the hearing. One employee, who was currently working as a quality control inspector at the time of the hearing, was familiar with both the Helium Test and Pad Check Machines. (Tr. 208-09). She explained Donghee's managers knew the light curtains and laser safety scanners were not working prior to OSHA's February 5th inspection, but workers were told to operate the machines anyway. (Tr. 211-12). She also observed the accident involving the ADA Pad Check Machine where another Donghee employee injured his lip on the machine's "stopper." *See* note 5.

The second employee worked at Donghee's Auburn facility for approximately five-and-a-half years, from 2015 to 2019, and eventually resigned due to what she viewed as "mismanagement" of safety in the facility. (Tr. 235-36). The Court found this employee to be a forthright and credible witness on how safety was treated at Donghee's Auburn facility and therefore will elaborate on her testimony in some detail.

At the start of OSHA's investigation, this employee told the CSHO "telling managers [about issues with the machines,] it goes in one ear and out the other; it's quicker to get with maintenance ourselves and get it fixed." (Exh. C-5, at 3). For example, on the issue of non-functioning light curtains on the Helium Test Machines, this employee detailed Donghee management's contradictory and production-centric response as follows:

[F]or instance, we had a machine that the light curtain was working on it, Michelle [Blankenship, Donghee's safety manager,] would specifically tell us do not go in

the light curtain, you know, do not go in the machine, don't touch it, don't open the door, just leave it alone, but then you would have another supervisor or manager would say – you know, tell us to go ahead and go in it or move the machines, take it apart, whatever we have to do to get the engines going down the line.

(Tr. 237-38).

This same employee was assigned to operate the ADA Pad Check Machine, despite its laser safety scanner having been disabled by Donghee's maintenance manager. (Tr. 238-39). The employee knew the purpose of the safety scanner and felt unsafe operating the machine without it: "Because if the light curtain or didn't anything [sic] work, if you stick your hand or any body part in the machine, you can get hurt because if the light curtain wasn't working, it wasn't any kind of way to stop the machine, you know, if something went wrong." (Tr. 239).

This employee reported safety concerns on the subject machines to multiple managers and "if maintenance couldn't fix [the issue], maybe it would start working for a little while and then it stopped, but if it stopped, we just kept working. They just keep working because they didn't want to hold up the line." (Tr. 241). This employee described instances where Donghee employees refused to work on a given machine because they thought it was unsafe and a manager, referred to only as "David," brought in a temporary worker from J&C to perform the task in their place. (Tr. 240-44). Indeed, on at least one occasion, the same thing happened to this employee: she refused to operate a Pad Check Machine because she thought it was unsafe, and "Dave" brought in a J&C worker to replace her. (Tr. 243).

As noted above, Donghee's managers were generally aware the manufacturer-installed light curtains on the Helium Test Machines and laser safety scanners on the Pad Check Machines were either inoperative or only partially operative at the time of the CSHO's inspection. (Exh. C-6, at 6; Tr. 50-51, 89, 95-96, 116, 259-60, 270-71, 300-05). The CSHO interviewed seven managers during his investigation, each of whom acknowledged the light curtains and laser safety scanners were inoperative at the time. (Tr. 134, 141). At the hearing, both of Donghee's managers who testified, Blankenship and Wills, maintained this was not an issue regarding the ADA Pad Check Machine, because the machine was not operated in a way which posed a hazard to employees. (Tr. 262, 301). Another manager, Cody Yates, who did not testify at the hearing, told the CSHO when he attempted to order a replacement laser safety scanner for the LFA Pad Check Machine, he was told there was no budget for it. (Tr. 140-41). Yet, the light curtains and laser safety scanners on the

subject machines were all made operational by the time the CSHO returned to Donghee's Auburn facility on February 6, 2019, one day after his initial inspection. (Tr. 143-44).

Complaint, Inspection & Citations

Sometime “[b]efore February 5, 2019, OSHA received a complaint that th[e] light curtains were inoperable on the TMA line helium test machine, UMA line pad check machine, and ADA line pad check machine” at Donghee's facility in Auburn. (Exh. J-1 ¶ C(6)). As a result of this complaint, OSHA sent CSHO David Tisdale to inspect the Auburn facility and further investigate the complaint. (Exh. J-1 ¶ C(7); Tr. 35-37). On several occasions, from February 5, 2019, to April 30, 2019, CSHO Tisdale inspected Donghee's facility, conducted interviews with employees and managers, reviewed documents provided by Donghee, and inspected and took photographs of the various machines. (Exhs. J-1 ¶ C(7); C-2, C-6, C-9, C-14, C-15; Tr. 38-41).

Following his inspection and investigation, the CSHO concluded Donghee had violated 29 C.F.R. § 1910.147(f)(1)(ii) on January 23, 2019, when Park was injured while not safely positioned in the energized Blow Mold Machine. (Tr. 55-56). The CSHO further concluded Donghee violated 29 C.F.R. § 1910.212(a)(1) by not having functional light curtains on either the TMA or UMA Helium Test Machines. (Tr. 96-98). Finally, the CSHO concluded Donghee had willfully violated 29 C.F.R. § 1910.212(a)(1) by not having operational laser safety scanners on either the ADA or LFA Pad Check Machines. (Tr. 123).

OSHA ultimately issued the two-item serious Citation and one-item willful Citation giving rise to this proceeding.

THE CITATIONS

The Secretary's Burden of Proof

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atl. Battery Co., Inc., No. 90-1747, 1994 WL 682922, at *6 (O.S.H.R.C. Dec. 5, 1994).

Applicable Law

The employer or the Secretary may appeal a final decision and order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the D.C. Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Auburn, Alabama in the Eleventh Circuit. The parties have

not identified, and the record does not contain, any principal place of business other than Alabama for Donghee. Where it is highly probable that a case will be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case, even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *4 (O.S.H.R.C. March 16, 2000). Here, the parties did not offer, and the Court has not found, relevant Eleventh Circuit precedent that differs from the Commission's precedent on any material issue raised in this case.⁷ The Court therefore applies Commission precedent in this case.

Citation 1, Item 1: Alleged Serious Violation of § 1910.147(f)(1)(ii)

The Alleged Violation Description

Citation 1, Item 1 alleges the following:

29 CFR 1910.147(f)(1)(ii): Employees were not removed from the machine or equipment area in accordance with paragraph (e)(2) of this section during testing or positioning of machines, equipment, or components thereof:

a) Production Floor; On or about January 23, 2019, an employee was exposed to struck-by and crush-by hazards in that the employee was allowed to be inside the Blow Mold Machine #1 production cell while it was in automatic operation. The employee was not safely positioned and was struck-by the machine.

The Cited Standard

29 C.F.R. § 1910.147(f)(1)(ii) provides:

Testing or positioning of machines, equipment or components thereof. In situations in which lockout or tagout devices must be temporarily removed from the energy isolating device and the machine or equipment energized to test or position the machine, equipment or component thereof, the following sequence of actions shall be followed: ... (ii) Remove employees from the machine or equipment area in accordance with paragraph (e)(2) of this section ...

Section (e)(2), referenced in the cited standard, provides in relevant part as follows:

Release from lockout or tagout. Before lockout or tagout devices are removed and energy is restored to the machine or equipment, procedures shall be followed and actions taken by the authorized employee(s) to ensure the following:
(2) Employees. (i) The work area shall be checked to ensure that all employees have been safely positioned or removed.

(1) The Applicability of the Cited Standard

Under Section 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

⁷ The Court has identified one *immaterial* issue raised by Donghee where Eleventh Circuit precedent differs from Commission precedent and addresses that issue below.

machines or equipment, or release of stored energy, could harm employees. This standard establishes minimum performance requirements for the control of such hazardous energy.” Further, under Section 1910.147(a)(2), the standard “applies to the control of energy during servicing and/or maintenance of machines and equipment” but not to normal production operations.

Section 1910.147(b) defines “servicing and/or maintenance” as “[w]orkplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment.”

Here, Park entered the Blow Mold Machine to observe the machine in operation so he could address a quality issue with the gas tanks being produced by the machine. (Exh. C-4; Tr. 72-73). His activities thus constituted “servicing and maintenance” under the standard. *See AJM Packaging Corp.*, No. 16-1865, 2022 WL 1102423, at *3 (O.S.H.R.C. Apr. 1, 2022). Moreover, as evidenced by Park’s actual injury in the Blow Mold Machine, the unexpected startup of the Blow Mold Machine had the potential to harm an employee standing inside the machine. (Tr. 64, 69-71, 209, 348); *cf. also Caterpillar, Inc.*, 17 BNA OSHC 1584, 1585 (No. 93-2230, 1996) (relying on employee injuries to find a violation of the standard requiring LOTO training for all potential hazards). The Court therefore finds the standard applied to Park’s activities in the Blow Mold Machine.

Donghee argues the standard did not apply under the “minor servicing” exception contained in a note to the applicability of the standard.⁸ However, by its own terms, the minor servicing exception only applies to “activities ... which take place during normal production operations.” NOTE to 29 C.F.R. § 1910.212(a). Park’s activities were not normal production operations, but servicing or maintenance activities, as evidenced by his express intention to address a performance issue with the machine and by his use of the “Nonstandard Work Safety Analysis” form prior to entering the machine. (Exh. C-4; Tr. 72-73). Thus, the minor servicing exception is not relevant to this case. Further, though, even if the exception were relevant to Park’s activities in the Blow Mold Machine, there is nothing in the record to suggest Park’s activities were “routine,

⁸ In its entirety, this note reads:

Note: Exception to paragraph (a)(2)(ii): 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 0 of this part).

repetitive, and integral to the use of the equipment for production,” as required by the exception. (Tr. 73-75). The Court therefore rejects Donghee’s invocation of the minor servicing exception, as it is inapplicable to the facts of this case. *See, e.g., J.C. Watson Co.*, 22 BNA OSHC 1235, 1240 (No. 05-0175, 2008) (rejecting the application of the exception where the employer “failed to show any of these tasks were in fact minor adjustments”), *aff’d* 321 Fed App’x 9 (D.C. Cir. 2009).

(2) Compliance with the Standard’s Terms

Section 1910.147(f)(1)(ii), read together with Section 1910.147(e)(2), requires employees to be “safely positioned or removed” when a “machine or equipment [is] energized to test or position the machine, equipment or component thereof ...” Here, there is no dispute the Blow Mold Machine was energized at the time Park entered it for the purpose of observing it while it cycled. (Exh. C-4, at 1; Tr. 288, 347-48). Park’s foot was broken when it was struck by the moving shuttle on the machine. (Exhs. C-2A & C-2B; Tr. 58-61, 67-69, 71-73). The Court therefore finds he was not “safely positioned” within the machine while testing it. Donghee makes no contrary arguments on this element of the Secretary’s case.

The Court finds the Secretary has established noncompliance the standard.

(3) Employee Access to the Violative Condition

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995), *aff’d*, 79 F.3d 1146 (5th Cir. 1996). Here, Park was actually exposed to the hazard presented by the moving shuttle when he entered the Blow Mold Machine while it was still energized. Donghee has not challenged this element of the Secretary’s case.

The Court finds there was actual employee exposure.

(4) Employer Knowledge

To prove the knowledge element of a violation, the Secretary must demonstrate the employer’s actual knowledge or constructive knowledge of the violation. *Jacobs Field Servs., N.A.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015); *see also ComTran Grp., Inc. v. U.S. Dep’t of Labor*, 722 F.3d 1304, 1307-08 (11th Cir. 2013). A supervisor’s actual or constructive knowledge of a violation is imputed to Donghee. *Quinlan v. Sec’y, U.S. Dep’t of Labor*, 812 F.3d 832, 837 (11th Cir. 2016); *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Here, Blankenship, Donghee’s safety manager, expressly authorized Park’s entry into the Blow Mold Machine when she signed the “Nonstandard Work Safety Analysis” form on January 23, 2019. (Exhs. C-4 & R-5; Tr. 75-78, 80-81, 257, 272). She thus had actual knowledge of the

violation, knowledge which is imputed to Donghee. *Quinlan*, 812 F.3d at 837; *Dover Elevator Co.*, 16 BNA OSHC at 1286. Donghee makes no argument to the contrary on this element of the Secretary's case.

The Court finds Donghee had actual knowledge of the violation.

Characterization of the Violation

The Secretary characterized the violation of § 1910.147(f)(1)(ii) as serious. A serious violation is established when there is “a substantial probability that death or serious physical harm could result [from a violative condition] ...” 29 U.S.C. § 666(k). “This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur.” *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992).

Park's foot was broken when it was struck by the moving shuttle of the Blow Mold Machine. (Exhs. C-2A & C-2B; Tr. 58-61, 67-69, 71-73). This suggests any further bodily exposure to the moving shuttle could have caused even greater physical harm to an employee inside the machine. *See Montgomery Kone, Inc.*, 18 BNA OSHC 2007, 2011 (No. 97-1133, 1999) (“Although the injuries actually suffered may not have been as serious as they could have been, there clearly was a substantial probability that serious injury could result We therefore find that this violation was serious.”), *aff'd* 234 F.3d 270 (D.C. Cir. 2000). Donghee has not challenged the classification of this violation as serious.

The Court finds the violation was properly characterized as serious.

Unpreventable Employee Misconduct Defense

Donghee briefly invokes the “unpreventable employee misconduct defense” with regard to the violation of 29 C.F.R. § 1910.147(f)(1)(ii). “In order to establish that affirmative defense, the employer must show: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps calculated to discover whether violations are occurring, and (4) that it has effectively enforced the rules when violations are discovered.” *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1933 n.15 (No. 94-3121, 1999). Donghee bears the burden of establishing each element by a preponderance of the evidence. *See ComTran*, 722 F.3d at 1314 (respondents before the Commission bear the burden of proof for affirmative defenses); *Marson Corp.*, 10 BNA OSHC 1660, 1662 (No. 78-3491, 1982) (burden of proof for unavoidable employee misconduct defense lies with the employer).

Donghee’s briefing of its defense is anemic, at best. Its sole citation to the record in support of the elements of the defense is to Exhibit R-2, Donghee’s LOTO Instruction Manual.⁹ Resp’t’s Br. 22-23. Donghee has not directed the Court to any particular page of this Manual, although the Court notes in two places in this document the following sentence has been highlighted: “No one may enter equipment, shells or machinery during automatic mode[.]” (Exh. R-2, at 3 & 9). The remainder of its “support” for this defense is contained in a single footnote citing to a treatise which merely reiterates the elements of the defense. *Id.* at 22 n.156. On these grounds alone, the Court finds Donghee has waived any reliance on its unpreventable employee misconduct defense. *See, e.g., NLRB v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998) (“Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived.”).

Were the Court to reach the merits of the defense, it would still reject it. There is some evidence in the record to establish Donghee had a work rule (element 1) and enforced this rule by disciplining Park following his accident (element 4). (Exhs. R-2 to R-4). However, there is a dearth of evidence establishing adequate communication and training of Park or establishing what, if any, steps Donghee took to discover violations of its work rule (elements 2 and 3). Donghee has, therefore, failed to fulfill its burden of establishing the affirmative defense of unpreventable employee misconduct.

The Court finds the Secretary has established all elements of his burden of proof. Donghee has failed to establish its affirmative defense. Therefore, Citation 1, Item 1 is **AFFIRMED** as a serious violation.

Citation 1, Item 2: Alleged Serious Violations of § 1910.212(a)(1)

The Alleged Violation Description

Citation 1, Item 2 alleges two instances of a serious violation of the cited standard as follows:

29 CFR 1910.212(a)(1): One or more methods of machine guarding was not provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks:

a) TMA Line; On or about February 5, 2019, and at time prior thereto, the employer exposed employees to caught-in and crushed-by hazards in that employees were required to operate the TMA Line Helium Test Machine with non-functioning light

⁹ Donghee also cites to a portion of the CSHO’s deposition testimony in support of its rather specious argument that the Secretary has added a “fifth element” to the defense in this case. Resp’t’s Br. 22. Because Donghee’s defense fails for at least three other reasons, the Court finds no need to further address this argument or the cited portion of the CSHO’s deposition testimony.

curtains which when working would prevent employees from placing their bodies inside the danger zone during the operating cycle.

b) UMA Line; On or about February 5, 2019, and at time prior thereto, the employer exposed employees to caught-in and crushed-by hazards in that employees were required to operate the UMA Line Helium Test Machine with non-functioning light curtains which when working would prevent employees from placing their bodies inside the danger zone during the operating cycle.

The Cited Standard

29 C.F.R. § 1910.212(a)(1) provides:

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.

(1) The Applicability of the Cited Standard

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding*. Section 1910.212 is captioned “General requirements for all machines.” The standard applies to all machines not covered by a more specific standard. *See Buffets, Inc.*, 21 BNA OSHC 1065, 1066 n.3 (No. 03-2097, 2005). Neither party has identified a more specific standard or argues against the applicability of Section 1910.212 to the Helium Test Machines. The Court, therefore, finds the standard applies.

(2) Compliance with the Standard's Terms

Section 1910.212(a)(1) is “performance standard, which means “it states the result required ... rather than specifying that a particular type of guard must be used.” *Aerospace Testing All.*, No. 16-1167, 2020 WL 5815499, at *2 (O.S.H.R.C. Sept. 21, 2020). “Performance standards require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them.” *Id.*

To establish noncompliance with Section 1910.212(a)(1), the Secretary must establish exposure to a hazard based on “the manner in which the machine functions and how it is operated by the employees ...” *Id.* To establish exposure to a hazard, the Secretary must show “that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Id.*

Regarding the TMA Helium Test Machine, there are pinch points between the moving metal tray and the adjacent metal surface of the machine. (Exhs. C-8, R-12B; Tr. 109-11, 296-98). The manual for the machine acknowledges the existence of these pinch points. (Tr. 296-98).

Additionally, the rising and lowering of the metal tray into and out of the testing chamber exposes an employee underneath the tray to a crush-by hazard, with the tray exerting approximately 87 pounds of pressure during this process. (Exhs. C-8, R-12B; Tr. 89-92, 109). As part of the operation of the machine, Donghee employees are required to enter the “zone of danger” when putting a gas tank onto the tray or removing the tank once it has been tested. (Exh. C-7, at 00:00 to 00:13; Tr. 37, 109-10, 122, 181). Indeed, employees do this approximately 300 times a shift, two shifts a day. (Exh. J-1 ¶ C(10)). The Secretary has proven employees are exposed to a hazard when operating the TMA Helium Test Machine.

The Secretary likewise has proven exposure to a hazard during the operation of the UMA Helium Test Machine. Regarding this machine, there are pinch points on the side of and in front of the machine as the drawer slides in and out of the testing chamber, applying 125 pounds of pressure in the process. (Exhs. C-6, at 3, 4, 6; Tr. 100-07, 111-13, 260-61). These pinch points are clearly marked by stickers on the machine.¹⁰ (Exh. C-6, at 3-5). Donghee employees must enter the “zone of danger” to place a tank into the drawer for testing, attach hoses to the tank, detach the hoses once the tank has been tested, and remove the tank from the drawer. (Exh. R-14, at 00:12 to 00:37, 02:32 to 02:44). Again, employees do this 300 times a shift, two shifts a day. (Exh. J-1 ¶ C(11)).

Donghee attempts to obfuscate the rather straightforward existence of the hazards posed when operating the Helium Test Machines by pointing to the *method* by which employees are instructed to operate the machines. It argues, essentially, if employees follow a particular method when operating the machines, they will never be in the zone of danger while the machine is cycling. Resp’t’s Br. 18-20.

More specifically, for the TMA Helium Test Machine, Donghee describes how, ideally, employees are to operate the machine first by loading the tank onto the metal tray, only then

¹⁰ Donghee argues “signs warning of a pinch point does not prove a hazard.” Resp’t’s Br. 20. Donghee cites *Gulf Oil Corp.*, 11 BNA OSHC 1476, 1481 (No. 76-5014, 1983), which stands only for the proposition that warning signs alone cannot establish the existence of a hazard without corroborating evidence. *See Gulf Oil Corp.*, 11 BNA OSHC at 1481 (“Gulf’s warning signs and respirator requirement *alone* do not establish the existence of the hazard.” (emphasis added)). Here, there is ample corroborating evidence to establish the existence of crush and pinch points on the UMA Helium Test Machine. In the video documenting the operation of this machine, these points can readily be seen as the metal drawer moves into and out of the machine’s testing chamber. (Exh. R-14, at 00:40 to 00:44, 02:24 to 02:32). The existence of pinch and crush and pinch points is further corroborated by Blankenship, Donghee’s safety manager. On January 31, 2019, in a message sent through Donghee’s internal messaging app, Blankenship sent a picture of the UMA Helium Test Machine accompanied by the following message: “The light curtain does not work someone almost got caught by [the] machine.” (Exh. C-6, at 6; Tr. 111-13, 269-72).

starting the machine, moving some distance away from the machine while it cycles, and only approaching the machine once the metal tray has fully lowered. *Id.* at 18. If an employee operates the machine in this manner, Donghee argues, “no employee has any duties in front of the machine while it is moving.” *Id.* at 18. Thus, Donghee continues, an employee operating the machine is out of the zone of danger while the machine is cycling. *Id.*

For the UMA Helium Test Machine, Donghee again lays out the ideal operation of the machine where an employee would load the tank into the drawer, attach the hoses, start the machine, and step away from the drawer while the machine cycled. Resp’t’s Br. 20. Donghee again argues “[e]mployees have no reason to be in front of the drawer as it is opening and reaching [its] pinch point ...” *Id.* at 20. Again, Donghee contends employees are thus out of the zone of danger while the machine is cycling. *Id.*

The Court rejects Donghee’s attempt to reframe its employees’ exposure to crush and pinch points when the Helium Test Machines are cycling. There is no physical barrier at all between the active Helium Test Machines and the employees operating them. Indeed, an employee has unfettered access to the zone of danger while the machines are cycling. And when the light curtains are inoperative or only partially operative, as they were at the time of the CSHO’s inspection, there is nothing to prevent an employee from entering the zone of danger on the machines when they are cycling and getting caught in the crush and pinch points.

In such cases, where “no physical guard [is] in place at all,” the Commission has consistently held employers “cannot rely on employee behavior for safety” due to the “possibility that an employee could put a finger or hand in the unguarded point of operation due to fatigue or inattention.” *Aerospace Testing All.*, 2020 WL 5815499, at *5 n.4; *see also B.C. Crocker*, 4 BNA OSHC 1775, 1777 (No. 4387, 1976) (“The [machine guarding] requirement implicitly recognizes that human characteristics such as skill, intelligence, carelessness, and fatigue, along with many other qualities play a part in an individual’s job performance, and it avoids dependence on human conduct for safety.”). The machine guarding standards “require[] the employer to do more than merely establishing rules which, if followed, would render the work safe.” *Gen. Elec. Co.*, 10 BNA OSHC 1687, 1690 (No. 77-4476, 1982).¹¹ In other words, Donghee is simply not entitled to rely

¹¹ Although this case dealt with a different subsection of OSHA’s machine guarding standard, 29 C.F.R. § 1910.212(a)(3)(ii) governing “[p]oint of operation guarding,” other Commission cases have equated all of the machine guarding standards for purposes of requiring more than work rules to protect employees. *See, e.g., George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436, 1444 (No. 76-647, 1982) (Section 1910.212(a)(1) and Section

on its employees following certain practices or standing a certain distance from the machines as a means of protecting them from the crush and pinch points present when the machines are cycling. *See Packers Sanitation Servs., Inc. v. Occupational Safety & Health Rev. Comm'n*, 795 F. App'x 814, 820 (11th Cir. 2020) (finding substantial evidence of exposure to a nip point where “[t]here was no external line or barrier marking a two-foot distance from the machine—the safe distance that Packers identified. Nor was there a hard physical barrier preventing the employee from accessing the nip point.”); *George C. Christopher & Sons, Inc.*, 10 BNA OSHC at 1444 (use of “awareness barriers” was inadequate under machine guarding standards because they “depend[ed] upon employee behavior for protection”).

Further, although Donghee had placed tape on the ground to mark the “safe” distance from the active Helium Test Machines and instructed some employees to stand behind the tape while the machine cycled, many employees did not even know what the tape represented or “forgot” to stand behind it. (Tr. 116-18, 122, Tisdale Dep. 73, 80, 93). Thus, even if Donghee could rely on its employees following certain practices instead of having a physical guard or operational light curtains on the Helium Test Machines, Donghee did not adequately instruct all of its employees.

Finally, Donghee points to a lack of recordable injuries on either of the Helium Test Machines. However, “[t]he absence of a history of injury does not relieve an employer of his duty under the standards to prevent future injuries if, as here, there are hazards to which employees are exposed.” *George C. Christopher & Sons, Inc.*, 10 BNA OSHC at 1444; *see also Buffets, Inc.*, 21 BNA OSHC at 1067 (No. 03-2097, 2005) (lack of injury relevant but “not dispositive” on the issue of employee exposure to a hazard requiring guarding).

The Secretary has demonstrated the existence of a hazard requiring guarding on both Helium Test Machines. As it is undisputed the light curtain were not fully operational on either machine, and Donghee has not asserted it guarded the machines in any other way, the Secretary has demonstrated noncompliance with the standard.

(3) Employee Access to the Violative Condition

“Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable.” *Phoenix Roofing*, 17 BNA OSHC at 1079

1910.212(a)(3)(ii) “require that guarding be provided by a device that itself prevents the operator from endangering himself. They do not permit an employer to depend instead on the skill or attentiveness of his employees.” (emphasis in original)).

n.6. The Commission has recognized “the noncompliance element in machine guarding cases overlaps with ... but is not identical to, the exposure element of the Secretary’s prima facie case.” *Wayne Farms, LLC.*, No. 17-1174, 2020 WL 5815506, at *3 n.2 (O.S.H.R.C., Sept. 22, 2020). Here, the Court finds exposure to the machines’ pinch and crush points was “reasonably predictable” based on the regular operation of the machines.

Employees operating the Helium Test Machines regularly had to put themselves near the moveable parts of the machines to slide a gas tank onto the metal tray (in the case of the TMA Line) or into the drawer (in the case of the UMA Line). (Exhs. C-6, at 3 & 4; C-7, at 00:00 to 00:13; R-14, at 00:12 to 00:26; Tr. 37, 100-01, 107, 109-10, 122). Employees on the UMA Helium Test Machine had to reach into the moveable drawer to attach the hoses to the tanks. (Exh. R-14, at 00:26 to 00:37; Tr. 37, 107, 109-10, 261-62). Thus, for both machines, employees had to reach at or near crush and pinch points 300 times a shift to operate the machines. (Exh. J-1 ¶¶ C(10) & (11)).

As to the TMA Helium Test Machine, Donghee argues “the machine’s operation simply does not bring employees near pinch points.” Resp’t’s Br. 19. Donghee goes on to argue the crush-by hazard posed by the moving metal plate is “8-feet in the air” and the pinch point hazard of the plate is “2-3 feet away” because “the employee is standing outside a box, 2-3 feet away.” This line of argument ignores the entirety of the operational process, which at some point requires the operator of the TMA Helium Test Machine to approach the machine and reach at or near the pinch points to move the gas tank from the metal plate and load a new one on for testing. Approaching the machine, which is energized and capable of movement, puts employees in the “zone of danger” of the moving parts of the machine. *Cf. Dover High Perf. Plastics, Inc.*, No. 14-1268, 2020 WL 5880242, at *3 (O.S.H.R.C., Sept. 25, 2020) (“Thus, the question before us is whether the Secretary has established that it was reasonably predictable Dover’s operators would come sufficiently close to the moving parts inside the lathes and mills so as to be exposed to the cited hazard.”).

The cases cited by Donghee, *Aerospace Testing All.*, 2020 WL 5815499, and *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419 (No. 89-0553, 1991), do not lead to a different conclusion regarding the TMA Helium Test Machine.

In *Aerospace Testing All.*, the Commission found access to a hazard was not reasonably predictable where the operator intentionally circumvented a pre-existing guard on the machine and

thereby injured himself. 2020 WL 5815499, at *1. In finding access was not reasonably predictable, the Commission noted only one operator, the operator who was injured, testified that circumventing the guard constituted regular use of the machine. *Id.* at *2. The Commission went on to explicitly discredit the injured employee's testimony that intentionally circumventing the guard was a regular practice. *Id.* Here, there is no dispute as to how the TMA Helium Test Machine is regularly operated. Video evidence of its operation was submitted at the hearing, and neither party argues this video represents anything other than the normal operation of the machine. The video evidence demonstrates normal operation of the TMA Helium Test Machine requires employees to approach the energized machine and reach toward the metal tray to move gas tanks to and from the tray. (Exh. C-7, at 00:00 to 00:13; Tr. 37, 109-10, 122). They are therefore in the zone of danger for the crush and pinch points on the machine.

In *Jefferson Smurfit Corp.*, the Commission found the operators of the machines in question *never* had occasion to be any closer than two feet to the machine's nip points. 15 BNA OSHC at 1421-22. The operators observed the machines from a distance of approximately two feet and adjusted the machines "using crank handles located and designed to keep their hands no closer than 2 feet from the nip points." *Id.* at 1422. Again, unlike *Jefferson Smurfit*, the evidence here shows employees regularly had to approach the energized TMA Helium Test Machine during normal operations to move the gas tanks to and from the metal tray. (Exh. C-7, at 00:00 to 00:13; Tr. 37, 109-10, 122).

Donghee argues similarly for the UMA Helium Test Machine and again cites *Aerospace Testing All.* in support of its argument. Resp't's Br. 19-20. The Court again rejects Donghee's arguments and reliance on *Aerospace*. Regular use of the machine, which again, unlike in *Aerospace*, is undisputed and documented by video evidence, requires employees to approach the machine and reach their hands into the metal drawer to move the gas tank and connect hoses to them. (Exh. R-14, at 00:26 to 00:37; Tr. 37, 107, 109-10, 261-62). Employees again must reach into the drawer after the tank has been tested to disconnect the hoses. (Exh. R-14, at 02:32 to 02:44; Tr. 108, 261-62). Operation of the UMA Helium Test Machine puts these employees in the zone of danger of the pinch points around the drawer.

The Secretary has proven exposure to the hazard was reasonably predictable for both Helium Test Machines.

(4) Employer Knowledge

To prove the knowledge element of a violation, the Secretary must demonstrate the employer's actual knowledge or constructive knowledge of the violation. *Jacobs Field Servs., N.A.*, 25 BNA OSHC at 1218; *see also ComTran Grp., Inc.*, 722 F.3d at 1307-08. A supervisor's actual or constructive of a violation is imputed to Donghee. *Quinlan*, 812 F.3d at 837 (11th Cir. 2016); *Dover Elevator Co.*, 16 BNA OSHC at 1218.

Here, the CSHO interviewed as many as seven of Donghee's managers during his inspection, and all of them knew the light curtains on the Helium Test Machines were partially or fully inoperative at the time of his inspection and had been inoperative for at least several months. (Tr. 50-51, 116). The managers' actual knowledge is imputed to Donghee. *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d at 837; *Dover Elevator Co.*, 16 BNA OSHC at 1218.

In its brief, Donghee argues the Secretary has failed to establish "employer foreseeability" because "the light curtains not functioning is not relevant absent foreseeable **need**." Resp't Br. 19 (emphasis in original). As the Court concluded above, however, the Secretary demonstrated the existence of a hazard for which guarding was necessary under the standard. Moreover, in the Eleventh Circuit, a foreseeability analysis only becomes relevant if the Secretary is attempting to establish the knowledge element of a violation based on a supervisor's own misconduct. *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d at 841-42. Here, the managers' actual knowledge is of "the conditions constituting the violation," i.e., the need for guarding against potential hazards for employees operating the Helium Test Machines, not of their own misconduct in committing a violation. *Jacobs Field Servs., N.A.*, 25 BNA OSHC at 1218. The issue of foreseeability is thus inapposite to this case.

The Secretary has established Donghee had actual knowledge of the violative condition.

The Court finds the Secretary has established all elements of his burden of proof. Therefore, both instances of Item 2 are **AFFIRMED**.

Characterization of the Violation

The Secretary characterized the violation of § 1910.212(a)(1) as serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] ..." 29 U.S.C. § 666(k). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but,

rather, that a serious injury is the likely result if an accident does occur.” *ConAgra Flour Milling Co.*, 15 BNA OSHC at 1824.

The Court finds the violations were properly classified as serious given an employee’s hand or finger could be crushed or pinched in either of the Helium Test Machines while the machines are cycling. Moreover, the raising and lowering of the tray on the TMA Helium Test Machine and the opening and closing of the drawer on the UMA machine occur automatically. (Exhs. C-6, at 4; R-14, at 02:24 to 02:32; Tr. 103, 117, 122, 180; *see also* note 3, *supra* (finding the table on the TMA Helium Test Machine lowers automatically after the machine completes testing)). With inoperative or partially operative light curtains on the machines, there would be nothing to stop the crushing or pinching of an employee’s appendage caught in the machines. Donghee makes no contrary argument as to the classifications for these violations.

The Secretary has properly characterized the violations as serious.

Citation 2, Item 1: Alleged Willful Violation of § 1910.212(a)(1)

The Alleged Violation Description

Citation 2, Item 1 alleges two instances of a willful violation of the cited standard as follows:

29 CFR 1910.212(a)(1): One or more methods of machine guarding was not provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks:

a) ADA Line; On or about February 5, 2019, and at time prior thereto, the employer exposed employees to caught-in and crushed-by hazards in that employees were required to operate the ADA Line Pad Check Machine with non-functioning laser safety scanner which when working would prevent employees from placing their bodies inside the danger zone during the operating cycle.

b) LFA Line; On or about February 5, 2019, and at time prior thereto, the employer exposed employees to caught-in and crushed-by hazards in that employees were required to operate the LFA Line Pad Check Machine with non-functioning laser safety scanner which when working would prevent employees from placing their bodies inside the danger zone during the operating cycle.

The Cited Standard

29 C.F.R. § 1910.212(a)(1) provides:

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.

(1) Applicability of the Cited Standard

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding*. Section 1910.212 is captioned “General requirements for all machines.” The standard applies to all machines not covered by a more specific standard. *See Buffets, Inc.*, 21 BNA OSHC at 1066 n.3. Neither party has identified a more specific standard or argues against the applicability of Section 1910.212 to the Pad Check Machines. The Court, therefore, finds the standard applies.

(2) Compliance with the Standard’s Terms

To establish noncompliance with Section 1910.212(a)(1), the Secretary must establish exposure to a hazard based on “the manner in which the machine functions and how it is operated by the employees ...” *Aerospace Testing All.*, 2020 WL 5815499, at *2. To establish exposure to a hazard, the Secretary must show “that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.” *Id.*

As it did with the Helium Test Machines, Donghee argues there was no hazard present in operating the Pad Check Machines which required guarding. Resp’t’s Br. 11-13. The Court again disagrees. As can be seen in the videos of the operation of the machine, nothing prevents employees operating a Pad Check Machine from being mere inches from the machine’s lowering metal arm and the half-inch-thick aluminum plate attached to it. (Exhs. C-10, at 00:00 to 20; R-9, at 00:00 to 00:17; Tr. 124, 138, 162, 225-26; Tisdale Dep. 48-49, 51). Donghee points out the CSHO “did not even measure arm force or speed, and had no proof of actual or potential bone, skin, banana, or pencil injury to dispute what Donghee had.” Resp’t’s Br. 11. However, the CSHO personally observed the machines during his inspection and perceived the plate to be heavy enough to injure an employee who might be caught in the up-and-down motion of the metal arms of the machines.¹² (Tr. 125). A Donghee employee who regularly operated the Pad Check Machines had the same perception of the hazard caused by the lifting and lowering of the metal plate. (Tr. 238-39). The Court finds this evidence sufficient to establish a hazard associated with operating the

¹² On this point, Donghee points to a small discrepancy in the CSHO’s testimony at the hearing. In his direct testimony, the CSHO testified he believed the moving metal plate on the Pad Check Machines could cause “a fracture in the mouth, [or] a contusion [or] a laceration.” (Tr. 125). In his cross-examination, however, the CSHO answered “No” when asked “Do you have any facts supporting a conclusion that this plate was going fast enough to cause a fracture?” (Tr. 178). Even if the CSHO’s cross-testimony refutes the possibility of the half-inch moving metal plate causing a fracture, it does not discount the other types of injuries the CSHO believed it could potentially inflict if unguarded, including a “contusion [or a] laceration.” (Tr. 125).

Pad Check Machines without proper guarding. *See, e.g., U.S. v. Jayyousi*, 657 F.3d 1085, 1102-03 (11th Cir. 2011) (lay witnesses may offer opinion testimony based on their personal perceptions and knowledge).

Donghee again points to the manner in which employees were meant to operate the machine, i.e., approximately two feet away while it cycled. Resp't's Br. 13. However, as the Court previously noted regarding the Helium Test Machines, where "no physical guard [is] in place at all," the Commission has consistently held employers "cannot rely on employee behavior for safety" due to the "possibility that an employee could put a finger or hand in the unguarded point of operation due to fatigue or inattention." *Aerospace Testing All.*, 2020 WL 5815499, at *5 n.4. Thus, even if Donghee's employees were instructed to remain two feet from the Pad Check Machines when they cycled, this work rule alone was inadequate to comply with the standard. *Gen. Elec. Co.*, 10 BNA OSHC at 1690.

Donghee points out the "machine lowered the metal plate with [springs] capable of producing three pounds of force onto the middle of a plastic gas tank." *Id.* at 12-13. As evidence the three-pound springs do not pose a hazard to the operator of the machine, Donghee points to its videos wherein a banana and a pencil are placed between the pad on the tank and springs attached to the metal plate on the arm of the machine. (Exhs. R-10A & R-10B). After the machine lowers and presses on the tank, only a slight indentation is made on the banana's skin (Exh. R-10A, at 00:34 to 00:36); the pencil emerges seemingly unharmed after the Pad Check Machine is finished cycling. (R-10B, at 00:15 to 00:18).

The Court does not find these unscientific videos persuasive as to the possible hazards associated with the Pad Check Machines. Indeed, as the CSHO explained in detail at the hearing, the three-pound rated springs on the machines do not only exert three pounds of pressure; rather, once the pressure on the springs reaches three pounds the machine is designed to interpret that pressure to mean a pad has been attached to that location on the gas tank. (Tr. 320-21, 387-88, 390-91). Moreover, as the Secretary rightly points out, these videos "only address the effect of contact with the plungers at the bottom of each metal plate. Neither video purports to demonstrate the effect of contact with the plate itself, because neither the banana nor the pencil ever make contact with the swinging plate." Sec'y's Br. 20.

Donghee also cites *Wayne Farms, LLC*, No. 17-1174, 2020 WL 5815506 (O.S.H.R.C. Sept. 22, 2020), and argues it supports its theory there was no hazard present when Donghee employees

operated the Pad Check Machines. Resp't's Br. 12. *Wayne Farms* is readily distinguishable from the instant case. In *Wayne Farms*, an employee was injured when manually cleaning a machine. 2020 WL 5815506, at *1. The question before the Commission was whether the manual cleaning of the machine was part of its "normal operation." *Id.* at *3. The Commission found manual cleaning was not part of the normal operation of the machine based on the inconsistent testimony of the injured employee. *Id.* Since manually cleaning the machine was not part of the machine's normal operation, the Commission found the Secretary failed to demonstrate the presence of a hazard requiring guarding. *Id.* at *5. Here, unlike in *Wayne Farms*, normal operation of the machine, which is documented by video evidence, requires Donghee employees to come within inches of the moveable arm and metal plate of the Pad Check Machines, the hazard the Secretary has cited. (Exhs. C-10, at 00:00 to 00:06; R-9, at 00:03 to 00:10; Tr. 124, 138, 162, 225-26; Tisdale Dep. 48-49, 51).

Finally, Donghee again points to a lack of recordable injuries or "close calls" involving the Pad Check Machines. Resp't's Br. 13. However, "[t]he absence of a history of injury does not relieve an employer of his duty under the standards to prevent future injuries if, as here, there are hazards to which employees are exposed." *George C. Christopher & Sons, Inc.*, 10 BNA OSHC at 1444; *see also Buffets, Inc.*, 21 BNA OSHC at 1067 (lack of injury relevant but "not dispositive" on the issue of employee exposure to a hazard requiring guarding).

The Secretary has demonstrated the existence of a hazard requiring guarding on the Pad Check Machines. As it is undisputed the laser safety scanners were not operational on the Pad Check Machines, and Donghee has not asserted it guarded the machines in any other way, the Secretary has demonstrated noncompliance with the standard.

(3) Employee Access to the Violative Condition

"Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6. The Commission has recognized "the noncompliance element in machine guarding cases overlaps with ... but is not identical to, the exposure element of the Secretary's prima facie case." *Wayne Farms, LLC.*, No. 17-1174, 2020 WL 5815506, at *3 n.2 (O.S.H.R.C., Sept. 22, 2020). As The Court finds exposure to the Pad Check Machines' rising and lowering arm was "reasonably predictable" based on the regular operation of the machines.

To load and unload the gas tanks onto the machine, employees had to come within inches of the moveable arms and metal plates on the energized Pad Check Machines. (Exhs. C-10, at 00:00 to 00:20; R-9, at 00:00 to 00:17; Tr. 124, 138, 162, 225-26; Tisdale Dep. 48-49, 51). The employees operating the machines were required to do so 300 times a shift, two shifts a day. (Exh. J-1 ¶¶ C(8) & (9); Tisdale Dep. 66). Thus, Donghee’s employees were exposed to a hazard on the Pad Check Machines.

Resisting this straightforward conclusion, Donghee argues “[n]o employee for any reason had to lean across the table into the machine” while it was cycling. Resp’t’s Br. 13. However, as with the noncompliance element of the violation, Donghee is not entitled to rely on work rules alone to protect its employees. *See Gen. Elec. Co.*, 10 BNA OSHC at 1690. The Commission regularly notes the possibility of inadvertence or fatigue as a basis for finding exposure to a hazard in the context of machine guarding. *Aerospace Testing All.*, 2020 WL 5815499, at *5 n.4 (citing cases).

Donghee also points to the incident with the employee injured by the stopper on the ADA Pad Check Machine and argues an operational laser safety scanner would not have prevented this “unforeseeable” injury.¹³ Resp’t’s Br. 14; *see also* note 5, *supra*. However, the Court does not base its finding of employee exposure to a hazard while operating the Pad Check Machines on this lone incident involving the machine’s stopper, but rather on the more readily identified hazard of the moving arm and plate on the machine, to which employees operating the machine were exposed 300 times a shift, two shifts a day. (Exh. J-1 ¶¶ C(8) & (9); Tisdale Dep. 66).

The Secretary has established employee exposure to a hazard while operating the Pad Check Machines.

(4) Employer Knowledge

To prove the knowledge element of a violation, the Secretary must demonstrate the employer’s actual knowledge or constructive knowledge of the violation. *Jacobs Field Servs., N.A.*, 25 BNA OSHC at 1218; *see also ComTran Grp., Inc.*, 722 F.3d at 1307-08. A supervisor’s

¹³ The evidence on this subject was mixed. The CSHO believed operational laser safety scanners would have prevented this injury, while Wills testified they would not have. (*Compare* Tr. 129-30, *with* Tr. 329-30). Although the Court does not believe the stopper on the Pad Check Machines was the main hazard to which employees were exposed, the Court nonetheless resolves this conflicting evidence by crediting Wills’ testimony over the CSHO’s. Wills was the maintenance manager at the Auburn facility and was much more familiar with the machines in the facility than the CSHO. (Tr. 295-96, 396). Moreover, Wills was a forthright witness during other portions of his testimony, including on subjects for which he might otherwise have had a motive to be evasive such as the deliberate disabling of the laser safety scanner on the ADA Pad Check Machine. (Tr. 300-05).

actual or constructive of a violation is imputed to Donghee. *Quinlan*, 812 F.3d at 837 (11th Cir. 2016); *Dover Elevator Co.*, 16 BNA OSHC at 1218.

Here, the CSHO interviewed Yates, one of Donghee's managers, who informed him the LFA Pad Check Machine's laser safety scanner was not functioning at the time of the inspection and had not been functioning for several months. (Tr. 51). Wills, Donghee's maintenance manager, knew the ADA Pad Pad Check Machine's laser safety scanner was not functioning, and indeed was present when it was deliberately disabled two or three years before the inspection. (Tr. 300-05). Donghee's managers' actual knowledge of the violative condition is imputed to it. *Quinlan*, 812 F.3d at 837 (11th Cir. 2016); *Dover Elevator Co.*, 16 BNA OSHC at 1218.

As it did with the Helium Test Machines, Donghee again asserts the lack of a hazard posed by the unguarded Pad Check Machines and further argues there was a lack of "foreseeable harm" in operating the Pad Check Machines without proper guarding. Resp't's Br. 15 (emphasis in original). The Court again rejects these arguments. As to the former argument, the Secretary has again established a hazard associated with employees operating the unguarded Pad Check Machines and thus the need for guarding. As to the latter argument, foreseeability is not implicated in this case where the issue is whether Donghee's managers had actual knowledge of the violative condition. *Quinlan*, 812 F.3d at 841-42; *Jacobs Field Servs., N.A.*, 25 BNA OSHC at 1218.

The Secretary has established Donghee had actual knowledge of the violative condition.

The Court finds the Secretary has established all elements of his burden of proof.¹⁴ Therefore, Item 2 is **AFFIRMED**.

Characterization of the Violation

The Secretary characterized both instances of this violation of Section 1910.212(a)(1) as willful. "A violation is willful if the employer's state of mind at the time of the violation reflects either: (1) an intentional, knowing, or voluntary disregard for the requirements of the Act or employee safety; or (2) "plain indifference" to either the cited OSHA requirements or employee safety." *Home Rubber Co., LP*, No. 17-0138, 2021 WL 3929735, at *2 (O.S.H.R.C., Aug. 26,

¹⁴ In a footnote in the knowledge section of its brief on this violation, Donghee briefly argues a guarding requirement on the Pad Check Machines "would violate reasonable notice requirements under [the Act], the Administrative Procedure Act § 553, and the Fifth Amendment's due process clause." Resp't's Br. 15 n.104. Donghee did not cite to anything, factual, legal, or otherwise, in support of any of these arguments. The Court summarily rejects these cursory arguments. *See, e.g., Herbert v. Architect of Capitol*, 839 F.Supp.2d 284, 298 (D.D.C. 2012) (defendant "has simply failed to support its argument with any meaningful measure of factual or legal argument. Courts need not consider cursory arguments of this kind, and the Court declines to do so here.").

2021); *see also Fluor v. Occupational Safety & Health Review Comm'n*, 295 F.3d 1232, 1239-40 (11th Cir. 2002) (reciting a similar formulation for willfulness). “The Secretary can establish intentional disregard by showing that the employer (1) had a heightened awareness of the applicable standard ... and (2) consciously disregarded the standard.” *Home Rubber Co., LP*, 2021 WL 3929735, at *2. “In other words, the Secretary can establish intentional disregard by showing that the employer was actually aware, at the time of the violative act, that the act was unlawful” *Id.* “Alternatively, the Secretary can prove plain indifference by showing that the employer possessed a state of mind such that if it were informed of the standard, it would not care.” *Id.*

The Secretary has alleged two instances of a willful violation of the machine guarding standard, one implicating the ADA Pad Check Machine (Instance (a)) and one implicating the LFA Pad Check Machine (Instance (b)). Because the evidence offered for each instance is materially different, the Court reaches different conclusions on whether Donghee’s violation in each instance was willful.

Instance (a) – the ADA Pad Check Machine

Regarding Instance (a), involving the ADA Pad Check Machine, the Court finds there is sufficient evidence of Donghee’s plain indifference to employee safety. Three years prior to OSHA’s inspection, Donghee’s maintenance manager, Mr. Kim, deliberately disabled the laser safety scanner on this machine. (Tr. 53, 130-33, 300-04). This was done explicitly to increase productivity on the machine because of the number of “false stops” when the safety scanner was active. (Tr. 133-34, 302-03). Donghee’s managers continued to run the machine for years without an operational laser safety scanner. (Tr. 209-10, 328-39, 262-64, 301). When Wills took over as maintenance manager, he did not reassess whether the disabling of the safety scanner posed a safety issue to employees but “put faith in the company’s decision.” (Tr. 302). At least one employee, who testified at the hearing, brought her safety concerns to management when operating the ADA Pad Check Machine. (Tr. 238-39, 243). Rather than address those concerns, a manager named “David” simply reassigned a temporary employee to operate the machine. (Tr. 243). Such actions occurred on multiple occasions when Donghee employees expressed concerns about operating the machine. (Tr. 240-44).

As a backdrop to all of Donghee’s actions concerning the ADA Pad Check Machine specifically, Donghee often prioritized production over safety. One former employee went into some detail as follows:

[F]or instance, we had a machine that the light curtain was working on it, Michelle [Blankenship, Donghee's safety manager,] would specifically tell us do not go in the light curtain, you know, do not go in the machine, don't touch it, don't open the door, just leave it alone, but then you would have another supervisor or manager would say – you know, tell us to go ahead and go in it or move the machines, take it apart, whatever we have to do to get the engines going down the line.

(Tr. 237-38). This same employee told the CSHO “telling managers [about issues with the machines,] it goes in one ear and out the other; it's quicker to get with maintenance ourselves and get it fixed.” (Exh. C-5, at 3).

Considering all of these circumstances, the Court concludes Donghee's violation was willful as to Instance (a). *See E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1577 (No. 94-1479, 2009) (finding a violation willful where employer put “emphasis on productivity over employee safety”); *Worldwide Mfg., Inc.*, 19 BNA OSHC 1023, 1024-25 (No. 97-1381) (view of Chairman Rogers) (affirming a finding of willfulness in part based on the employer deliberately removing safety devices to increase production), *aff'd* 22 Fed App'x 684 (8th Cir. 2001); *Valdak Corp.*, 15 BNA OSHC 1135, 1137 (No. 93-0239, 1994) (finding a violation willful where management knew the “interlock” on the machine was broken, continued to operate it anyway and where that decision was “made at least partly for economic reasons.”); *see also Am. Recycling & Mfg. Co. v. Sec'y of Labor*, 676 Fed. App'x 65, 71 (2d. Cir. 2017) (willfulness finding based in part on employer's failure to respond to employee complaints about the unsafe pedal on a machine).

Donghee's arguments to the contrary are unavailing, as they simply rehash whether or not a hazard existed to require guarding on the Pad Check Machines.¹⁵ Resp't's Br. 16-17. Because the Court has concluded a hazard did exist, the Court does not find these arguments relevant to determining whether or not Donghee acted willfully when it deliberately disabled the laser safety scanner designed to protect against the hazards of operating the machine.

¹⁵ Donghee's arguments in this part of its brief are a bit scattershot, so the Court will briefly summarize them lest there is any question whether the Court has considered them all in reaching its finding of willfulness. Donghee first argues the willful characterization of this violation is “absurd” and then proceeds to argue it is a “high bar” for the Secretary to prove willfulness. Resp't's Br. 15. Having laid out the standard for willfulness, Donghee cites to the four cases discussed *infra. Id.* at 15-16. Donghee then argues the Secretary has failed to show the Pad Check Machines were capable of causing injury to an employee “or a banana or a pencil for that matter.” *Id.* at 16. Donghee then goes on to point out neither of the Pad Check Machines has had a recordable injury despite operating nearly 600 times a day. Resp't's Br. 16-17. Donghee again argues the cited standard is “need-based” and no such need was proven because there was no hazard from which to guard. Resp't's Br. 17. All of these arguments were addressed in one form or another in the portion of the Court's decision finding noncompliance and exposure for Citation 2, Item 1.

Donghee cites four cases in support of its argument that its violation was not willful. *Id.* at 16 nn.107-10. Two of these cases, *Jimerson Under-Ground, Inc.*, No. 04-0970, 2006 WL 1083457 (O.S.H.R.C.A.L.J., March 3, 2006), and *George Cairns & Sons, Inc.*, 21 BNA OSHC 1361 (No. 03-2005, 2005) (ALJ), are unreviewed ALJ decisions and therefore not binding on this Court. *See Hartwell Excavating Co.*, 4 BNA OSHC 1263, 1264 (No. 3841, 1976).

The Court does not find the other two decisions cited by Donghee dictate a different result in this case. In *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718 (No. 95-1449, 1999), the Commission noted the employer's efforts to comply with the standard after receiving a first citation under the standard, including efforts to repair a cantilever and a "somewhat friendly, ongoing relationship" with OSHA to comply with the standard. 18 BNA OSHC at 1727-28. The Commission considered this to be evidence the employer was acting in good faith to comply with the standard. *Id.* at 1728. No such evidence exists here, at least with regard to the ADA Pad Check Machine. And in *Greenleaf Motor Express, Inc.*, 21 BNA OSHC 1872 (No. 03-1305, 2007), a majority of the Commission found the violations were not willful because the employer lacked actual knowledge of the violations. 21 BNA OSHC at 1875-76. Here, as the Court concluded above, Donghee's managers had actual knowledge of the disabled laser safety scanner on the ADA Pad Check Machine because it was Donghee's own maintenance manager who disabled it. (Tr. 51, 300-05).

The Court finds Instance (a) of Citation 2, Item 1 was a willful violation.

Instance (b) – the LFA Pad Check Machine

The evidence of willfulness for Instance (b), regarding the LFA Pad Check Machine, is not nearly as conclusive, however. The laser safety scanner on this machine had been inoperative for only a few months prior to the inspection. (Tr. 51-53, 304-05). Further, unlike Instance (a), the circumstances leading to the non-functionality of this machine's laser safety scanner are not clear from the record, particularly whether or not it was deliberately disabled for the purpose of increasing productivity on the machine. There is evidence to suggest this was not the case. Yates told the CSHO he *did* try and have the laser safety scanner repaired on the LFA Pad Check Machine but was told it was not currently in the budget to do so. (Tr. 141). The Court also notes the circumstances regarding the non-functioning laser safety scanner on the LFA Pad Check Machine are much closer to those around the non-functioning light curtains on the Helium Check Machines,

violations the Secretary only classified as “serious.” Based on these considerations, the Court finds Instance (b) of Citation 2, Item 1 is more properly classified as serious.

The Court finds Instance (a) of the violation was willful; however, Instance (b) is reclassified as a serious violation.

PENALTY

When OSHA issues a Citation, it may include a proposed penalty amount. *See* 29 U.S.C. § 659(a). OSHA has published a Field Operations Manual (FOM) to, among other things, act as a guide for its CSHOs in proposing penalties. FOM at 1-1, 6-1. FOM, Directive No. CPL-02-00-163 (eff. Jan. 23, 2023). However, the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *See Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0293, 1995), *aff’d*, 73 F.3d 1466 (8th Cir. 1995); *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975). In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to four criteria: (1) the size of the employer’s business; (2) the gravity of the violations; (3) the good faith of the employer; and (4) the employer’s prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Citations proposed a total penalty of \$135,019, as follows:

For the serious violation of 29 C.F.R. § 1910.147(f)(1)(ii), the Citation proposed a penalty of \$13,127. This was based on the CSHO’s determination the violation had a high severity because an employee “could be crushed or killed or struck [or] permanently disabled” by the moving shuttle in the Blow Mold Machine. (Tr. 81). The CSHO also determined the probability was “greater” because “Park was in the machine and got struck.” (Tr. 82). This combination resulted in a “high greater” gravity violation and a gravity-based penalty of \$13,260. (Tr. 82, 85). The CSHO applied a ten percent reduction based on Donghee’s size, zero reduction for good faith, and a ten percent increase for history because Donghee “had a high rate of violation[s] within five years.” (Tr. 85).

For the two instances of a serious violation of 29 C.F.R. § 1910.212(a)(1) regarding the Helium Test Machines, the Citation proposed a total penalty of \$9,377. This was based on the CSHO’s determination the violations had a high severity because the machines “could cause ... an

amputation [or] permanent disability.” (Tr. 118). The CSHO determined the probability was “lesser” because the machines “had been running [for] 3 to 6 months, 300 times a day, and they had not had an injury.” (Tr. 118). This combination led to a gravity-based penalty of \$9,472. (Tr. 121). The CSHO again applied a ten percent reduction for size, zero reduction for good faith, and a ten percent increase for history “with a high grade of violation of a lockout/tagout violation within five years.” (Tr. 121).

For the two instances of a willful violation of 29 C.F.R. § 1910.212(a)(1) regarding the Pad Check Machines, the Citation proposed a total penalty of \$112,515. This was based on the CSHO’s determination the violation had a “medium” severity because the machines could not cause death but “could cause a fracture [or] a serious injury striking the employee on the head with that plate.” (Tr. 144-45). The CSHO determined the probability was “lesser” because “one machine had been two to three years, the other was two to three months, and we had the one known strike in the mouth.” (Tr. 145-46). This combination, as well as the violation’s willful classification, led to a gravity-based penalty of \$113,652. (Tr. 146). The CSHO again applied a ten percent reduction for size, zero reduction for good faith, and a ten percent increase for history. (Tr. 146-47).

The Secretary asks the Court to assess all of the proposed penalties; Donghee has made no arguments specific to the penalty amount.

Having weighed the relevant factors, the Court finds the proposed penalties for all the violations are appropriate and therefore assesses them for each of the Citation items. The Court finds the CSHO’s determinations as to the violations’ gravity accurately accounted for the severity and probability of harm on each of the subject machines. Donghee has not argued a reduction for good faith is warranted, and the Court finds no basis in the record to reduce the penalties on that basis. The CSHO’s calculation already applied a ten-percent reduction for Donghee’s size. Donghee has not challenged the CSHO’s representations as to its violation history, and the Court therefore adopts his increase of ten percent based on history.

Finally, even though the Court has reclassified one instance of the willful violation of 29 C.F.R. § 1910.212(a)(1) as serious rather than willful, the Court nonetheless assesses the full proposed penalty. The Court does so on the basis of Donghee: 1) deliberately disabling the safety device on the ADA Pad Check machine for the sake of increasing production efficiency (Tr. 300-05); 2) continuing to run the machine for years despite knowing its manufacturer-installed safety device had been disabled (Tr. 209-10, 238-39, 262-64, 301); and 3) bringing in temporary workers

to replace Donghee employees on the machine when those employees reported their safety concerns about operating the machine without the laser safety scanner (an action the Court finds particularly offensive). (Tr. 240-44). The Court also notes the record-evidence showing Donghee's managers often ignored safety issues with many of its machines and only re-installed the safety devices on the subject machines in response to the instant Citations. (Tr. 143-44, 237-38). The Court therefore finds the full proposed penalty is warranted here, even with only one instance of the violation being willful. *Cf. Valdak Corp.*, 17 BNA OSHC at 1139 (increasing the ALJ's penalty determination for a single willful violation).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a) and Commission Rule 90(a), 29 C.F.R. § 2200.90(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.147(f)(1)(ii), is **AFFIRMED**, and a penalty of \$13,127 is assessed;
2. Citation 1, Item 2, alleging two instances of a serious violation of 29 C.F.R. §1910.212(a)(1), is **AFFIRMED**, and a penalty of \$9,377 is assessed;
3. Citation 2, Item 1, alleging two instances of a willful violation of 29 C.F.R. § 1910.212(a)(1): Instance (a) is **AFFIRMED** as a willful violation; Instance (b) is reclassified as a serious violation. A penalty of \$112,515 is assessed.

SO ORDERED.

Dated: November 9, 2023
Atlanta, GA

/s/
Sharon D. Calhoun
Administrative Law Judge, OSHRC