Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WARD VESSEL & EXCHANGER CORPORATION, Respondent.	OSHRC DOCKET NO.: 21-0732

Appearances:

Dolores G. Wolfe and Felix R. Marquez, Department of Labor, Office of Solicitor, Dallas, Texas,
For Complainant

Barbi M. Lorenz and Steven R. McCowan, Littler Mendelson, P.C., Dallas, Texas,
For Respondent

Before: Judge Joshua R. Patrick – U. S. Administrative Law Judge

DECISION AND ORDER

I. INTRODUCTION

On the evening of January 23, 2021, one of Respondent's employees got the tips of his fingers pinched in a plate rolling machine. (Tr. 185). This occurred when his supervisor, who was troubleshooting a power problem on the machine, activated it without ensuring the area was clear. The supervisor took the employee to the emergency room, where the employee was treated for his injuries and went home the following morning. Three days later, Respondent received a report from its insurance company, indicating the employee suffered an "amputation" of his fingertips. (Tr. 187). Upon receiving the report, Respondent called Complainant's injury reporting line to report the injury. In response, Complainant initiated an inspection of Respondent's worksite and

issued a Citation and Notification of Penalty, alleging multiple violations of the Occupational Safety and Health Act of 1970.

Complainant makes two principal allegations. First, that Respondent failed to implement an adequate system of lock-out/tag-out as to the plate roller. Second, that Respondent failed to report an amputation to OSHA within 24 hours. In response, Respondent argues the LOTO standard does not apply to a single-source, cord-and-plug machine like the plate roller. Respondent also contends the requirements of LOTO did not apply to troubleshooting or cleaning and prep work for stainless steel, because the work process either required energization or proper implementation of the work process removed the hazard. Finally, Respondent asserts it reported the amputation to OSHA once it became aware the injured employee's injury was an amputation.

The Court will examine (1) whether maintenance of the plate roller, which is powered by a cord and plug, is governed by the LOTO standard; (2) whether Respondent violated the standard because it did not require LOTO when cleaning and prepping the rollers for stainless steel; (3) whether Respondent violated the LOTO standard while troubleshooting the power problem; and (4) whether the information available to Respondent at the time of the accident was sufficient to trigger its obligation to report. Based on the evidence presented, the Court finds Complainant failed to prove a violation of the LOTO standard and failed to establish Respondent did not timely report an amputation once it was characterized as such by a medical professional.

I. PROCEDURAL HISTORY

Complainant initiated an inspection in response to a report that one of Respondent's employees suffered an amputation while cleaning the rollers of a Roundo plate rolling machine. (Tr. 193, 194). Respondent reported one of its employees suffered an amputation on Saturday, January 23, 2021. Respondent reported the amputation to OSHA on January 26, 2021. In response,

Complainant sent Compliance Safety and Health Officer, Javier Fernandez, to Respondent's workshop, where he conducted an inspection of the plate roller and conducted interviews of the employees involved in the incident, as well as members of Respondent's management team. (Tr. 195). Based on CSHO Fernandez's inspection, he recommended, and Complainant issued, a five-item Citation and Notification of Penalty, alleging various sections of the LOTO standard, as well as a violation of OSHA's mandatory reporting requirement. *See* 29 C.F.R. § 1904.39. Respondent timely contested the violation, which brought this case before the Commission.

Complainant moved to withdraw Citation 1, Item 3, which was accepted by the Court. (Tr. 12). Thus, only four of the original five citation items remain for the Court's review. The trial was held on April 4, 2023, in Houston, Texas, and the following witnesses testified: (1) Frank Hernandez, Respondent's night supervisor; (2) [Redacted], a welder and fitter for Respondent; (3) Bob Besh, Respondent's VP of Production; (4) David Vilagura, Respondent's daytime supervisor and safety coordinator; and (5) CSHO Javier Fernandez. Both parties timely submitted post-trial briefs for the Court's review.

II. STIPULATIONS AND JURISDICTION

The parties stipulated the Commission has jurisdiction over this proceeding under section 10(c) of the Act and that Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

III. FACTUAL BACKGROUND

A. The Roundo Plate Roller

The violations alleged by Complainant all involve Respondent's use of the Roundo plate rolling machine, which uses a series of three rollers to turn large metal plates into cylinders. (Tr. 32). The cylinders can be used in multiple settings, including chemical and food processing. (Tr.

89-90). The Roundo is powered by a hydraulic motor, which is energized by a single cord and plug. (Tr. 152). The cord is plugged into a 480-volt breaker on the adjacent wall, and the machine is operated with a pendant controller that raises, lowers, and rotates the rollers.[1] (Tr. 153, 241; Ex. C-3).

According to Bob Besh, Respondent's VP of Production, who also oversees safety, the Roundo is a single-plug, single energy source machine, which means it can be effectively de-energized by unplugging it. (Tr. 153). To perform LOTO, Respondent's employees can either (a) lock out the breaker on the wall or (b) place the plug in a lockable container.[2] (Tr. 153; Ex. C-3). Besh testified the Roundo was energized the same way as 30-40 other welding machines at Respondent's workshop, all of which used a single cord and plug and a single 480-volt breaker. (Tr. 153). Because of this, Respondent utilized a single, general procedure for LOTO for all 480-volt, cord-and-plug machines. (Tr. 162-63).

During his inspection, CSHO Fernandez discovered the Roundo machine had hydraulics in addition to electric power and determined the single, general procedure for LOTO was insufficient to control all forms of hazardous energy. (Tr. 216). Aside from stating the Roundo motor used hydraulics, however, CSHO Fernandez was unable to describe how the hydraulics worked; how, or even if, hydraulic energy was stored; nor was he able to describe how the hydraulic energy should be controlled to prevent unexpected energization. (Tr. 227). Besh, on the other hand, explained the Roundo's hydraulics are used to raise the bottom rolls to impact the metal, but there is no stored potential energy to create a pinch point when the machine is not being operated because there is no pressure on the hydraulics. (Tr. 153-54). Specifically, Besh testified:

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1. Only the bottom two rollers raise and lower; the top roller remains in place. (Tr. 157).
2. Besh testified the preferred method is to place the plug into a locked container. While locking out the local switch prevents the machine from being plugged into the adjacent wall, it does not prevent using an extension cord to plug the machine into a different outlet. (Tr. 175).

> I heard you ask previous people on the stage, "Is there hydraulic energy?" and I believe they understood it to mean, "Is there hydraulics on the machine that power the machine?" I believe there was some confusion about is there stored potential energy left on it when it's not being operated, *and there's not*.

(Tr. 154) (emphasis added). In response to questioning about how he knew this, Besh testified he has extensive experience in the "set-up, start-up, installation, [and] maintenance of [plate-rolling] machines." (Tr. 154). This testimony was uncontradicted by CSHO Fernandez or any of Complainant's other witnesses.

B. Preparing the Roundo to Make Stainless Steel Cylinders

According to Frank Hernandez, rolling stainless steel required additional cleaning and preparation, because rust on the rollers contaminates the steel. (Ex. 64). To prevent contamination, the rollers must be cleaned with acetone and then wrapped with plastic. (Tr. 64). Respondent does not require its employees to de-energize the Roundo when preparing it for stainless steel applications; instead, the process requires a series of steps that Respondent asserts removes any pinch-point hazards or exposure to the release of hazardous energy.

The cleaning and preparation process requires two people. (Tr. 110). First, one employee uses the pendant controller to lower the bottom two rollers to their lowest setting.[3] (Tr. 117-118, 155-56). This creates an eight-inch gap between the two bottom rollers and the top roller and another gap of eighteen inches between the two bottom rollers. (Tr. 169, 177). Next, two employees wipe down the rollers with acetone. (Tr. 48, 53). One employee progressively rotates and stops the rollers with the pendant until the entire surface of each roller has been exposed and wiped clean. (Tr. 126). Once the rollers are wiped clean, one employee wraps plastic stretch wrap halfway around a stationary roller so that it will stick. (Tr. 125). The employee in charge of the pendant

3. The pendant controller is, as it sounds, a remote-control unit that is attached to the Roundo by a cord. (Tr. 39-40; Ex. C-2). The pendant raises and lowers the bottom two rollers and controls the speed and direction of the rollers.

ensures the velocity of the rollers is turned down to 1-3 revolutions per minute and activates the machine with the pendant controller. (Tr. 48, 169). While the rollers are rotating, the employee in charge of wrapping allows the plastic to wrap around the rollers as they rotate until each individual roll is covered in plastic wrap. (Tr. 125).

Around 9 p.m. on Saturday, January 23, 2021, Hernandez directed [Redacted] and I.E.[4] to prepare the Roundo plate rolling machine to create stainless steel cylinders. (Tr. 47-48). When they tried to lower the bottom rollers to begin the cleaning process, the rollers did not move. (Tr. 118). [Redacted] and I.E. notified Hernandez, who went to the machine with them to troubleshoot the problem. (Tr. 119-120). Hernandez directed [Redacted] to stand at the 480-volt breaker, which was only a couple of feet away from the Roundo's control panel and told I.E. to gather some additional acetone for cleaning. (Tr. 120, 146).

Hernandez sat on a bucket near the Roundo's control panel to figure out why the rollers would not lower. (Tr. 146). Hernandez needed to have the machine energized to test the reset buttons inside the control panel, which is why he stationed [Redacted] at the breaker switch. (Tr. 91, 114-115, 176; Ex. C-3 at 2, 15). Ultimately, he discovered the power problem was due to an unnecessary extension cord connecting the Roundo to the breaker. (Tr. 140). Hernandez directed [Redacted] to disconnect the superfluous extension cord and connect the Roundo's cord directly to the breaker. (Tr. 140, 147-48). Due to the voltage, [Redacted] had to turn off the breaker, remove the extension cord, reconnect the Roundo cord, and then re-energize the breaker. (Tr. 115, 147-48). Once the machine was re-energized, Hernandez activated the rollers, which is when [Redacted] heard

I.E. scream. (Tr. 56, 122). Unbeknownst to either [Redacted] or Hernandez, I.E. returned from

4. It is the policy of OSHRC to redact the names of individuals whose medical information is contained in the record. To avoid the inartful redaction marks, the Court has opted to refer to the injured employee with the initials "I.E." for the remainder of this opinion.

collecting acetone and started wiping down the rollers. (Tr. 70, 124). Once the machine activated, I.E.'s fingers were briefly pinched in between two of the rollers before he pulled them out. (Tr. 79). According to Hernandez, it appeared I.E.'s fingers had been cut or pinched down to the tip of his fingernails. (Tr. 68-69).

In response, Hernandez took I.E. to the hospital and told [Redacted] to shut down the machine and close the shop for the evening. (Tr. 71). Hernandez also contacted David Vilagura and let him know I.E.'s fingers had been pinched in the Roundo's rollers. (Tr. 183). Vilagura notified Besh at "sometime on Sunday" that I.E. got his fingers pinched in the plate rolls and that Hernandez took him to the emergency room. (Tr. 172). Vilagura followed up with Hernandez on Sunday morning, and Hernandez told him I.E. was going into surgery to stitch up the wounds on his fingertips. (Tr. 184). Notwithstanding their efforts to follow up with the hospital, the doctor, and the insurance company, Respondent did not receive notice that I.E.'s injury was an amputation until Tuesday. (Tr. 187). According to Vilagura, around the same time, they sent Adam Renstrom, Respondent's General Manager, to I.E.'s home to determine what happened. Eventually, on Tuesday, January 26, 2023, Respondent received an emailed report from the insurance company, which stated I.E. suffered an amputation of his fingertips. (Tr. 187). Within hours of receiving the report, Vilagura contacted OSHA and reported the amputation. (Tr. 188-191).

Respondent conducted an internal investigation of the incident and determined I.E.'s injuries were the result of two failures. First, Respondent determined I.E. violated company rules by attempting to clean the rollers before ensuring the proper steps to clean had been completed. (Tr. 169). Both I.E. and [Redacted] knew they were not supposed to proceed with cleaning when the rollers would not lower, and even contacted Hernandez when the problem arose. However, I.E.'s decision to clean the rollers while they were in the "up" position was a violation of company policy.

(Tr. 169). Second, and more critical, however, was Hernandez's failure to ensure the area surrounding the Roundo was clear prior to troubleshooting the machine. According to Besh, this was the primary failure leading to the accident, and one that resulted in Hernandez being disciplined and nearly fired. (Tr. 167; Ex. R-13). Respondent opted not to discipline I.E., as they believed the incident itself was a stark enough reminder and that additional discipline would not be productive. (Tr. 170).

IV. Analysis

a. Burden of Proof under Section 5(a)(2) of the Act

To establish a prima facie violation of a specific standard promulgated under section 5(a)(2) of the Act, the Secretary must prove by a preponderance of the evidence that: "(1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions." *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-0531, 1991).

The Secretary must establish his prima facie case by preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

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

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

b. The LOTO Citations

Complainant contends Respondent violated three separate sections of the LOTO standard. In Citation 1, Item 1(a), Complainant contends Respondent failed to utilize a machine-specific LOTO procedure when cleaning the Roundo plate rolling machine in violation of 29 C.F.R. § 1910.147(c)(4)(i). In Citation 1, Item 1(b), Complainant contends Respondent failed to require the use of individual LOTO devices during the cleaning process and, in Citation 1, Item 2, the use of group LOTO devices when Hernandez was attempting to restart the machine. See 29 C.F.R. §§ 1910.147(d)(4)(i), (f)(3)(ii)(D).

Respondent does not dispute it did not have a machine-specific procedure for the Roundo, nor does it dispute its employees did not place lockout or tagout devices on the Roundo when troubleshooting or preparing it for stainless steel rolling. Instead, Respondent argues the Roundo machine is excepted from the cited standards on two bases: (1) the exception for cord-and-plug machines under § 1910.147(a)(2)(iii)(A); and (2) the exception from the machine-specific procedure requirement under § 1910.147(c)(4)(i). Respondent also contends Complainant failed to establish it had knowledge of the violative condition and that Hernandez's conduct was unpreventable.

i. Whether the Cited LOTO Standards apply?

Prior to discussing the applicability of any particular exception, Complainant must first establish the cited standard applies to the condition identified in the Citation. *See Ormet, supra*. The Scope paragraph of the cited standard states, "This standard covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. This standard establishes minimum performance requirements for the control of such hazardous energy." 29

C.F.R. § 1910.147(a)(1)(i) (underlining added); *see also Gen. Motors Corp., Delco Chassis Div.*, Nos. 91-2973, 1995 WL 247469 at *2-3 (OSHRC, Apr. 26, 1975) (consolidated) ("We find that the standard clearly and unambiguously applies only where the Secretary shows that unexpected energizing, start-up or release of stored energy could occur *and cause injury*.") (emphasis added), *aff 'd* 89 F.3d 313 (6th Cir., 1996). While the Commission was primarily concerned with the definition of "unexpected energization", it simultaneously highlighted that application of the standard requires that the possibility of unexpected energization or release of hazardous energy *could cause injury*. *See id.* (discussing preamble and contemporaneous interpretive materials emphasizing this interpretation).

The Application paragraph indicates that "This standard applies to the control of energy during servicing and/or maintenance of machines and equipment." 29 C.F.R. § 1910.147(a)(2)(i). Servicing and/or maintenance are defined as:

> Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

Id. § 1910.147(b). Normal production operations are not covered by § 1910.147. Even servicing and maintenance during normal production is only covered in limited circumstances, including: *(1)* if an employee is required to bypass a guard; or (2) if an employee is required to place any part of their body into the point of operation or where an associated danger zone exists. *Id.* § 1910.147(a)(2)(ii). Neither of those scenarios is present here. According to Hernandez, the Roundo was being prepped that night for work to occur the following shift. (Tr. 48-49). Thus, the basis for the standard's application must be § 1910.147(a)(2)(i), as further defined by § 1910.147(b).

On the face of it, the activities engaged in by Hernandez, I.E., and [Redacted] appear to be covered by the scope and application paragraphs of the cited standard. The Roundo is a machine, and the employees were in the process of cleaning and/or maintaining it. *See* 29 C.F.R. § 1910.147(b). This case requires a more nuanced approach, however. To determine whether the LOTO standard applies, the Court must break down the scenarios described in the citation items. In the Court's estimation, there are three different scenarios that require analysis:[5] (a) maintenance of the machine; (b) the process of cleaning and prepping the machine for stainless steel; and (c) troubleshooting.

A. "Maintenance" of the Roundo

Respondent characterizes the following as examples of "maintenance" on the Roundo: work on the transmission, disassembling the machine, and changing electrical components. (Tr. 175). In those instances, the machine is unplugged and either the plug is placed in a locked receptacle or the breaker is shut off and locked out. These are the methods Respondent uses to prevent an unexpected release of hazardous energy that could injure an employee. (Tr. 174-176). Aside from the general LOTO policy, however, Respondent does not have a machine-specific procedure for LOTO on the Roundo.

With respect to Respondent's overall maintenance regime on the Roundo, the Court finds the exception at § 1910.147(a)(2)(iii)(A) applies. Respondent established, and Complainant failed to contradict, that "the hazards of unexpected energization or start up of the equipment is controlled by the unplugging of the equipment from the energy source and by the plug being under the exclusive control of the employee performing the servicing or maintenance." *Id.*

5. The Court could also discuss a fourth scenario; however, production, or the process of rolling the cylinders, is governed by the machine guarding standard under Subpart O. *See* 29 C.F.R. § 1910.147(a)(2)(ii).

§ 1910.147(a)(2)(iii)(A). While CSHO Fernandez identified the Roundo as having hydraulics, he also testified he "didn't have a full understanding of what the hydraulics did." (Tr. 227). On the other hand, Besh, who has extensive experience with plate rollers like the Roundo, convincingly testified that disconnecting the Roundo from its electrical power source effectively removed the hazard of stored potential energy. (Tr. 154). This is because there is no stored pressure on the hydraulics to create a pinch point between the rollers. (Tr. 153-54).

Without proof to the contrary, the Court finds Besh's testimony establishes the exception under § 1910.147(a)(2)(iii)(A) for general maintenance work. *See, e.g., Nat'l Envelope Corp. dba N.Y. Envelope Co.*, No. 94-2968, 1998 WL 758717 at *8 (OSHRC ALJ, Oct. 26, 1998) (consolidated) (finding § 1910.147(c)(4)(i) exception applied to machine with pneumatics controlled by single electrical source because Complainant failed to rebut evidence that disconnecting electrical source eliminated hazard from pneumatic energy). It is important to note, however, that this exception is only applicable in those situations where the machine is actually unplugged. *See Tops Markets, Inc.*, No. 94-2527, 1997 WL 93943 at *2 (OSHRC, Mar. 3, 1997) (noting the preamble clearly states the LOTO standard does not apply to cord-and-plug equipment *when* the equipment is unplugged and the plug is in the exclusive control of the servicing employee) (citing Control of Hazardous Energy Sources (Lockout/Tagout) 54 Fed. Reg. 36644, 36663 (Sept. 1, 1989) (to be codified at 29 C.F.R. Part 1910)). As such, it does not apply to the stainless steel preparation process, which Respondent knowingly performs while the Roundo is energized.

Alternatively, yet for much the same reasons, the Court also finds the exception to the documented, machine-specific LOTO procedure requirement is also applicable. According to the exception to 29 C.F.R. § 1910.147(c)(4)(i), an employer does not have to document a machine-

specific LOTO procedure if eight (8) different elements are met. *See* 29 C.F.R. § 1910.147(c)(4)(i), *note*. The Court finds Besh's testimony, as it relates to maintenance, satisfies all the elements of the exception. As discussed above, Besh showed the Roundo is a single-source, plug-in machine that does not have the "potential for stored or residual energy or reaccumulation of stored energy after shut down *which could endanger employees*". *Id.* (emphasis added). Respondent achieves a locked-out condition by placing the plug of the machine in a lockable container, which is secured by the individual performing maintenance. Because of this condition, the machine does not pose any additional hazards for other employees. Finally, though Complainant contends the injury in this case disproves the exception, Respondent was not relying on the exception at the time of the injury. Hernandez was performing energized troubleshooting, which is governed by a different section of the standard and is accounted for in Respondent's LOTO policy. (Ex. C-4 at 95). *See* § 1910.147(f).

Complainant, through CSHO Fernandez, provided little to no persuasive, contradictory evidence in response to Besh's testimony. In many respects, CSHO Fernandez agreed with Besh and admitted his lack of understanding about the Roundo and how it functioned. (Tr. 217-222, 227). As such, the Court finds the foregoing, as well as the ensuing, discussions illustrate Respondent established all the relevant elements of the exception to the LOTO procedure requirement. Accordingly, the Court finds the exception found at § 1910.147(c)(4)(i) applies, as well.

B. Prepping for Stainless Steel

The cleaning and prep work for stainless steel applications presents a different issue. As noted by the Commission in *Tops Markets* and *National Envelope*, *supra*, the exception from the standard only applies if the machine is actually unplugged while work is being performed.

Respondent admits its employees apply acetone and plastic wrap to the Roundo's rollers while it is energized. Thus, neither exception applies, and we are confronted with a different question: Does the standard apply to Respondent's process for preparing the Roundo for stainless steel? The Court finds Complainant failed to prove the LOTO standard applies to this process, because she failed to prove exposure to a hazard.[6]

As noted by the Commission and affirmed by the Sixth Circuit, "[T]he standard clearly and unambiguously applies only where the Secretary shows that the unexpected energizing, start-up or release of stored energy could occur *and cause injury*." *Gen. Motors Corp., Delco Chassis Div.*, 1995 WL 247469 at *2-3 (citing 29 C.F.R. § 1910.147(a)(1)(i)) (emphasis added); *see also Sec'y of Labor v. Action Elec. Co.*, 868 F.3d 1324, 1335 (11th Cir. 2017) (citing 29 C.F.R. § 1910.147(b) ("The clear thrust of the LOTO standard is broadly to ensure safety where an employee performs legitimate workplace activities directed at the relevant machine and 'where the employee may be exposed to the unexpected energization or startup of the equipment or release of hazardous energy.'"). In other words, application of the standard requires proof of two prongs: (1) the possibility of an unexpected start-up or release of energy; and (2) the potential for injury. The Court finds Complainant fails at step (2).

The Court finds the employees engaged in the stainless steel cleaning process are not exposed to the release of hazardous energy as required by the second prong of the application paragraph. According to everyone that testified, the first step in the cleaning process is to drop the bottom rollers to their lowest setting. In so doing, the pinch point typically present at the point of operation is removed. In its stead are gaps eight- to eighteen-inches wide. The next step in the

6. For the same reason, the Court could also conclude the standard applied and nonetheless find Complainant failed to establish exposure to a hazard. *See Fabricated Metal Prods. Inc.*, 18 BNA OSHC 1072, 1073 (No. 93-1853, 1997) (holding exposure established where "reasonably predictable" employee will be in danger zone).

process requires the velocity button on the pendant to be turned down to 1-2 RPM, which, in Besh's estimation, was equivalent to "a snail's pace".[7] (Tr. 48). Only after the first two steps are completed do the employees apply the acetone. Once they clean the accessible side of the cylinder, the employee in charge of the pendant rotates and stops the cylinders to expose and wipe down the back side of the roller. (Tr. 53). According to Hernandez, the cylinders cannot be advanced manually by hand. (Tr. 83). Finally, after one employee places a portion of plastic wrap around a roller, the employee in charge of the pendant activates the roller. This permits the plastic to be wrapped around the entire circumference of the cylinder. The process is repeated for all three cylinders.

The Court finds Complainant did not show how this process exposed Respondent's employees to the release of hazardous energy. CSHO Fernandez relied upon the existence of hydraulic energy but failed to explain how it operated, let alone how its mere existence presented a hazard in any of the circumstances alleged. Further, Besh provided succinct and uncontradicted testimony regarding the lack of exposure to hazardous hydraulic energy under the above-described scenario. Second, Complainant's reliance on I.E.'s injury as proof that Respondent's cleaning process was hazardous is misplaced. Complainant's singular focus on the way this particular injury occurred fails to appreciate the distinction between Respondent's process for prepping the Roundo for stainless steel and troubleshooting the Roundo to ensure it is running properly. Granted, in this case, the processes occurred in rapid succession. But the distinction is an important one, because it is the work performed on a machine that dictates the standard by which that work is governed.

7. Some basic math bears this out. According to Besh, the cylinders were approximately 8 inches in diameter. To determine the circumference of a circle, you multiply the diameter by pi (π). This comes out to a distance of slightly more than 2 feet. At one RPM, that is just over 2 feet every minute, or 120 feet every hour, or 0.02 miles per hour. Even at the maximum rate of 10 RPM, the cylinder would only make a rotation once every 6 seconds, or 0.2 miles per hour. (Tr. 52).

Further, it is the condition, not the cause of a particular accident, that determines whether the standard was violated. *See, e.g., The Boeing Co., Wichita Div.*, No. 12879, 1977 WL 7783 at *2 (OSHRC, Oct. 21, 1977).

Based on the foregoing, the Court finds Complainant failed to prove the LOTO standard applied to Respondent's process for cleaning and prepping the Roundo machine for stainless steel applications, as set forth in Citation 1, Items 1(a), 1(b), and 2. Alternatively, the Court finds Complainant failed to prove the process by which Respondent's employees clean the rollers for stainless steel exposed them to a hazard. *See Kaspar Wire Works*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) ("The Secretary bears the burden of proving employee exposure to cited hazards, which requires [him] to show that it is reasonably predictable . . . that employees have been, are, or will be in the zone of danger.").

C. Troubleshooting While Energized

In Citation 1, Item 2, Complainant expands its application of LOTO beyond "cleaning" to "multiple employees perform[ing] maintenance and servicing activities", which appears to target the transition from I.E. and [Redacted] cleaning the Roundo to Hernandez troubleshooting it. *See* Citation and Notification of Penalty at 6-8.

I.E. and [Redacted] did what they were instructed to do when they discovered the rollers would not drop: they contacted their supervisor, Hernandez. Once Hernandez became involved, the process changed from cleaning to troubleshooting. Hernandez needed the power running to determine why the power from the breaker was not translating into movement of the rollers. I.E. was injured during this transition from process to process by applying acetone before Hernandez had completed troubleshooting. But, that was not a deficiency caused by the cleaning process, the lack of a machine-specific LOTO procedure, or failure to lock out the machine with one or more

tags. Rather, the failure here was two-pronged: (1) Hernandez's failure to take the proper precautions during troubleshooting; and (2) I.E.'s decision to put his hands on the rollers before they were lowered (even though they had *just* paused the cleaning process because of this very problem). In either case, the occurrence of an injury based on these facts does not, on its own, establish a violation of any of the cited standards.

Company policy required Hernandez to clear the area surrounding the Roundo to ensure no one would be exposed to a start-up of the machine while he was troubleshooting the energized machine. (Tr. 92, 167). This policy is compliant with paragraph (f)(1) of the LOTO standard, which specifically requires it as a condition of performing "operational testing" in lieu of LOTO. *See* 29 C.F.R. § 1910.147(f)(1)(ii); *see Gen. Motors Corp., CPCG Okla. City Plant*, No. 91-2834E, 2007 WL 4350896 at *27 (OSHRC, Dec. 4, 2007) (consolidated) ("In circumstances where troubleshooting requires 'operational testing'—observing equipment that is energized and in motion—the standard would not apply." (citing 54 Fed. Reg. 36,647)). In other words, Respondent is permitted to perform energized, operational testing of equipment so long as it takes certain precautions to avoid exposure to injury. This, and not the failure to use group lockout/tagout or have a procedure for LOTO, was the operative violation in this case. Respondent concluded it was Hernandez's failure to execute this vital step that resulted in I.E.'s injury, and the Court agrees.

c. The Secretary Failed to Prove Her *Prima Facie* Case

Irrespective of what may have caused the accident, the Court finds the resolution of this matter turns primarily on the Secretary's failure to prove her *prima facie* case. She failed to explain how the hydraulics worked, how they served as an additional source of hazardous energy, or how Respondent's employees were exposed to any purported hazard caused by it. She failed to overcome Besh's explanation of how control over (or de-energization of) the single-source plug

worked to simultaneously control the hydraulics. She failed to prove how the stainless steel preparation process, as described by Respondent's employees, exposed Respondent's employees to injury. And, she failed to distinguish between the various processes at work in this case and, subsequently, how those processes are individually governed by the LOTO standard.

It is Complainant's obligation to align the standard with the condition alleged to have violated it. The failure prompting Complainant to cite Respondent did not stem from Respondent's failure to have a machine-specific LOTO procedure or from failing to use one lock or three. Respondent proved the Roundo is not the type of machine that requires such a procedure, and Complainant failed to prove the processes identified in the Citation items required the use of locks or tags. As regards the process of cleaning, Complainant failed to prove exposure to a hazard requiring the use of a lock. The problem, instead, arose at the intersection of [Redacted] and I.E. cleaning and Hernandez performing troubleshooting. Complainant asserts the basis for exposure is Respondent's failure to use group lockout during the troubleshooting process. The problem, however, is that the machine cannot be locked out during the troubleshooting process. Indeed, as noted above, so long as the required precautions are taken, energized troubleshooting is permitted by the LOTO standard. Respondent's failure to execute that process correctly should not serve as a basis for establishing exposure under a different standard from which Respondent has already established an exemption.

These failures are fatal to Citation 1, Items 1(a) and 1(b) and Citation 1, Item 2. Accordingly, those items shall be VACATED.

d. Respondent Reported the "Amputation" in a Timely Manner

In Citation 2, Item 1, Complainant contends Respondent failed to timely report an amputation in violation of 29 C.F.R. § 1904.39(a)(2). Specifically, Complainant contends

(1) Respondent knew I.E.'s injury was an amputation at the time the accident occurred; and (2) Respondent had 24 hours from the instant the injury occurred to report it to OSHA. Respondent does not dispute many of the legally operative facts on this issue: (1) it did not report I.E.'s injury within 24 hours of its occurrence; and (2) the injury constituted an "amputation" as that term is defined under 29 C.F.R. § 1904.39(b)(11). Respondent does dispute, however, the legal effect of those facts.

The Court finds Complainant takes a too narrow view of the requirements of 29 C.F.R. § 1904.39(a)(2). Subparagraph (b) of the cited standard indicates how the reporting process is to be implemented. *See* 29 C.F.R. § 1904.39(b), *Implementation*. Within that plan of implementation, paragraph (b)(7) provides:

> *What if I don't learn about a reportable fatality, in-patient hospitalization, amputation, or loss of an eye right away?* If you do not learn about a reportable fatality, in-patient hospitalization, amputation, or loss of an eye at the time it takes place, you must make the report to OSHA within the following time period after the fatality, in-patient hospitalization, amputation, or loss of an eye is reported to you or to any of your agent(s): Eight (8) hours for a fatality, and twenty-four (24) hours for an in-patient hospitalization, an amputation, or a loss of an eye.

Id. at § 1904.39(b)(7). In other words, the fact of an amputation, alone, is not sufficient to start the time clock for reporting under the cited standard. It also matters when Respondent knew or should have known about the in-patient hospitalization[8] or amputation. *Id.* Based on the record, the Court finds Respondent reported the amputation within 24 hours of learning the injury was an amputation, in compliance with its obligation under § 1904.39(b)(7).

Complainant contends Hernandez, as a supervisor, was aware of the amputation and reported it to the production manager, David Vilagura. Hernandez's testimony regarding what he

8. There was no competent evidence introduced indicating Perez was ever admitted for in-patient hospitalization.

observed and what he reported is not as definitive as Complainant characterizes it. Hernandez testified as follows:

> Q. What did you do immediately after he screamed?
> A. I looked at his fingers, and it was like he cut the tip off.

(Tr. 71).

> Q. And what did you tell [David Vilagura]?
> A. I told that [] had cut his tips off. Pinched his fingers

(Tr. 79).

> Q. And what did you tell [Vilagura] when you called him?
> A. I told him []'s fingers were pinched, they were cut. I think he needs stitches. I have to take him to the ER.

(Tr. 94). Complainant also cited to Hernandez's testimony that approximately a quarter inch of I.E.'s fingertips were removed, but this was in response to questions about seeing I.E.'s fingers after the accident occurred. (Tr. 68, 69). The injury was characterized numerous ways, including the tips being cut off, pinched, or cut, but no one believed the injury was an amputation. (Tr. 142).

The Court finds a citation is too harsh a result given the unique facts of this case. Yes, the injury was ultimately characterized as an amputation *by a medical professional* and qualifies as such according to the definition provided at 29 C.F.R. § 1904.39(b)(11). But, this is not a typical "amputation" where an entire digit or limb is removed from the body. The Court finds I.E.'s injuries, at least as they were presented to Hernandez—and as he presented them to Vilagura—were sufficiently ambiguous to call into question whether reporting was necessary. Regardless of how Respondent's employees referred to the injury (cut, cut off, pinched, etc.), it is a stretch to expect Hernandez to identify I.E.'s injury as an amputation, or for Vilagura to do the same based on the limited information he received from Hernandez. This is especially the case here, where Respondent undertook efforts to determine the nature of I.E.'s injury and, ultimately, reported the injury the instant it was formally categorized as an amputation. (Tr. 186).

The Court finds Complainant failed to establish a violation of 29 C.F.R. § 1904.39(a)(2). Accordingly, Citation 2, Item 1 is VACATED.

V. CONCLUSION

Ultimately, Complainant took a narrow view of this case and placed an inordinate amount of emphasis on the fact that an injury occurred. The facts, as well as the cited standards, however, warranted a more nuanced approach to the job processes involved, as well as a more thorough investigation into how the Roundo machine worked and what hazards were associated with those processes. While the fact of an injury is a relevant consideration, it is not enough to carry the day in this case.

VI. ORDER

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

1. Citation 1, Item 1(a) is VACATED.
2. Citation 1, Item 1(b) is VACATED.
3. Citation 1, Item 2 is VACATED.
4. Citation 1, Item 3 was WITHDRAWN.
5. Citation 2, Item 1 is VACATED.

SO ORDERED.

/s/ Joshua R. Patrick

Dated: October 10, 2023
Denver, Colorado

Joshua R. Patrick
Judge, OSHRC