UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. JOON, LLC d/b/a AJIN USA, Respondent.	OSHRC Docket Number **17-0053**

DECISION AND ORDER

Attorneys and Law firms

Matt Stephen Shepherd, Matthew K. McClung, Megan A. Carrick, Attorneys, Office of the Solicitor, Nashville, TN, for Complainant.

John J. Coleman, III, Marcel L. Debruge, Ingu Hwang, Cayman L. Caven, Attorneys, Burr Forman, LLP, Birmingham, AL, for Respondent.

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

I. INTRODUCTION

Respondent Joon, LLC d/b/a Ajin USA ("Ajin") manufactures automotive parts at its plant in Cusseta, Alabama ("worksite"). On June 18, 2016, a machine operator at the worksite suffered grievous injuries when a robotic arm unexpectedly activated and struck her as she attempted to troubleshoot a malfunctioning piece of equipment. The machine operator died the next day from her injuries. This proceeding arises from the fatality investigation conducted by the Occupational and Health Administration ("OSHA") in response to the machine operator's death.

At the time of the accident, the 20-year-old Decedent had been employed as a machine operator at the plant for approximately three months. That day, a piece of machinery stopped working due to a sensor fault in one of the plant's many gated enclosures, called "robotic cells," where robotic equipment and other machinery assemble automotive parts. Several employees, including two Ajin supervisors, entered the cell and attempted to troubleshoot the faulty machinery. OSHA's lockout/tagout ("LOTO") standards and Ajin's own written safety rules

requires employees to apply a specific LOTO procedure before entering the cell. Ajin required employees to use a control panel to put the robots in manual mode, open the gate at the back of the cell (the gate connects to an electrical interlock device that deactivates the cell's robots when the gate is open), and hang their personal locks on the gate (regardless of how many other locks have already been placed there) before entering the cell. This ensures the gate remains in an open position so the machinery and equipment inside the cell cannot energize. That day, however, none of the employees, including the supervisors, placed locks on the gate. While Decedent was in the cell with the two Ajin supervisors and other employees, one of the robots energized and struck Decedent, crushing her against another piece of equipment. Her coworkers eventually freed Decedent and rendered first aid. She was transported to a hospital, where she died the next morning.

Following OSHA's fatality investigation, the Complainant Secretary of Labor ("Secretary")[1] issued a Citation and Notification of Penalty to Ajin on December 12, 2016, alleging serious (Citation 1), willful (Citation 2), and other-than-serious (Citation 3) violations of the Occupational Safety and Health Act of 1970 (Act) with total proposed penalties of $2,515,737.00.[2] Ajin timely contested the citations and proposed penalties pursuant to § 10(a) of the Act, bringing the matter before the Commission under § 10(c) of the Act.[3] Including subitems for grouped violations, the Secretary alleged 51 separate violations of OSHA's standards. The Secretary subsequently filed a formal complaint[4] with the Commission seeking an Order affirming the citations and proposed penalties. The Court has jurisdiction over this proceeding and Ajin is a

[1] The Secretary has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order 1–2012, *Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health*, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

[2] The Act contemplates various grades of violations of the statute and its attendant regulations— "willful"; "repeated"; "serious"; and those determined "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. § 666. A serious violation is defined in the Act; the other grades are not. *See* 29 U.S.C. § 666(k).

[3] The case was stayed in the Commission pending resolution of the companion criminal case and was lifted on January 22, 2021.

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

covered employer under the Act (Compl. ¶¶ 1, 2; Answer ¶¶ 1, 2; Pretrial Order Attach. C; Tr. 44). The Court held a bench trial on in Montgomery, Alabama, and the parties subsequently filed post-trial briefs.

Citation Items Deemed a Final Order of the Commission

When the trial commenced, Ajin withdrew its notice of contest with regard to Citation 2, grouped Item 1(a-c) and grouped Item 2(a-c) (Tr. 24-27). The Secretary proposed a penalty of $124,709 for each grouped Item (Tr. 24). Because Ajin has withdrawn its notice of contest with regard to Citation 2, grouped Item 1(a-c) and grouped Item 2(a-c), in accordance with §10(a) of the Act, Citation 2, grouped Item 1(a-c) and grouped Item 2(a-c) and the proposed penalties are "deemed a final order of the Commission and not subject to review by any court or agency." Therefore, Citation 2, grouped Item 1(a-c) and grouped Item 2(a-c) (Tr. 24-27) are no longer pending in the Court.

In Ajin's proposed Findings of Fact and Conclusions of Law it also withdrew its notice of contest related to Citation 1, Item 2 and Citation 3, Item 1 (Ajin's Findings Fact Concls. Law pp. 1-2).[5] The Secretary proposed a penalty of $9,799 for Citation 1, Item 2 and proposed no penalty for Citation 3, Item 1. Because Ajin has withdrawn its notice of contest with regard to Citation 1, Item 2 and Citation 3, Item 1, in accordance with § 10(a) of the Act, Citation 1, Item 2 and Citation 3, Item 1 and their proposed penalties are "deemed a final order of the Commission and not subject to review by any court or agency." Therefore, Citation 1, Item 2 and Citation 3, Item 1 are no longer pending in the Court.

Citation Items Still Pending

At trial, Ajin withdrew its notice of contest to Citation 2, Items 5(a-c), 6(a-c), 12(a-c), 13(a-c), and 14(a-c), except as to the willful characterizations (Tr. 24-25). These alleged violations mirror those cited in uncontested Citation 2, Items 1 and 2 but refer to eight other employees. In Ajin's brief and in its proposed Findings of Fact and Conclusions of Law it asserts these Items must be "recharacterized as a single 'serious' citation, as they share a common abatement[.]"

[5] The parties filed a joint stipulation to extend the deadline to file post-trial briefs to August 26, 2022, which the Court granted. Ajin filed a proposed Amended Findings of Fact and Conclusions of Law on August 29, 2022, without the Court's permission and without first seeking an additional extension as required by Commission Rule 5 ("A request for an extension of time should be received in advance of the date on which the pleading or document is due to be filed."). Therefore, the Court does not rely on any of Ajin's proposed Amended Findings of Fact and Conclusions of Law.

(Ajin's Br. p. 68; Ajin's Findings Fact Concls. Law p. 7 ¶ 9). If true, this would result in the assessment of a single penalty rather than the five separate penalties proposed by the Secretary. Even if Ajin was not bound by its withdrawal of its notice of contest to Citation 2, Items 5(a-c), 6(a-c), 12(a-c), 13(a-c), and 14(a-c), except as to the willful characterizations, which it is, for the reasons indicated in Section III(C) (Per Employee Citations) *infra*, the Court declines to regroup them as a single item.

Remaining at issue in their entirety are Citation 1, Item 1 alleging a serious violation of § 1910.132(a), with a proposed penalty of $11,758; Citation 2, Items 3(a-c), 4(a-c), 7(a-c), 8(a-c), 9(a-c), 10(a-c), and 11(a-c), each with a proposed group penalty of $124,709; Citation 2, Item 15 alleging a willful violation of § 1910.147(c)(5)(i), with a proposed penalty of $124,709; and Citation 2, Items 16 through 20 each alleging a willful violation of § 1910.255(b)(4), each with a proposed penalty of $124,709. Also at issue is Ajin's allegation that the contested citations and characterizations resulted from OSHA's "anti-Korean race bias." (Ajin's Br. p. 68).

Pursuant to Commission Rule 90, after hearing and considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 12(j) of the Act. 29 U.S.C. § 661(j). For the reasons indicated *infra*, the Court affirms Citation 1, Item 1 and assesses a penalty of $12,471, affirms Citation 2, grouped Items 5(a-c), 6(a-c), 7(a-c), 10(a-c), 11(a-c), 12(a-c), 13(a-c), and 14(a-c) and assesses a penalty of $124,709 for each grouped Item, affirms Citation 2, Items 16, 17, 18, 19, and 20 as serious and assesses a penalty of $12,471 for each item, and vacates Citation 2, grouped Items 3(a-c), 4(a-c), 8(a-c), and 9(a-c), and Item 15 and their respective proposed penalties.

II. BACKGROUND

Ajin manufactures automotive parts at its plant in Cusseta, Alabama, to supply Hyundai and Kia facilities. The plant consists of a main manufacturing building with a warehouse building behind it, measuring more than 70,000 square feet. The warehouse, referred to as the "CKD warehouse," is the location of the violations alleged in this proceeding. Ajin employed over 600 employees at the Cusseta plant at the time of the inspection. It used two temporary staffing agencies to fill approximately 150 of those positions (Tr. 394-95). The dash main line in the CKD warehouse is where dashboards are assembled by a series of robotic cells. The robots in the cells take pieces of the dashboards that has been assembled and secure and weld them. When the robots

are finished, the sensor will tell the robots to move the welded pierces to another location in the cell. "So it's moving all around in the cell, multiple robots are." (Tr. 635.)

OSHA's March 2016 Comprehensive Inspection of Ajin's Facility[6]

On March 3, 2016, OSHA Compliance Safety and Health Officer[7] Scott Tisdale opened a comprehensive inspection at Ajin's facility (Tr. 395-97).[8] He conducted a walkaround inspection of the plant on March 4, accompanied by plant manager David Wilkerson and senior safety manager Gerald Earls, among other Ajin personnel (Tr. 399). During the walkaround inspection, Tisdale observed press welding machines (also referred to at trial as "resistance welders," "spot welders," and "projection welders") that were not guarded (Tr. 390, 400). He did not observe any employees failing to follow LOTO procedures (Tr. 399).

The Secretary subsequently issued a Citation and Notification of Penalty to Ajin on April 15, 2016. Citation 1, Item 2 alleged Ajin committed a serious violation of § 1910.255(b)(5) for failing to effectively guard four projection welders (Ex. R-3; Tr. 390, 401, 415). In Instances a through d, the citation alleged that on or about March 2, 2016, Ajin "exposed employees to crush/amputation hazards in that employees were allowed to operate [either the S-33, S-19, S-23, or S-21, respectively,] press welding machine where the point of operation was not effectively guarded by use of an electronic safety circuit, two hand control, or other similar protection as required by the regulation." (Ex. R-3.) Ajin had a total of forty projection welders. The four cited projection welders are used to weld small parts. The thirty-six projection welders not cited are used to weld large parts (Tr. 289, 376-77, 401). After this citation was issued Ajin installed thumb sensors on the four cited projection welders (Tr. 331).

OSHA's June 2016 Fatality Investigation of Ajin's Facility

Upon notification of Decedent's death on June 19, 2016, OSHA assigned Compliance Safety and Health Officers Tisdale and Heather Sanders to conduct a fatality investigation at Ajin's facility.[9] Sanders arrived at the facility on June 20. Tisdale, who was traveling at the time of the

[6] The citation issued as a result of this comprehensive inspection is not a part of the present case but is relevant to the Secretary's willful characterization of some of the alleged violations in the present case.
[7] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d).
[8] In 2016 OSHA had a Regional Emphasis Program for Safety Hazards in Auto Parts Industry - NAICS 3363XX (Motor Vehicle Parts Manufacturing). *See* Ex. R-2.
[9] At the time of the trial, Tisdale was Assistant Area Director for OSHA's Mobile, Alabama, Area Office, and Sanders was Acting Assistant Area Director for OSHA's Jacksonville, Florida, Area Office (Tr. 391, 588).

assignment, returned to the facility on June 27 (Tr. 427-28, 594, 596-97). They performed walkaround inspections, took photographs, interviewed employees, and obtained footage taken from a security camera in the CKD warehouse for June 18, 2016 (Tr. 427-29).

Ajin's LOTO Procedure for Entering Robotic Cells

In June 2016, Ajin had a written LOTO procedure in place for employees entering robotic cells. The seven-step procedure includes photographs identifying the parts of the control panel and gate that are relevant to each step (Ex. C-15). The first three steps of the procedure instruct employees to put the robots on hold by pressing a button on the control panel, turning the control to manual mode, and then pressing two more buttons. Step four addresses "energy control" for the "gate door." The instruction for this step directs the employee to "SLIDE HANDLE TO OPEN SAFETY PLUG, FLIP STRIKEPLATE DOWN, PLACE LOCKS THROUGH STRIKEPLATE." (*Id.*) (capitalization in original). The "procedure verification" for this step indicates "BUZZER SOUNDS AS HANDLE SLIDES OUT OF PLUG. VERIFY ALL INDIVIDUALS THAT ENTER AREA HAVE LOCKS ON GATE." (*Id.*) (capitalization in original).

The robots are equipped with several tips used for welding that eventually wear down and need to be replaced and employees routinely enter the robotic cells to perform tip changes and to clear sensors. To perform tip changes, Ajin requires employees to lock out, enter the cell, turn off the water to the machine, remove the old tips with a pipe wrench, and insert new tips. They then turn the water back on, exit the cell and remove their locks from the gate (Tr. 255).

The welding process generates dust, which can adhere to metal sensors used to detect parts that have been set down at workstations before loading them into machines or after unloading them (Tr. 255-56). To clear the sensors, Ajin requires employees to lock out, enter the cell, remove the part, and "wipe the top of that sensor down with [their] hand[s] to clear it." (Tr. 256.) Some of the sensors can be reached from the front of the cell. Employees can clear them by only partially entering the cell and breaking the light curtain that guards that robot (Tr. 347-49). Other sensors require employees to enter fully into the cell where they are not protected by light curtains. The sensor Decedent was attempting to clear when she was struck by a robot that was not accessible from the front of the cell and was not guarded by a light curtain (Tr. 541-42).

Security Camera Footage

Exhibit C-1 is a copy of video footage, running an hour and eleven minutes, taken from a security camera positioned in the CKD warehouse on the day of the accident. The footage shows

an area identified as the ADA Dash Main Line, where robotic cells are visible. The robotic cells are arranged "like a huge assembly line," where the robots would "pick up parts [and] weld them together."(Tr. 56-57.) The cells at issue are located on the left side of the large room. Each cell has a front and a rear gate. Control panels are set up next to the front gates. At the start of the video, half a dozen employees are visible in the large center area of the room (Ex. C-1).

The video footage shows that over the course of about 70 minutes employees, in the presence of and including supervisors, entered, left, and reentered cells without performing step four of the LOTO procedure, i.e., without placing their personal locks through the strikeplates of the gates for the robotic cells they were entering. At Timestamp 45:55, Decedent walks past Supervisor Michael Spikes and enters a cell without locking out (Tr. 245, 313).[10] At Timestamp 50:05, Employee [redacted] (employee #9) enters a cell without locking-out (Tr. 662-71, 786-88, 831-33). At Timestamp 50:29, Decedent enters another cell from the front without locking out (Tr. 245). At Timestamp 53:25, Team Lead Davaris Thomas enters a cell without locking-out (Tr. 247-48). Relevant to each of these instances, Spikes is working on the line in proximity to the employees entering the cells. He does not stop, speak to, or otherwise interact with the employees as they enter the cells without following the LOTO procedures.

At Timestamp 1:00:00 to 1:00:10, employees and supervisors, including Assembly Manager Austin Park, gather in front of cell A900 because a piece of machinery in the cell has malfunctioned. They enter the front gate of the cell without first locking out (Tr. 662-71). At Timestamp 1:00:13, employee [redacted] follows the others into the cell without locking-out (Tr. 664-68). At Timestamp 1:00:54, Spikes also enters the cell without locking out (Tr. 249-50, 666-68). At Timestamp 1:01:21 to 1:01:30, while Park, Spikes, and other employees are inside cell A900, Decedent again enters the cell through the front gate without locking out. While standing a foot and a half from her supervisor, Decedent is struck by a robotic arm when it suddenly energizes (Tr. 250).[11]

Plea Agreement in Criminal Proceeding

[10] The timestamps refer to the cited timestamp in the Exhibit C-1 video. Transcript citations refer to pages where employees appearing in the video are identified at trial.

[11] Decedent is not visible in the video when the robotic arm strikes her. The Court's findings related to the timing of the accident are based on the reactions of the employees standing at the control panel outside the front gate at Timestamp 1:01:30 (Tr. 250).

The United States Department of Justice brought criminal proceedings against Ajin, arising from Decedent's death, in the United States District Court for the Middle District of Alabama. In a plea agreement signed August 31, 2020, Ajin agreed to plead guilty under 29 U.S.C. §666(e) (§ 17(e) of the Act) to willfully violating an OSHA standard that caused the death of an employee (Ex. C-7 p. 1 ¶ I.B & C).[12] At trial, on the Secretary's motion and over Ajin's objection, the Court admitted a copy of the plea agreement (Tr. 39-44; *see also* Ex. C-7). In its brief, Ajin renews its argument that the plea agreement is inadmissible, arguing that "[a]dmitting C-7 was error, as the plea is irrelevant to contested cites [sic], and OSHA cannot use it as generalized gush slop to enhance their characterization." (Ajin's Br. p. 10, n. 33.) The Court finds no merit in Ajin's argument since "an issue resolved in favor of the United States in a criminal prosecution may not be contested by the same defendants in a civil suit brought by the Government." *Tomlinson v. Lefkowitz,* 334 F.2d 262, 264 (5th Cir.1964), *cert. denied,* 379 U.S. 962 (1965).[13] "This rule applies in all civil cases brought by the United States where a defendant previously has been found guilty, either by a jury verdict or by a guilty plea." *United States v. Killough,* 848 F.2d 1523, 1528 (11th Cir. 1988).

---

[12] Section 17(e) provides:

> Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

[13] 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 violations occurred in Cusseta, Alabama, where Ajin also has its principal place of business, both in the Eleventh Circuit. The Commission has held that where it is highly probable that a case will be appealed to a particular circuit, it generally has applied the precedent of that circuit in deciding the case — even though it may differ from the Commission's precedent. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2068 (No. 96-1719, 2000). The Court will apply the precedent of the 11th Circuit, where the fatality occurred. The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. The Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). This body of precedent is binding unless and until overruled by the Eleventh Circuit en banc. *Id.* Further, the decisions of the continuing Fifth Circuit's Administrative Unit B are also binding on the Eleventh Circuit, while Unit A decisions are merely persuasive. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377 (11th Cir. 2006).

As part of the plea agreement, Ajin agreed to "make factual admissions of guilt in open court." (Ex. C-7 p. 3 ¶ V.3.) Under the "VI. FACTUAL BASIS" section of the plea agreement, Ajin made the following relevant admissions:

> 10. * * *
>
> c. On or about June 18, 2016, while she was working in the production department at the Facility, [Decedent] entered an enclosure containing several robots and other pieces of machinery ("robotic cell") and attempted to troubleshoot a sensor fault on a piece of machinery that had stopped working, without following LO/TO procedures for the robotic cell.
>
> d. While she was inside the robotic cell, one of the robots energized and [Decedent] was struck by a robotic arm, which pinned her against another piece of machinery. Her co-workers freed her and performed first aid. She was transported to a hospital in Birmingham, where she died from her injuries on or about the morning of June 19, 2016.
>
> e. [Ajin] was aware that it was required to utilize LO/TO procedures, but was also aware that employees were failing to follow these procedures and supervisors and managers were failing to enforce them, as evidenced by, *inter alia*:
>
> i. An October 9, 2014, email from the Facility's General Manager for HR & Administration warning . . . Ajin managers: "our employees are improperly locking out, not locking out or by-passing the lockout procedures when required to do so. ... [S]ome of our management condones this practice and allows this behavior to go on without taking corrective action. ... Lock-Out Tag-Out is one of the most important safety procedures that we, as a Company must follow to keep our employees safe." The email also warned about the safety risks of not following LO/TO procedures.
>
> ii. A November 17, 2015, email from the Facility's Safety Manager to . . . Ajin managers describing failure to follow LO/TO procedures as "an ongoing issue that has not been addressed by management."
>
> iii. A May 5, 2016, email from the Facility's Safety Manager warning . . . Ajin managers that employees were not following LO/TO procedures because "[c]ompliance is not being strictly enforced."
>
> iv. June 18, 2016, video footage from the 15 minutes prior to [Decedent] being struck by the robotic arm, which showed five other instances wherein Operators entered robotic cells attempting to troubleshoot (or assist in troubleshooting) sensor faults, without following LO/TO procedures. In each instance, a supervisor was present but did not attempt to stop or reprimand them. The video footage also showed that two supervisors (who had been observing this behavior) entered a robotic cell to assist in troubleshooting without following LO/TO procedures.
>
> 11. If proper LO/TO procedures had been utilized, the machinery in the robotic cell would not have been able to energize while [Decedent] was inside the robotic cell;

she would not have been struck by the robotic arm and she would not have been killed.

(Ex. C-7 pp. 5-7 ¶¶ VI.10 & 11.)

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.),* 499 U.S. 144, 147 (1991) (quoting 29 U.S.C. § 651(b)). "The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards." *Id*. To achieve this purpose, the Act imposes two duties on an employer, a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1), and a specific duty to "comply with occupational safety and health standards promulgated under this Act." *Id.* § 654(a)(2). Thus, each employee must "comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." *Id.* § 654(b).

Pursuant to that authority, the standards at issue in this case were promulgated. See 29 U.S.C. § 665. Meanwhile, the Commission is assigned to carry out adjudicatory functions under the Act and serves "as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (*per curiam*). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I Steel Corp*., 499 U.S. at 151.

Under the law of the Eleventh Circuit, "the Secretary will make out a *prima facie* case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (*quoting ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)). "If the Secretary establishes a *prima facie* case with respect

to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id.* (*citing id.* at 1308).

A. VINDICTIVE PROSECUTION ARGUMENT

Ajin contends OSHA is biased against Korean employers and impermissibly targeted Ajin. Ajin cites as an example of OSHA's bias its regional emphasis program for auto parts manufacturing in Region 4, "where virtually all Korean-owned suppliers [are]," and the absence of the same REM in Region 5, "where the Big Three Caucasian-owned OEMS (Ford, GM, and Chrysler) and suppliers" are located (Ajin's Br. p. 69). This is a vindictive prosecution argument. "Although there is no uniform test for proving vindictive prosecution, "a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right." *S. Scrap Materials Co., Inc.,* 23 BNA OSHC 1596, 1602 (No. 94-3393, 2011) (citation omitted).

Here, OSHA is required to investigate all workplace fatalities, and Decedent died in a horrific accident while working for Ajin. Ajin has not identified a protected right it has exercised to which OSHA responded with an improper action. It produced no credible evidence at the hearing that OSHA violated its rights by conducting an inspection of its facility in June 2016, following the death of an employee. Ajin has not shown that the Secretary acted with any retaliatory motive in citing it for violations observed by OSHA's Compliance Safety and Health Officers, either in person or on video Exhibit C-1 or learned by them via employee interviews. The Secretary has demonstrated that hazardous conditions existed at Ajin's facility in June of 2016. The Secretary acted appropriately in citing Ajin for violations discovered through the investigation. Ajin has not demonstrated vindictive prosecution by the Secretary. Accordingly, its vindictive prosecution defense is rejected.

B. CITATION 1

Item 1: Alleged Serious Violation of § 1910.132(a)

Citation 1, Item 1 alleges that "on or about June 20, 2016," Ajin violated §1910.132(a), the General Requirements provision of the Personal Protective Equipment (PPE) standard, when it "exposed employees to laceration hazards in that employees were permitted to work with parts having sharp edges" while either improperly wearing protective sleeves or not wearing protective sleeves at all. Section 1910.132(a) requires employers to provide "personal protective equipment for . . . extremities, [and] protective clothing[.]" 29 C.F.R. §1910.132(a). Employers must ensure the protective equipment is "used . . . wherever it is necessary by reason of hazards of processes or environment . . . encountered in a manner capable of causing injury or impairment in the

function of any part of the body through . . . physical contact." (*Id.*) The Secretary proposes a penalty of $12,471 for this item.

Applicability of the Cited Standard

Section 1910.132(a) applies "wherever it is necessary by reason of hazards." *C&W Facility Servs., Inc. v. Sec'y of Lab., Occupational Safety & Health Rev. Comm'n*, 22 F.4th 1284, 1287 (11th Cir. 2022). "Section 1910.132(a) is a 'performance standard,' which means that it identifies its objective but does not prescribe the means for or the specific obligations of the employer to comply with the objective." *Id.* "In the context of performance standards like section 1910.132(a), settled precedent resolves the problem of fair notice with a heightened knowledge requirement." *Id.* at 1287–88. "That is, to hold an employer liable under a performance standard, the Secretary must prove either that the protective measure is industry custom or that the employer had 'actual knowledge that a hazard requires the use of some other or additional personal protective equipment.'" *Id.* at 1288 (*quoting Fla. Mach. & Foundry, Inc. v. Occupational Safety & Health Rev. Comm'n*, 693 F.2d 119, 120 (11th Cir. 1982)).

As the Commission has also noted, "[t]o establish the applicability of a PPE standard such as this, which 'by its terms, applies only where a hazard is present,' the Secretary must show that there was 'a significant risk of harm' *and* that either (1) 'the employer had actual notice of a need for protective equipment' or (2) 'a reasonable person familiar with the circumstances surrounding the hazardous condition would recognize that such a hazard exists.'" *Schaad Detective Agency, Inc.,* No. 16-1628, 2021 WL 261573, at *2 (OSHRC Jan. 15, 2021) (emphasis in original) (citations omitted). "Whether there exists a significant risk [of harm] depends on both the severity of the potential harm and the likelihood of its occurrence, but there is an inverse relationship between these two elements." *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (No. 98-0701, 2003). "As the severity of the potential harm increases in a particular situation, its apparent likelihood of occurrence need not be as great." *Id.*

Spikes testified the metal parts that employees are required to handle when loading them in robotic cells have sharp edges. This is why Ajin requires employees handling the parts to wear cut-resistant sleeves (Tr. 311-12). Angela Duffy was Ajin's Senior Safety Coordinator at the time of the accident (Tr. 155).[14] She testified Ajin required employees working on the production floor to wear protective sleeves and gloves. The protective sleeves are 18 to 21 inches long and are worn

[14] At the time of the trial, Duffy was an Ajin supervisor in its first aid office. (Tr. 153.)

from the wrist (the wrist end has a thumb hole) to "above the elbows." (Tr. 157.) The purpose of the protective sleeves it to prevent cuts and lacerations (Tr. 158).

Sanders reviewed AJN's OSHA 300 logs and found injuries resulting from "being cut by large parts." (Ex. C-24; Tr. 700.) Even if there had been no previous injuries, that absence of previous injuries would not establish the absence of a hazard. "Since the goal of the Act is to prevent the first accident … the absence of any recorded case … is not dispositive." *Waldon Health Care Ctr.*, 16 BNA OSHC 1052, 1062 (No. 89-2804, 1993). Indeed, as the Commission has observed, "[w]hile the fact that there have been no injuries ... may be some evidence of no probability of the hazard causing an accident, it is not conclusive on the question of whether a hazard existed." *B.C. Crocker Cedar Prods.*, 4 BNA OSHC 1775, 1777 (No. 4387, 1976).

The Court concludes the Secretary has established handling sharp-edged metal parts presents the hazard of lacerations. Ajin employees had sustained injuries from handling the metal parts in the past (Ex. C-24). Therefore, the Court concludes the Secretary established a significant risk of harm exists for employees handling the metal parts in Ajin's facility. Further, Ajin's requirement that employees handling the metal parts wear protective gloves and sleeves establishes it had notice of the need for the PPE. Spikes and Duffy acknowledged they recognized the hazard presented by the sharp edges of the metal parts and the need for appropriate PPE (Tr. 156-58, 311-12). Therefore, the Court concludes section 1910.132(a) applies to the cited conditions.

Noncompliance with the Terms of the Standard

Duffy admitted that at times she observed employees failing to wear protective sleeves at all or wearing them incorrectly, with them "pushed down below their elbow[s]." (Tr. 158, 165). Exhibit C-13 comprises five photographs taken from the June 18, 2016, security footage showing employees walking around without protective sleeves or with their protective sleeves pushed down below their elbows (Tr. 701-04). The Court concludes the Secretary has established noncompliance with terms of the cited standard.

Employee Access to the Violative Conditions

Ajin contends the Secretary "offered no exposure evidence." (Ajin's Br. p. 73). The Court finds Ajin's argument to be disingenuous. Video Exhibit C-1 is replete with instances of employees either wearing no sleeves or wearing rolled-down sleeves while handling metal parts. And there are multiple instances where employees can be seen reaching into carts containing metal parts, picking them up, and feeding them into robotic cells. For example, from Timestamp 19:46 to

21:16, an employee in front of the A900 robotic cell (in the lower left hand corner of the video image) can be seen handling eight different metal parts. He is wearing white gloves. From his wrists to his tee shirt, his arms are bare. Further up the line, employees with protective sleeves rolled down to mid-forearm can be seen handling metal parts (Ex. C-1). Employees without protective sleeves or with protective sleeves rolled down can be seen repeatedly handling metal parts over the course of the video, specifically at Timestamps 00:31, 00:56, 01:36, 02:27, 02:47, 03:29, 04:53, 05:15, 06:12, 06:29, 08:14, 08:36, 09:13, 09:45, 20:12, 30:04, 39:43, 40:20, 49:57, and 57:42. At Timestamp 28:52, Spikes approaches an employee who is wearing gloves and protective sleeves pushed below her elbows. They speak with each other and she gestures as she talks, waving her arms. They work side by side for the next 22 minutes until Timestamp 50:58 (Ex. C-1). At no time does Spikes stop any of the employees who are not wearing or are improperly wearing protective sleeves and correct them. The Court concludes the Secretary has established Ajin's employees were exposed to the violative conditions.

Employer Knowledge of Violative Conditions

Ajin argues it was unaware of the violative condition caused by its employees' failure to properly wear protective sleeves and argues that Tisdale did not cite it for violating § 1910.132(a) following his March 2016 inspection of the facility ("If this was such an ongoing problem, how did Tisdale miss it?" (Ajin's Br. p. 73, n. 421)). The Court finds no merit in Ajin's argument.

First, as the Eleventh Circuit has admonished, "mere silence by OSHA inspectors is not enough to support a company's claim that it was lulled into violating a regulation." *Fluor Daniel v. Occupational Safety & Health Rev. Comm'n,* 295 F.3d 1232, 1238 (11th Cir. 2002). And "it is well established by both the Commission and the courts that OSHA's failure to cite an employer during a past inspection does not, standing alone, constitute a lack of fair notice." *Id.* And as the Commission has noted, it is well established that "the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard and does not preclude the Secretary from pursuing a later citation." *Seibel Mod. Mfg. & Welding Corp.,* 15 BNA OSHC 1218. 1225 (No. 88-821, 1991).

Second, the record establishes that Ajin's employees were notified OSHA was on the premises the day of the March 2016 inspection (Tr. 83-85, 118-19). Machine operator Amber Meadows was working in March 2016 when OSHA arrived for an inspection (Tr. 83). She testified, "Supervisors and team lead advised us that OSHA was there. . . . I did get advice from team lead

and supervisors that OSHA was on the premises." (Tr. 84-85.) Machine operator [redacted] testified, "I remember we got notified before [OSHA] hit CKD that they were already in the building. So everyone scrambled to find their PPE if it wasn't on. And everybody was notified to be on their best behavior, for the most part, as always when OSHA came." (Tr. 118.)

During the March 2016 OSHA inspection, news of OSHA's presence had spread throughout the facility and employees knew "to be on their best behavior." Until Decedent's accident on June 18, 2016, machine operators in the CKD warehouse were working an ordinary shift that day. It is more likely than not that the multiple, repeated instances of employees failing to wear or to properly wear PPE caught on the June 18 security camera is a more typical representation of their PPE compliance than when they were notified on March 2016 that OSHA was onsite.

Exhibit C-1 shows Spikes working among and interacting with several employee who were not wearing or were improperly wearing protective sleeves. Spikes was later joined on the line by Park. Both supervisors were in the presence of employees who were not wearing appropriate PPE. At no point did either supervisor instruct the employees to properly wear their protective sleeves. "[W]here the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer." *ComTran Grp., Inc. v. U.S. Dep't of Lab*., 722 F.3d 1304, 1307-08 (11th Cir. 2013). "An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *Id.* at 1308. "An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *Id.*[15]

Exhibit C-1 shows Spikes working closely with employees on the ADA Dash Main Line. He is seen talking face to face with an employee whose protective sleeves are pushed down closer to her wrists than her elbows. He works side by side with her for approximately 22 minutes as she handles large metal parts (Ex. C-1, Timestamp 28:52 to 50:58). "Under these circumstances," the Court concludes that Spikes "either knew the "employee's protective sleeves were pushed down, "or deliberately avoided this knowledge[.]" *Stark Excavating, Inc.,* 24 BNA OSHC 2218, 2232 (Nos. 09-0004 & 09-0005, 2014). "'[A]ctual knowledge and deliberate avoidance

[15] "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program . . . with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.*

of knowledge are the same thing"' and "[b]ehaving like an ostrich supports an inference of actual knowledge." *E. Smalis Painting Co., Inc.,* 22 BNA OSHC 1553, 1584 (No. 94-1979, 2009) (relying on *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) (citation omitted). Therefore, the Court concludes Spikes had actual and/or constructive knowledge of the violative conduct of the employees who were not using PPE properly and imputes that knowledge to Ajin. Thus, Citation 1, Item 1 must be affirmed.

Characterization of the Violation

The Secretary characterizes the violation of § 1910.132(a) 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] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). Employees handling sharp-edged metal parts without properly worn protective sleeves were exposed to lacerations on their forearms (Tr. 705-06). The Court concludes the Secretary properly characterized the violation as serious.

C. CITATION 2

Items 3 Through 14

Citation 2, Items 3 through 14 allege willful violations of the same three LOTO standards based on the actions of eight employees who, on June 17 and 18, 2016, entered robotic cells without following LOTO procedures.[16] Each item comprises three subitems (a-c) alleging violations of §§ 1910.147(c)(4)(i), (d)(2), and (d)(4)(i), respectively. These subitems allege violative conduct similar to that cited in Citation 2, Items 1 and 2 (to which Ajin withdrew its notice of contest), involving the actions of the Decedent. As indicated *supra*, Ajin does not dispute it committed the violations alleged in Citation 2, Items 5, 6, 12, 13, and 14, but contests the characterization of the violations as willful and as indicated *supra*, asserts they should be regrouped as a single violation. Remaining at issue in their entirety Citation 2, Items 3, 4, 7, 8, 9, 10, and 11.

Per-Employee Citations

Ajin contends the Secretary improperly cited individual employees for the violations detailed in the three subitems (resulting in Citation 2, Items 3 through 14) instead of citing the instances in one item and proposing one penalty. Ajin argues the individual items are duplicative

[16] Four of the eight employees are cited twice in separate items, resulting in the twelve items at issue.

of each other. Ajin is conflating the issue of duplicativeness with per-instance or per-employee citations. "The Commission has consistently adhered to the general legal principle that "'per-instance violations and penalties are appropriate when the cited regulation or standard clearly prohibits individual acts rather than a single course of action."' *E. Smalis Painting Co., Inc.,* 22 BNA OSHC at 1584 (citations omitted). "'The key . . . [is] the language of the statute or the specific standard or regulation cited."' *Id*. (citation omitted). Here, each cited employee was engaged in an individual act when he or she entered a robotic cell without locking out. Compliance by one employee would not ensure compliance by other employees. The Court concludes the Secretary's citation of violations on a per-employee basis is proper.

Subitems "a"

Section 1910.147(c)(4)(i) mandates that "[p]rocedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section." 29 C.F.R. §1910.147(c)(4)(i). Citation 2, subitems a of Items 3 through Items 14 (Item 3a, Item 4a, Item 5a etc.) all allege willful violations of § 1910.147(c)(4)(i) for failing to ensure employees utilized procedures for the control of potentially hazardous energy before entering the robotic cells. Each of the subitems allege that on either June 17 or 18, 2016, the cited employee "was exposed to caught-in, struck-by, and crush hazards in that the employee was required [or allowed] to enter the robotic cell with energized robots and other jigs and fixtures" to either clear sensor faults or replace a welding tip on a robot.

Ajin's development and documentation of a LOTO procedure for entry into the robotic cells is not at issue—Ajin had a written LOTO procedure in June 2016 (Ex. C-15; Tr. 633). The alleged violation is Ajin's failure to "utilize" the procedure because its supervisors observed employees entering robotic cells without locking out. The supervisors did not stop the employees or remind them of the procedure, and also engaged in the same misconduct.

Subitems "b"

Section 1910.147(d)(2) mandates that "[t]he machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment. An orderly shutdown must be utilized to avoid any additional or increased hazard(s) to employees as a result of the equipment stoppage." 29 C.F.R. §1910.147(d)(2). Citation 2, subitems b of Items 3 through Items 14 (Item 3b, Item 4b, Item 5b etc.) allege willful violations of § 1910.147(d)(2) for failing to ensure employees turned off or shut down the robotic equipment and machinery in the robotic cells before

entering the cells. Each of the subitems allege that on either June 17 or 18, 2016, the cited employee "was exposed to caught-in, struck-by, and crush hazards in that the employee was required [or allowed] to enter the robotic cell with energized robots and other jigs and fixtures" to either clear sensor faults or replace a welding tip on a robot "without shutting down the machine in accordance with the established procedure."

Subitems "c"

Section 1910.147(d)(4)((i) mandates that "[l]ockout or tagout devices shall be affixed to each energy isolating device by authorized employees." 29 C.F.R. §1910.147(d)(4)(i). Citation 2, subitems c of Items 3 through Items 14 (Item 3c, Item 4c, Item 5c etc.) allege willful violations of § 1910.147(d)(4)(i) for failing to ensure employees affixed their personal locks to the robotic cell gates before entering the cells. Each of the subitems allege that on either June 17 or 18, 2016, the cited employee "was exposed to caught-in, struck-by, and crush hazards in that the employee was required [or allowed] to enter the robotic cell where there were energized robots and other jigs and fixtures" to either clear sensor faults or replace a welding tip on a robot "without locking out the electrical, hydraulic and pneumatic energy sources."

Applicability of the Cited LOTO Standards

The cited standards are found in Subpart J (General Environmental Controls) of the Part 1910 general industry standards. Section 1910.147 addresses "the control of hazardous energy (lockout/tagout)," known as "LOTO." The LOTO standard "covers the servicing and maintenance of machines and equipment in which the *unexpected energization* or start up of the machines or equipment, or release of stored energy, could harm employees." 29 C.F.R. §1910.147(a)(1)(i) (emphasis in original). "This standard establishes minimum performance requirements for the control of such hazardous energy." (*Id.*)

"Servicing and/or maintenance" means "[w]orkplace activities such as . . . adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment." 29 C.F.R. § 1910.147(b). "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.* (emphasis in original). "Energization is 'unexpected' in the absence of some mechanism to provide adequate advance notice of machine activation*." Gen. Motors Corp., Cpcg Oklahoma City Plant,* 22 BNA OSHC 1019, 1021 (Nos. 19-9834E & 91-2950, 2007).

As Decedent's tragic death demonstrates, employees who entered the robotic cells to perform servicing work (clearing sensor faults and replacing welding tips on robots) were exposed to hazards created by the unexpected energization of machinery and equipment. The Court concludes the standards cited in Citation 2, Items 3 through 14 apply to the cited conditions.

Noncompliance with the Terms of the Standards and Access to the Violative Conditions

The Court addresses the elements of noncompliance and access to the unexpected energization of robotic machinery together. Gerald Earls is Ajin's Senior Safety Manager, a position he held at the time of the June 2016 fatality (Tr. 328-29). He developed Ajin's LOTO procedure for employees entering robotic cells (Ex. C-15; Tr. 342-42). Earls admitted "[f]ailure to perform lockout in a robotic cell can be exceedingly dangerous. . . . The robots could potentially fall on you. The robots could move around during the process and actually injure the person[.]" (Tr. 344.) If employees entered the robotic cells without locking out, they were necessarily exposed to the struck-by hazards should the robots activate.

In addition to Decedent's actions cited in uncontested Citation 2, Items 1 and 2, five of the fourteen cited incidents (Citation 2, Items 5, 6, 12, 13, and 14) were captured by the security camera (Ex. C-1). These are the items that Ajin contests only their characterizations as willful (and argues they should be regrouped as one violation). The Secretary argues the other seven incidents (Citation 2, Items 3 and 4, and Items 7 through 11) are documented in employees statements taken by Sanders or established by employee testimony at trial (Tr. 14). Ajin disputes those seven incidents.

Sanders testified that during her inspection she interviewed employees, transcribed their answers on the form OSHA uses for employee statements, and then had the employees sign each page of the statement. She described her method:

> I explain to the employee why I'm here. I'm going to have to ask them about, you know, certain things, you know, I want to tell them, you know, if -- I know they're probably uncomfortable just, you know, I'm going to ask you about hazards. I'm going to record the good things and the bad things. And I just start asking questions and write it all down.

(Tr. 597.) After Sanders was done with the interview, she gave the written statement to the employee to review and then asked the employee to sign each page of the statement (Tr. 597). Above the signature line on the first page of the form is the following:

> I have read and had the opportunity to correct this statement and these facts are true and correct to the best of my knowledge and belief. Public Law 91-596, Paragraph 17(g) makes it a criminal offense to knowingly make a false statement or misrepresentation in this statement.

(Ex. C-6.)

Items 3 and 4—Machine Operator Glasco (Employee #15)

Machine operator Erriontae Glasco is identified as Employee #15 in Citation 2, Items 3 and 4 (Tr. Vol. III p. 647). Citation 2, Items 3a, 3b, and 3c allege that "on or about June 17, 2016," Employee 15 was exposed to the cited hazards when he was required to enter robotic cells "to replace a welding tip on a robot and allowed to clear sensor faults." Citation 2, Items 4a, 4b, and 4c allege the same conduct, but assert it occurred "on or about June 18, 2016."

Sanders took an interview statement from Glasco on June 21, 2016, which he signed, and conducted a follow-up phone interview with him on August 1, 2016, that she transcribed but that Glasco did not sign (Ex. C-6). When asked if Sanders afforded him the opportunity to review his statement before signing it, Glasco replied, "That's what I'm not sure about. She – I think she just asked me just to -- just to sign it cause the way she was writing down from the way she was going over it with me with cause I guess she just had me sign it, I guess." (Tr. 914.) In his signed interview statement, Sanders recorded that Glasco told her other maintenance employees entered robotic cells daily without applying LOTO (Ex. C-6, pp. 1-2). In the follow-up unsigned phone interview, Sanders recorded that Glasco told her he entered robotic cells on June 17 and 18, 2016, to clear sensors and replace tips without applying LOTO procedures, and he did so in the presence of Spikes (Ex. C-6, pp. 3-5).

At trial, Glasco contradicted his written statement, testifying he never entered a robotic cell without using locking out, and he did not tell Sanders that Spikes was aware employees were entering robotic cells without locking out (Tr. 915, 918-19). Ajin's counsel asked Glasco why he signed the written statement without reviewing it. His response was stilted and uncertain.

> A: Cause she -- cause I -- she -- she was just asking me questions and she was just writing down while I was talking. I don't know she – I don't why she might have had some of what I wrote written down some things differently than what I said unless she might have gotten confused in some things I was -- I was -- I was saying. But in that I have no idea why she might have [done] something different.
> Q. Okay. And you signed it because she slid it across the table?
> A: Yeah, she asked to sign cause of what I was saying she might have interpreted it how she did or whatever.

(Tr. 921.)

The Court notes Glasco did not state that Sanders "slid [the statement] across the table;" this was Ajin's counsel's statement, not Glasco's testimony. Glasco's explanation for why he signed an allegedly inaccurate statement offers no clarity. Glasco was noticeably nervous during his testimony. On cross-examination, he became evasive and feigned confusion over simple questions. The Court does not credit his trial testimony repudiating his interview statement given to Sanders. The Court concludes, however, the Glasco's interview statement is insufficient to establish the violative conduct alleged in Citation 2, Items 3 and 4.

The Court credits the portion of Glasco's witness statement that appears on the first two and a half pages of the statement (Ex. pp. 1-3, C-6 lines 1 through 68). Sanders took that part of the statement in person and gave Glasco the opportunity to review it, and he signed those pages. The Court does not credit, however, the portion of Glasco's statement appearing on lines 69 through 90 (Ex. C-6 pp. 3-5, lines 69 through 90 and thereafter lines 56 through 90), because Glasco did not have the opportunity to review Sanders's transcription of the phone interview, and Glasco did not sign that portion of the interview statement. Unfortunately for the Secretary's case, this is the portion of Glasco's statement where he acknowledges the violative conduct alleged in Citation 2, Items 3 and 4.

According to his signed statement, Glasco was not present on the ADA Dash Main Line at the time of the Decedent's accident because he was taking a break. He stated "some people do" enter robotic cells without locking out, singling out maintenance employees who enter the cells "daily" without locking out (Ex. C-6, pp. 1-2). He stated he had seen Decedent in robotic cells to change tips when the gate was locked out. He stated he entered the robotic cells from the front (where light curtains provide protection) to wipe the sensors (Ex. C-6, pp. 2-3).

The Court concludes the Secretary has failed to establish Glasco engaged in the violative conduct alleged in Citation 2, Items 3 and 4. His witness statement is the only evidence the Secretary offered in support of the alleged violations. His admission that he did not lock out when entering the robotic cells to change welding tips appears in the unsigned portion of the statement taken during the follow-up phone conversation. This is also where he states Spikes was present and aware of his violative conduct (Ex. C-6, lines 76-90). Therefore, Citation 2, Items 3 and 4 must be vacated.

Item 7—Machine Operator Meadows (Employee #36)

Machine operator Meadows is identified as Employee #36 in Citation 2, Item 7 (Tr. Vol. III p. 671-672). She was no longer working for Ajin at the time of the trial (Tr. 55). Meadows is cited for violative conduct on or about June 17, 2016, when she entered robotic cell A910 to replace a welding tip without locking out. Meadows testified her duties included entering the robotic cells to change tips. The robots are designated by numbers. When a robot needs a tip changed, the monitor for that robot's cell signals the machine operators (Tr. 58-59). Ajin's LOTO procedure instructs employees to enter the robotic cells through the rear gate, but Meadows testified she routinely entered through the front gate. "To go in I would go through the front. Hurry up. Change it and get out. . . . [I]f it was closer to me from the front entrance I would just go in through the front entrance and change it and come right back out." (Tr. 59.) She estimated she would be in the robotic cell for about "30 seconds" when changing a tip, and she performed this task four or five times a day (Tr. 59).

Meadows admitted she did not place her lock through the strikeplate on the gate as required by Ajin's LOTO procedure (Tr. 63). And she admitted she observed other machine operators enter robotic cells without locking out every day when she worked there, including Spikes (Tr. 68-69). Meadows worked the day before and the day of Decedent's accident, on June 17 and 18, 2016, and admitted she entered robotic cells through their front gates without locking out on June 17, 2016 (Tr. 80-81).

Ajin contends Meadows's testimony is not credible, based on contradictory statements she made regarding LOTO training and receipt of a personal lock for LOTO. At trial, Meadows initially testified Ajin had not provided her with LOTO training (Tr. 66-67). When cross-examined, she acknowledged her signature appeared on a sign-in sheet for LOTO training provided by Ajin Senior Safety Manager Gerald Earls on February 1, 2016 (Ex. R-15; Tr. 92-93). The Court does not find Meadows's mistaken testimony regarding LOTO training undermines her testimony that she routinely entered robotic cells without applying LOTO. The record establishes that she received LOTO training on one day in 2016. A singular occurrence of training may be forgotten. But her regular job, day in and day out, required her to enter robotic cells to change tips and clear sensors. It is more likely than not that Meadows would remember whether she and other machine operators routinely locked out when entering cells.

With regard to receiving a lock from Ajin, Meadows testified she received one approximately four months after she initially was paired with another machine operator who showed her how to perform her job (Tr. 67-68). On cross-examination, Ajin's counsel claimed her testimony contradicted her written statement given to OSHA on June 22, 2016, when, he asserted, Meadows stated OSHA had never provided her with a lock (Tr. 96). The Court, however, rejected Meadows's written statement when sustaining Ajin's objection to the Secretary's motion to admit it into the record (Tr. 78-80, 87-88). Therefore, since Ajin successfully excluded her statement from the record, neither Ajin nor the Court can now rely on it to determine if an inconsistency exists.

The Court credits Meadows's testimony that she entered robotic cell A910 on June 17, 2016, without locking out. Thus, the Court concludes Ajin violated the cited standards when it allowed Meadows to enter the robotic cell that day where there were energized robots and other jigs and fixtures without locking out the electrical, hydraulic, and pneumatic energy sources. The Court concludes the Secretary has established noncompliance with terms of the cited standards.

Items 8 and 9—Machine Operator Merrits (Employee #30)

Former Machine operator Desmond Merrits[17] is identified as Employee #30 in Items 8 and 9 (Tr. Vol. III p. 675). Items 8a, 8b, and 8c, and 9a, 9b, and 9c all allege that on or about June 17, 2016, Ajin violated the cited standards when "Employee 30 was exposed to caught-in, struck-by, and crush hazards in that the employee was required to enter a robotic cell where there were energized robots and other jigs and fixtures to replace a welding tip on a robot without shutting down the machine in accordance with the established procedure." While Items 8a, 8b, and 8c allege the conduct occurred on ADA Dash Main Line A900, Items 9a, 9b, and 9c allege the same conduct but on JFA Quarter Line UH (Left Hand) A01/A02/A03, which is the left hand side of the JFA Quarter Line.

The Court, upon the Secretary's request, issued a subpoena to Merrits to appear as a witness at trial but he failed to appear (Tr. 482).[18] Merrits no longer worked for Ajin at the time of the trial. The Court admitted Merrits's signed interview statement, taken by Sanders, over Ajin's objection,

[17] Sanders misspelled Merrits's last name on the statement as "Merrick," but it is apparent the misspelled name refers to the employee at issue, machine operator Merrits, who legibly signed the statement on three pages (Ex. C-5; Tr. 479, 484-87).

[18] The record does not reflect whether the subpoena was issued to "Merritt" or to "Merrick" or even whether service was perfected. Nonetheless, the Secretary did not seek any relief to enforce the subpoena.

as an exception to the hearsay rule. (Ex. C-5; Tr. 491). *See* FRE 801(d)(2)(d) ("The statement is offered against an opposing party and . . . was made by the party's . . . employee on a matter within the scope of that relationship and while it existed[.]").[19]

However, although Merrits's statement is admissible as a hearsay exception, that does not mean it is reliable. As the Advisory Committee on Proposed Federal Rules of Evidence points out, "[n]o guarantee of trustworthiness is required in the case of an admission." Fed.R.Evid. 801(d)(2) Advisory Committee's Note. As the Commission has held, "[w]hether evidence should be classified as non-hearsay for the purpose of determining its admissibility bears little relation to its value to support the Secretary's case." *Morrison–Knudsen, Inc.,* 13 BNA OSHC 1121, 1123 (No. 80–345, 1987). "Certain exceptions to the hearsay rule . . . exist because the statements are considered to be inherently reliable. This is not true of admissions." *Regina Constr. Co.,* 15 BNA OSHC 1044, 1048 (No. 87-1309, 1991).

Here, the reliability of Merrits's out-of-court statement is undermined by his failure to appear as a witness, which deprived Ajin of the opportunity to cross-examine him. Merrits's written statement is not corroborative, but rather, is the sole evidence for the willful violations alleged in Items 8 and 9. The Court concludes Merrits's statement, standing alone, lacks probative value. The Court accords no weight to Merrits's interview statement. Therefore, Citation 2, Items 8 and 9 must be vacated.

Items 10 and 11-- Machine Operator [redacted] (Employee #20)

[redacted] is the machine operator identified as Employee #20 in Items 10 and 11 (Tr. Vol. III p. 677). [redacted] was no longer working for Ajin at the time of the trial (Tr. 105). [redacted] was working the day of Decedent's accident (Tr. 106). [redacted] stated she entered robotic cells on June 17 and 18, 2016, without locking out and doing so was "a common occurrence" for her. Spikes was present when she entered the cells without locking out. He never reprimanded her for her violative conduct (Tr. 115, 117). She also observed Spikes enter robotic cells, including through front gates, without locking out (Tr. 117-18). [redacted] observed Decedent enter the cell in which she was struck by the robotic arm on June 18, 2016. Spikes was in the cell at the time Decedent entered (Tr. 136, 138).

[19] "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." Fed.R.Evid. 801(d)(2) Advisory Committee's Note.

[redacted] testified she routinely entered robotic cells to change tips. "[E]ach robot had anywhere from two to maybe four tips on it." (Tr. 110.) When asked how long it took her to change tips, she responded,

> Depends on how fast you move. And to be honest, it depends on if you follow regulation. If you do the lockout/tagout, it takes longer. Maybe about three to four minutes, because you have to go in, you have to take the tips off. . . . Now, if you don't do the lockout/tagout, maybe two to three minutes. Well, really one to two minutes because it's . . . the part that kind of took a while go get your lock in and . . . remove the lock and all that. So it depended on if you follow regulations, to be honest.

(Tr. 111.)

Ajin's counsel unsuccessfully attempted to impeach [redacted] with her deposition testimony. Ajin's counsel read a portion of her deposition testimony, in response to the question of whether she locked out for each entry into a robotic cell. "Most times I did. Now, again being honest, not all the time did I follow the lockout/tagout full procedure, but most times I can say I did." (Tr.133 (quoting deposition).) Nothing in this statement contradicts [redacted]'s trial testimony that she failed to lock out when entering robotic cells on June 17, 2016, as alleged in Items 10 and 11. Ajin also points out [redacted] subsequently was fired for failing to lock out when entering a robotic cell. (Tr. 134.) However, [redacted]'s termination after OSHA's fatality investigation (and after she informed Sanders that she entered robotic cells without locking out while Spikes was nearby) does not undermine her credibility as a witness. The Court credits [redacted]'s testimony that she entered robotic cells on June 17, 2016, without applying locking out. Therefore, [redacted] was exposed to the hazard of the unexpected energization of the robotic equipment. Thus, the Court concludes the Secretary has established noncompliance with terms of the cited standards.

Employer Knowledge of the Violative Conditions

"The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program." *Samsson Constr., Incorp. v. Sec'y, U.S. Dep't of Lab.*, 723 F. App'x 695, 697 (11th Cir. 2018) (*citing Comtran*, 722 F.3d at 1311). In the plea agreement Ajin admitted it "was aware that it was required to utilize LO/TO procedures but was also aware that employees were failing to follow these procedures and supervisors and managers were failing to enforce them[.]"

(Ex. C-7 pp. 5-7 ¶ VI.10.e.) Therefore, the Court concludes Ajin had actual knowledge of the violative conduct cited in Items 7, 10, and 11.

The Secretary also contends the testimony of the two machine operators establish they routinely entered robotic cells without locking out in the presence of Spikes, whose knowledge of their violative conduct is imputed to Ajin. The Court agrees. Spikes testified he never observed an employee enter a cell without first locking out (Tr. 242, 258-63). However, in evidence is the security camera footage (Ex. C-1) taken on June 18, 2016, which shows several employees entering robotic cells in Spikes' presence without locking out, and, at Timestamp 1:00:54, shows Spikes also entering a cell without locking out (Tr. 245-50). Spikes acknowledged employees shown in the video, including himself, did not lock out before entering the cells, but rationalized his violative conduct, stating, "When I walked up to the machine I assumed that it was locked out." (Tr. 250.)

Spikes agreed Ajin's LOTO procedure requires every employee entering a cell to place his or her lock on the gate, regardless of how many locks are already placed there (Tr. 250-51). He conceded that if any one of the several employees entering that cell on June 18, 2016, had followed the LOTO procedure and placed a lock on the open gate, the robotic arm that struck and killed Decedent would not have activated (Tr. 251). Spikes claims the collective failure of Ajin's employees to lock out on June 18, 2016, was an anomaly, asserting that prior to the date of this accident he had never failed to properly lockout and had never seen anyone else fail to properly lock out (Tr. 251). Spikes' testimony defies belief. A reasonable person viewing video Exhibit C-1 could not rationally conclude that Spikes was not aware employees were entering robotic cells without locking out. The Court deems his testimony to be fabricated and lacking in all credibility.

Ajin acknowledges the June 18, 2016, video taken in the CKD warehouse establishes the violations cited in the uncontested citations. Ajin argues, however, that the video is not material to the items at issue (Items 7, 10, and 11) that allegedly occurred the day before. The Court disagrees. Meadows and [redacted] both testified that they entered robotic cells on June 17, 2016, in the presence of Spikes, who did not stop or reprimand them. The video taken the next day corroborates their testimony that Spikes' lax (or nonexistent) enforcement of LOTO procedure was his modus operandi.

What is striking about video Exhibit C-1 is how normalized the behavior of Ajin's employees is when entering the robotic cells without locking out. None of the employees hesitate

or break stride when entering the cells. They do not look around to see if Spikes or any other supervisor is watching them. Nothing in their demeanor indicates the employees were engaging in anything other than routine conduct. The Court concludes the video exhibit is material to the violations alleged in Items 7, 10, and 11, in that it demonstrates how Spikes treated obvious LOTO infractions occurring in his presence. He ignored them. As previously noted, actual knowledge and deliberate avoidance of knowledge are the same thing and behaving like an ostrich supports an inference of actual knowledge. *Stark Excavating, Inc.,* 24 BNA OSHC at 2232. The Court concludes Spikes had actual knowledge that Meadows and [redacted] did not lock out when entering robotic cells on June 17, 2018 and imputes this knowledge to Ajin. Therefore, Citation 2, Items 7, 10, and 11 must be affirmed.

Characterization of Violations

The Secretary characterized Citation 2, Items 5 through 7 and Items 10 through 14 as willful. The definition of willful in the Eleventh Circuit "is, in its simplest form, an intentional disregard of, or plain indifference to, OSHA requirements." *Fluor Daniel v. Occupational Safety & Health Rev. Comm'n*, 295 F.3d 1232, 1239 (11th Cir. 2002) (internal quotation and citation omitted). As indicated *supra*, Ajin admitted in the plea agreement it knew it was required to utilize LOTO procedures, knew that employees were failing to follow these procedures, and knew supervisors and managers were failing to enforce them. (Ex. C-7 pp. 5-7 ¶ VI.10.e.) Despite these repeated warnings, on June 18, 2016, the security camera in the CKD warehouse captured several employees and two Ajin supervisors blithely entering robotic cells without a single one locking out. The nonchalance with which they entered the robotic cells demonstrates the conscience disregard the Ajin supervisors had for the LOTO standards. Therefore, the record clearly establishes Ajin consciously disregarded the LOTO standards. The Court concludes Citation 2, Items 5 through 7 and Items 10 through 14 were properly characterized as willful.

Item 15

Item 15 alleges a willful violation of § 1910.147(c)(5)(i) for failing to provide employees with locks to place on robotic cell gates before entering the cells. Item 15 lists eleven instances (a through k). Each of the instances alleged that on either June 17 or 18, 2016, the cited employee "was exposed to caught-in, struck-by, and crush hazards in that the employee was required to enter the robotic cell with energized robots and other jigs and fixtures" to replace a welding tip on a robot (or, in Instance b, "to clean"). "The employee was unable to lock out the robotic cell because

the employer had not provided or ensured the employee had a lock." Section 1910.147(c)(5)(i) provides: "Locks . . . shall be provided by the employer for isolating, securing or blocking of machines or equipment from energy sources." 29 C.F.R. §1910.147(c)(5)(i).

Applicability of the Cited Standard

At issue is whether Ajin provided locks to its employees so they could comply with mandated LOTO procedures. Since there is no dispute that the lockout/tagout standard applies, the Court concludes § 1910.147(c)(5)(i) must by necessity apply to the cited conditions, i.e., employees were required to lock out the robotic cells before they entered robotic cells with energized robots and other jig and fixtures to clean.

Noncompliance with the Terms of the Standard

The Secretary contends Ajin failed to provide personal locks for LOTO to employees working in the CKD warehouse. This allegation is based on interviews conducted by Sanders with Ajin employees during OSHA's fatality investigation. Sanders stated she interviewed approximately 30 authorized employees to whom Ajin should have provided locks. About 22 of them told Sanders Ajin did not provide them with locks (Tr. 693-94). According to Sanders, she informed Senior Safety Manager Earls that employees did not have locks, and "soon thereafter," Ajin placed a large order (for 200 to 400 locks) and employees "stated that they had received a lock after the accident." (Tr. 696.) Earls stated he relayed to David Wilkerson, Ajin's General Manager of Human Resources, what Sanders had told him (Tr. 353-55). Wilkerson confirmed that Ajin then ordered "a large quantity of locks." (Tr. 204.)

On cross-examination, Sanders conceded she found out later that some of the employees who stated they did not have locks had, in fact received locks from Ajin (Tr. 738-53). Exhibit R-28 is an inventory checkout list showing that some of the cited employees had been issued locks in either 2011, 2015, and 2016. Sanders stated she had cross-checked the inventory log with the statements of the employees who claimed not have been issued locks, but "if they had a lock issued to them in 2015, it does not mean that they had a lock at the time of the accident." (Tr. 753.)

Two of the employees who told Sanders that Ajin had not issued locks to them were machine operators Meadows and [redacted]. Their testimony illustrates the shaky foundation on which the Secretary has built his case for Item 15. Meadows initially testified she did not receive a lock from Ajin until "about four months" after she started working (Tr. 68). The record does not

indicate on what date Meadows started working for Ajin. The issue of whether she had a lock at the time of Decedent's accident is not resolved by her testimony.

On cross-examination, Meadows agreed with Ajin's counsel's assertion that she told OSHA she never received a lock, and then stated, "I eventually had a lock." (Tr. 96) She elaborated, "sometimes from a shortage of locks we would share locks. So there are times I physically did not have a lock." (Tr. 96.) On redirect, the Secretary's counsel attempted to clarify the matter, but it is still an open question whether "on or about June 17, 2016" Meadows (Employee #36 in Instance 15(d)) was exposed to struck-by hazards because Ajin "had not provided or ensured the employee had a lock."

> Q. And when you were talking with OSHA in the summer 2016, did you tell them that you did not have a lock at that time?
> A: No.
> Q. So you had a lock in June 2016; is that correct?
> A: Myself and Mr. [TG] would share a lock. . . . [A]fter the first four months of myself being at Ajin, I asked for a lock for a station. They gave me one. After a while there was a shortage on locks. They were running out. We did end up having to share locks.

(Tr. 86.)

The evidence regarding [redacted]'s receipt of a lock is similarly hazy. The inventory checkout list shows her signature confirming she received a lock on December 11, 2015 (Ex. R-28 p. 6). In her interview statement, when asked if Ajin had issued a lock to her, she replied, "No, but after the accident we were issued locks." (Ex. C-3 p. 1.) However, on cross-examination, her testimony was similar to Meadows's, stating Ajin did not at first provide a lock to her but did so eventually.

> Q. [Y]ou were provided with a lock when you worked at Ajin, right?
> A: Not when I initially started.
> . . .
> Q. So you're saying today that you did work at Ajin for some period of time without a lock?
> A: Yes, sir. I didn't get a lock on the first day of hitting the floor.

(Tr. 123-24.)

The Court does not doubt that Sanders accurately recorded the statements of Ajin's employees regarding the locks. But as the inventory checkout list and the testimony of Meadows and [redacted] show, the employees' recall on this issue is not well-defined. In his brief, the

Secretary argues the inventory checkout list "does not show whether or not employees still had locks at the time of the accident on June 18, 2016." (Sec'y's Br. p. 45, n. 2.) However, it is not Ajin's burden to show the eleven cited "employees still had locks at the time of the accident," but rather, it is the Secretary's burden to show Ajin "had not provided or ensured" the eleven cited employees "had a lock." Based on the record, the Court concludes the Secretary has failed to carry this burden by a preponderance of the evidence. Therefore, Citation 2, Item 15 must be vacated.

Items 16 Through 20

Citation 2, Items 16 through 20 allege willful violations of § 1910.255(b)(4) for failing to effectively guard the point of operation of five press welding machines, referred to as "projection welders," which are floor-mounted and used to weld small parts, such as nuts and fittings, onto component parts. Each of the items allege that on June 23, 29, or 30, 2016, Ajin exposed employees to "crush and amputation hazards in that employees were required to operate" a specified press welding machine "where the point of operation was not effectively guarded by use of electronic eye safety circuit, two hand control, or other similar protection as required by regulation." Section 1910.255(b)(4) mandates that "[a]ll press welding machine operations, where there is a possibility of the operator's fingers being under the point of operation, shall be effectively guarded by the use of a device such as an electronic eye safety circuit, two hand controls or protection similar to that prescribed for punch press operation[.]" 29 C.F.R. § 1910.255(b)(4). "All chains, gears, operating bus linkage, and belts shall be protected by adequate guards, in accordance with § 1910.219 of this part." (*Id.*)

Applicability of the Cited Standard

Section 1910.255(b)(4) is found in Subpart Q (*Welding, Cutting and Brazing*) of the Part 1910 general industry standards. It applies to "[a]ll press welding machine operations." It is undisputed that the machines at issue are press welding machines. The Court concludes the cited standard applies to the cited conditions.

Noncompliance with the Terms of the Standard

A press welder has a lower stationary electrode and an upper electrode, shaped like a rod, positioned directly above it. The electrodes are 3 inches apart when the press welder is not in use. The operator uses a foot pedal to move the upper electrode up and down (Exs. R-19 and C-16; Tr. 285, 400). The cited press welders are used to weld large parts, as opposed to the four press welders

used to weld small parts cited following the March 2016 OSHA inspection (Tr. 289). It is undisputed the cited press welders were unguarded at the time of the June 2016 OSHA inspection.

Possibility of Access to the Point of Operation

Employers must guard press welders "where there is a possibility of the operator's fingers being under the point of operation." 29 C.F.R. §1910.255(b)(4). "In order for the Secretary to establish employee exposure to a hazard [he] must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger[.]" *Latite Roofing & Sheet Metal, LLC v. Occupational Safety & Health Rev. Comm'n*, No. 20-14793, 2021 WL 4912479, at *3 (11th Cir. Oct. 21, 2021) (*citing Sec'y of Labor v. Fabricated Metal Prod.*, Inc., 18 BNA OSHC 1072 (No. 96-1853, 1997)). "[T]he inquiry is not simply into whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable." (*Id.*) Here, the Secretary must show that it was reasonably predictable by operational necessity or otherwise that the fingers of an employee using a large-parts press welder could have been in the zone of danger presented by the point of operation between the upper and lower electrodes.

Spikes testified that when using a large-parts press welder, the operator holds the part being welded with both hands (Tr. 286). "[T]he operators would hold this part out to balance it one the bottom pin so that once the top electrode came down, it would be stabilized and it wouldn't shift or move to one side or the other, which could cause a quality issue." (Tr. 287.) It was his opinion that "in the normal operation of the machine, it would be impossible for someone to be handling a large piece of metal and cause the [press welder] tips to come together while their hand is in the machine." (Tr.310.) He acknowledged that it is possible to hold the metal part other than by the edges (Tr. 312).

Spikes conceded that employees had been injured using the press welders. An employee was injured in 2012 on a large-parts press welder. According to Spikes, the employee was performing welds and the projection welder "was placing too many nuts on the part. [The] employee reached to push the extra nuts off the part and she stepped on the foot pedal. The projector came down then." (Tr. 299.) He explained that occasionally the press welder's feeder "will bring more than one nut with it. When that happens, they should remove the part[.] . . . Either shake them onto the floor or wipe them off and put the part back on, and then start the process over." (Tr. 299.)

Another operator was injured in a similar manner in 2013 while using a large parts projection welder. "She noticed an extra nut on the part, and she reached to move the extra nut. She leaned on the activation pedal, caused the machine to come down on [one of] her left finger[s]." (Tr. 300.) A third operator was injured the same way in 2014, when the projector "came down and caught her left index finger." (Tr. 303.)

Despite these documented injuries, Spikes testified it was not foreseeable injuries could occur (Tr. 305). He agreed press welder operators could perform a "[c]ouple of hundred" welds a day (Tr. 309-10).

> Q. [Y]ou've demonstrated that the person would remove the piece from the projection welder, then remove the nut, and then put the piece back on?
> A: That is what they're -- that is what they're trained to do, yes.
> Q. And in the circumstances here that we've talked about where they were injured, they didn't do that?
> A: That is correct.
> Q. So that puts the onus on the employee not to get injured, doesn't it?
> A: Yes.

(Tr. 309.)

The Commission has long held that standards requiring physical guards should not rely on human conduct for compliance. "The Commission consistently stated . . . that employers cannot rely on employee behavior for safety, but also referenced 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.,* No. 16-1167, 2020 WL 5815499, at *6, n. 4 (OSHRC Sept. 21, 2020) (*citing Gen. Elec. Co.*, 10 BNA OSHC 1687, 1690 (No. 77-4472, 1982); *George C. Christopher & Sons, Inc.*, 10 BNA OSHC 1436, 1444 (No. 76-647, 1982); *H.B. Zachry Co. (Int'l)*, 8 BNA OSHC 1669, 1674 (No. 76-2617, 1980); *Pass & Seymour, Inc.*, 7 BNA OSHC 1961, 1963 (No. 76-4520, 1979); *B.C. Crocker Cedar Prods.*, 4 BNA OSHC 1775, 1777 (No. 4387, 1976)). The Eleventh Circuit has also held, "[a]fter all, 'common human errors such as neglect, distraction, inattention or inadvertence,' which might cause an employee to enter the zone of danger, are part of the basis for the standards in the first place." *Packers Sanitation Servs., Inc. v. Occupational Safety & Health Rev. Comm'n*, 795 F. App'x 814, 820, 2020 WL 115472 (11th Cir. 2020) (quotation omitted).

Tisdale explained why the manner in which the press welders' function and how they are operated make it reasonably predictable the fingers of the operators could be injured by the points of operation. "These employees are welding these parts 10 to 12 hours a day, and they're doing a

thousand or more, and some parts get multiple welds. So they may cycle this machine several thousand times. And through just human nature and inattentiveness, all they have to do is turn their head and they get a finger in the point of operation, and they step on a foot pedal, and they have an injury." (Tr. 435-56.) The Court concludes the Secretary has established there was a possibility of the operator's fingers being under the point of operation when using a large-parts press welder.

Item 16

Tisdale observed an employee operating the #PW 04 press welder on June 30, 2016. He estimated the fingers of the employee's right hand were 2 to 3 inches from the point of operation as she held the part (Tr. 434-35). His estimate is corroborated by the photos he took showing the employee's right hand as she welds a part, holding it underhand in one photo and overhand in the other (Ex. C-16, pp. 1-2).

Item 17

Tisdale observed and photographed an employee operating the #PW 16 press welder on June 30, 2016 (Ex. C-17; Tr. 442). He measured the part the operator was welding and found it to be 7½ inches by 14 inches (Ex. C-17 p. 2; Tr. 443-44).

Items 18 and 19

Press welders #PW 33 and #PW 33-1 are two separate welding stations (with two different points of operation) located on the same base (Tr. 445-46). Tisdale observed the same employee using the press welders at the welding stations on June 23 and 29, 2016 (Exhs. C-18 and 19; Tr. 446-49). Photographs in Exhibit C-18 show the employees' fingers in proximity to the point of operation of #PW 33 (Ex. C-18 p. 2).

Item 20

Tisdale interviewed employee Elmeco Ray who operated the #PW 34 welding press on June 29, 2016, who told Tisdale his fingers were 2 to 3 inches from the point of operation when he used the machine (Tr. 452, 456). The Court concludes the Secretary has established Ajin failed to guard the cited welding presses, in violation of the cited standard.

Employee Access to the Violative Conditions

"The Secretary can establish that the employees had access to the violative condition by showing that the employee was actually exposed to the cited condition or that access to the condition was reasonably predictable." *Latite Roofing & Sheet Metal, LLC v. Occupational Safety & Health Rev. Comm'n*, No. 20-14793, 2021 WL 4912479, at *3 (11th Cir. Oct. 21, 2021). The

Secretary "need not prove that a given employee was actually endangered by the unsafe condition, but only that it was reasonably certain that some employee was or would be exposed to that danger." *Min. Indus. & Heavy Const. Grp. v. Occupational Safety & Health Rev. Comm'n*, 639 F.2d 1289, 1294 (5th Cir. 1981). "The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." (*Id.*)

Duffy is a supervisor in the first aid office of Ajin's facility (Tr. 153). She testified that, prior to March 2016, Ajin employees had been injured while operating projection welders (Tr. 166). They sustained lacerations or hairline fractures caused by their hands or fingers being caught in the points of operation when "there were extra nuts placed by the machine, and [the employees] would go to flick them off. And they would lean in to do that." (Tr. 168.) Ajin recorded the injuries in its OSHA 300 log (Tr. 169). The Court concludes the Secretary has established Ajin's employees had access to the crushing and amputation hazards presented by the machines' points of operation.

Employer Knowledge of the Violative Conditions

Earls testified that prior to the March 2016 OSHA inspection, he met with HR general manager Wilkerson to request funding to guard the press welders at Ajin's facility. He brought a copy of Ajin's OSHA 300 logs with him. Ajin chose not to guard the press welders (Tr. 337-41). Thus, the Secretary argues, Ajin knew of the violative condition.

Ajin argues the Secretary cannot establish it knew of the violative condition of the press welders because OSHA did not cite the thirty-six press welders for large parts following the March 2016 inspection. Tisdale gave the following explanation for why he cited only four of the forty projection welders he observed during the March 2016 inspection. "I went through the OSHA logs, I identified eight employees that had been injured on the machines, and then I found out who was still working for the company, and I interviewed four of the eight." (Tr. 416.) "Three of them were still operating press welders, and so I interviewed them about their injury." (*Id.*) "And then also I used them and their machine as the exposure for that instance in the first A, B and C." (*Id.*) "And D was a just a random that I observed on the floor, an employee using one of the machines." (*Id.*)

Tisdale maintains he specifically remembers telling senior safety manager Earls "about the requirement to guard not just four but all forty projection welders" at a meeting with him in March 2016 (Tr. 570). Despite rigorous cross-examination by Ajin's counsel, Tisdale did not waver in

his testimony (Tr. 571-74). The Court credits Tisdale's testimony that he informed Ajin that all of its press welders needed to be guarded.

Ajin contends it could not be expected to know it was required to guard the large-parts press welders when OSHA had previously cited only the small-parts press welders. But, as previously noted, "the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard and does not preclude the Secretary from pursuing a later citation." *Seibel,* 1991 WL 166592, at *715. Ajin knew the large-part press welders were unguarded. It is immaterial whether Ajin believed they presented a hazard to their users. "To satisfy his burden, the Secretary must show knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Cent. Fla. Equip. Rentals, Inc.,* No. 08-1656, 2016 WL 4088876, at *8 (OSHRC July 26, 2016) (emphasis in original).

Earls' testimony that he met with Wilkerson, showed him Ajin's OSHA 300 log, and requested guarding for the press welders establishes management officials were aware the press welders were unguarded, and injuries had occurred due to the lack of guarding. The actual knowledge of Earls and Wilkerson is imputed to Ajin. The Court concludes the Secretary established Ajin had actual knowledge of the violative condition of the unguarded press welders.

Characterization of the Violations

The Secretary characterized Items 16 through 20 as willful. As previously noted, the Secretary may show a violation was willful by proving (1) the employer knew of an applicable standard prohibiting the condition and consciously disregarded the standard, or (2) that, if the employer did not know of an applicable standard, it exhibited such reckless disregard for employee safety. *J.A.M. Builders, Inc. v. Herman*, 233 F.3d at 1355. The Secretary argues he has proven that Ajin knew of the standard and consciously disregarded it. The Court disagrees.

As a result of the March 2016 OSHA inspection, the Secretary cited Ajin for failing to guard the four small-parts welding presses. Ajin misconstrued this action to mean that it was required to guard only the small-part welding presses. While Ajin was incorrect, the Court finds it a plausible scenario. The small-part welding presses are qualitatively distinguishable from the large-part welding presses, and only they were cited. HR general manager Wilkerson testified he was the person responsible for submitting the abatement information for the four cited small-parts

projection welders to OSHA. He received no response from OSHA telling him the abatement was inadequate (Tr. 865-57).

The Court concludes the Secretary has not established that Ajin's state of mind was one of conscious disregard of the requirements of § 1910.255(b)(4). Due to the circumstances of the March 2016 OSHA inspection, Ajin may have mistakenly believed it was in compliance with the standard.

> *See Gen. Motors Corp.*, 22 BNA OSHC 1019, 1043-44 (No. 91-2834E, 2007) (consolidated) (concluding Secretary did not establish willful characterization where employer "was keenly aware of the LOTO standard and its requirements" but no evidence showed employer "appreciated its procedure was deficient"); *see also AJP Constr., Inc.*, 357 F.3d at 74 (willful state of mind is evident where "employer was actually aware, *at the time of the violative act*, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care" (internal quotation marks omitted; emphasis added)).

Envision Waste Servs., LLC, No. 12-1600, 2018 WL 1735661, at *11 (OSHRC Apr. 4, 2018). Therefore, the Court concludes the Secretary has not established Ajin's violation of § 1910.255(b)(4) cited in Items 16 through 20 was willful. Citation 2, Items 16 through 20 are properly characterized as serious. Therefore, Citation 2, Items 16 through 20 must be affirmed but as serious.

IV. PENALTY DETERMINATION

In 2015 Congress passed the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act), which requires federal agencies to adjust civil penalties for inflation. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 701, 129 Stat. 584, 599 (2015) (codified at 28 U.S.C. § 2461 note). The Inflation Adjustment Act provides that the increased penalty levels apply only to civil monetary penalties "which are assessed after the date the increase takes effect." *See* §6 of the Inflation Adjustment Act, 28 U.S.C. 2461 note (Nov. 2, 2015). Here, the penalty increases took effect on August 1, 2016, and the citations, which were issued on December 12, 2016, were subject to the increased penalty maximums of $124,709 for each willful violation and $12,471 for each serious and other-than-serious violation. *See* Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 FR 43430, 43453 (July 1, 2016).

"In assessing a penalty, the Commission must consider 'the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history

of previous violations.'" *Home Rubber Co., LP*, No. 17-0138, 2021 WL 3929735, at *6 (OSHRC Aug. 26, 2021) (*quoting* 29 U.S.C. § 666(j)). "When determining gravity, typically the most important factor, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury." *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *73 (OSHRC, Mar. 4, 2019)). Ajin employed approximately 600 employees at its Cusseta facility (Tr. 394, 710). It is not entitled to a reduction based upon its size. Ajin has been cited for OSHA violations within five years prior to the inspection at issue (Tr. 710-11). Therefore, it is not entitled to a reduction based upon history. Ajin is also not entitled to a reduction for good faith since it failed to enforce its LOTO procedure, despite repeated warnings that employees routinely were failing to lock out.

Citation 1, Item 1

The gravity of this violation is high. Exhibit C-1 shows, over the course of 70 minutes, half a dozen employees repeatedly grabbed sharp-edged metal parts while not wearing or improperly wearing protective sleeves on June 16, 2016. Some employees wear sleeves rolled down, which affords some protection, but others are wearing no sleeves at all. The likelihood of injury is high. The employees repetitively grabbed metal parts with sharp edges and fed them into the robotic cells and then removed them. Considering Ajin's size, the gravity of the violation, the lack of good faith, and its history, the Court concludes a penalty of $12,471 is appropriate for this item.

Citation 2, Items 5 -7 and 10-14

The gravity of these willful violations is extremely high, as evidenced by the death of Decedent. Eight employees, including supervisors Spikes and Park, entered robotic cells without locking out. They took no precautions against injury, the likelihood of which was high. Considering Ajin's size, the gravity of the violation, the lack of good faith, and its history, the Court agrees the Secretary's proposed grouped penalty of $124,709 each for Citation 2, grouped Items 5 -7 and 10-14 is appropriate.

Citation 2, Items 16-20

The gravity of these serious violations is high. Five employees were exposed to amputation and crushing injures when using the unguarded press welders. The work is fast-paced and repetitive, increasing the likelihood of injury. Considering Ajin's size, the gravity of the violation, the lack of good faith, and its history, the Court concludes a penalty of $12,471 each for Citation 2, Items 16, 17, 18, 19, and 20 is appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERED THAT the Court affirms Citation 1, Item 1 and assesses a penalty of $12,471, affirms Citation 2, grouped Items 5(a-c), 6(a-c), 7(a-c), 10(a-c), 11(a-c), 12(a-c), 13(a-c), and 14(a-c) and assesses a penalty of $124,709 for each grouped Item, affirms Citation 2, Items 16, 17, 18, 19, and 20 as serious and assesses a penalty of $12,471 for each item, and vacates Citation 2, grouped Items 3(a-c), 4(a-c), 8(a-c), and 9(a-c), and Item 15 and their respective proposed penalties.[20]

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: February 21, 2023
Atlanta, GA

[20] As indicated *supra*, Ajin withdrew its notice of contest with regard to Citation 1, Item 2, Citation 2, grouped Item 1(a-c) and grouped Item 2(a-c), and Citation 3, Item 1, and their respective proposed penalties, and in accordance with § 10(a) of the Act, they are each "deemed a final order of the Commission and not subject to review by any court or agency." Therefore, Citation 1, Item 2, Citation 2, grouped Item 1(a-c) and grouped Item 2(a-c), and Citation 3, Item 1 are no longer pending in the Court.