



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 94-1374

DAYTON TIRE, BRIDGESTONE/FIRESTONE,

Respondent,

UNITED STEEL WORKERS OF AMERICA,

LOCAL 998,

Authorized Employee  
Representative.

**APPEARANCES:**

Ronald J. Gottlieb and John Shortall, Attorneys; Kenneth A. Hellman and Nicholas J. Levintow, Senior Trial Attorneys; Ann Rosenthal, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Marvin Krislov, Deputy Solicitor; J. Davitt McAteer, Acting Solicitor; U.S. Department of Labor, Washington, DC  
For the Complainant

Willis J. Goldsmith, Esq.; Thomas M. Beck, Esq.; Jacqueline M. Holmes, Esq.; Michael F. Dolan, Esq.; Jones, Day, Reavis & Pogue, Washington, DC and Chicago, IL  
For the Respondent

George H. Cohen, Esq.; Jeremiah A. Collins, Esq.; Margo Pave, Esq.; Bredhoff & Kaiser, PLLC, Washington, DC  
For the Authorized Employee Representative

**DECISION**

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

**BY THE COMMISSION:**

Following an accident that resulted in a fatality, the Occupational Safety and Health Administration ("OSHA") inspected a tire manufacturing plant operated by Dayton Tire, a division of Bridgestone/Firestone, Inc. ("Dayton") located in Oklahoma City, Oklahoma. The

Secretary issued a citation to Dayton under the Occupational Safety and Health Act of 1970 (“OSH Act” or “Act”), 29 U.S.C. §§ 651-678, alleging 107 willful violations under various provisions of the general industry lockout/tagout (“LOTO”) standard, 29 C.F.R. § 1910.147.

The Secretary alleges that Dayton violated the cited LOTO standard provisions based on its failure to do the following: (1) establish energy control procedures for seven different machines located in six departments; (2) inspect, certify, and utilize those procedures; (3) supply the necessary locks to effectively lock out its equipment; and (4) provide its employees with the required level of LOTO training. She alleged six separate violations for Dayton’s failure to establish energy control procedures for the seven machines located in six different departments, and alleged multiple training violations on a per-employee basis (collectively referred to hereafter as “per-instance” citations). The Secretary proposed the maximum willful penalty of \$70,000 for each alleged violation and, after she withdrew a number of citation items and amended the citation to add one item, the total proposed penalty was \$7,000,000.

After a 35-day hearing, former Administrative Law Judge Robert A. Yetman affirmed all of the citation items except the item pertaining to Dayton’s failure to utilize LOTO procedures (Item 107), which he *sua sponte* consolidated into a single item with one of the items pertaining to Dayton’s failure to establish energy control procedures (Item 1). The judge characterized some of the affirmed items as willful, others as serious, and one item as other-than-serious, and assessed a total penalty of \$517,000. On review, Dayton argues that the LOTO standard is unenforceably vague and inapplicable to the cited conditions, compliance with the standard is infeasible, and certain items are duplicative. Dayton also challenges the Secretary’s decision to cite Dayton’s failures to establish energy control procedures and provide proper training on a per-instance basis. Finally, both parties raise challenges regarding characterization and penalties.<sup>1</sup> For the reasons that follow, we reject Dayton’s vagueness challenge and infeasibility defense, find the standard applicable to the cited conditions, and find that the Secretary permissibly cited Dayton on a per-instance basis for its failures to establish energy control procedures and provide proper training. Accordingly, we affirm all but one of the citation items, characterize the affirmed items as willful, and assess a total penalty of \$1,975,000.

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<sup>1</sup> We note that the Secretary did not challenge the judge’s consolidation of Item 107 into Item 1.

## BACKGROUND

From the time it opened in 1969, Dayton manufactured tires at its Oklahoma City plant which, as the judge noted, comprised “approximately 72 acres . . . , employ[ed] approximately 1,200 employees[,] and produce[ed] an average of 35,000 tires per day.” The judge’s description of the tire manufacturing process reveals that it is “complex,” involving “[h]undreds of machines performing a large variety of tasks” in numerous departments that begins with “the initial mixing of [] various grades of rubber” and ends with “the final inspection function.” On October 19, 1993, a Dayton employee was preparing a tire assembly machine to produce a different size tire at the Oklahoma City plant when, as Dayton’s investigation showed, he accidentally tripped a limit switch that activated the machine and was caught in its workings. As a result of this accident, the employee sustained a serious injury from which he later died.

On the day of the accident, OSHA commenced an inspection of the plant focusing on LOTO compliance and issued Dayton a willful citation on April 18, 1994. The factual allegations underlying the citation involve seven different types of machines that were part of Dayton’s tire manufacturing process: (1) beadwinder machines, (2) second stage tire assembly machines (“TAMs”), (3) radial dopers, (4) curing presses, (5) banbury machines, (6) “Dayton loaders” and tread tubers, and (7) module machines. As described below, Dayton employees worked on this equipment at two different stages in the manufacturing process: (1) before commencement of a production run or during a break in production to prepare the machines for the specific production process, and (2) during production by performing tasks necessary to keep the equipment functioning properly.

With respect to pre-production tasks, Dayton employees were required to prepare the beadwinder machines, the TAMs, and the curing presses for their respective production operations. To prepare the beadwinder machines for the production of different sizes of beads (the part of the tire that fits within the wheel rim), employees known as “operators” removed and installed various machine parts, including a metal rotating disc known as a “chuck” and a horseshoe-shaped part known as a “ply block.” To prepare the TAMs for the production of different sizes of tires, employees known as “TAM size-changers” not only removed and installed several machine parts, but also made adjustments to the machinery and built “check tires”—a set of six tires produced for quality control purposes. And to prepare the curing presses for different sizes or types of tires, employees known as “mold/bladder changers” removed and

installed the presses, which were comprised of numerous parts including large metal molds and inflatable rubber bladders. Whenever there were changes in bead size, the mold/bladder changers also removed and installed post cure inflator (“PCI”) rings, which inflated and cooled the molded tires, and then mechanically transferred the tires to a conveyor.

During the course of production operations, Dayton employees were required to clean the radial dopers and replace certain parts of the beadwinder and module machines, as well as remove material that jammed the components of the module machines, tread tubers, Dayton loaders, and banbury machines. Specifically, employees known as “radial doper attendants” periodically removed paint and lubricant that built up on various parts of the radial dopers. Employees known as “module operators” replaced certain worn parts of the module machines such as “grinding stones,” which are round disks with sandpaper-like edges that rotate at high speeds, and removed tires that jammed various components of the machinery. Operators of the beadwinder machines replaced large wire reels when wire ran out, broke, or was not the correct type. Finally, employees known as “mill attendants” removed rubber that jammed various components of the Dayton loaders and tread tubers, and employees known as “belt loaders” and “T-mix attendants” removed rubber that jammed various components of the banbury machines.

It is undisputed that, between October 19, 1993 and April 18, 1994, Dayton did not develop, document, or utilize energy control procedures under 29 C.F.R. § 1910.147(c)(4)(i) for its employees who performed any of these job tasks. It is also undisputed that during this period, Dayton employees were not provided with locks under 29 C.F.R. § 1910.147(c)(5)(i), and that all of the employees specifically referenced in the citation items affirmed by the judge received LOTO training under 29 C.F.R. § 1910.147(c)(7)(i) at the affected, but not authorized, level.<sup>2</sup>

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<sup>2</sup> Under the LOTO standard, an “affected employee” is defined as “[a]n employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed.” 29 C.F.R. § 1910.147(b). An “authorized employee” is defined under the standard as “[a] person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment”—the definition specifies that “[a]n affected employee becomes an authorized employee when that employee’s duties include performing servicing or maintenance covered under [section 1910.147].” *Id.* The Secretary contends that all of the employees referenced in the citations here were authorized employees who lacked the requisite training.

Finally, with one exception, *see infra* footnote 4, evidence in the record shows that during this period, each of these employees performed at least one of the activities described above.

## ANALYSIS

### I. The LOTO Standard: Scope, Application, and Purpose

The core principles and elements of the LOTO standard were described by the Commission just a few years ago in a case that involved similar citations.

The LOTO standard, which became effective January 2, 1990, was promulgated to prevent industrial accidents during servicing of machines that remain in an operational mode, are turned off but connected to a power source, retain stored energy, or are reactivated by another worker unaware that servicing is in progress. Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule [], 54 Fed. Reg. 36,644 (Sept. 1, 1989); Control of Hazardous Energy (Lockout/Tagout): Final Rule; Suspension of Effective Date [], 54 Fed. Reg. 46,610, (Nov. 6, 1989). In general, the LOTO standard requires an employer to establish a program that includes employee training, use of energy control procedures, and periodic inspections designed to prevent employee exposure to the unexpected energization of equipment during servicing and maintenance operations, and dovetails with the requirements for the safe operation of machines during production, as prescribed by 29 C.F.R. Part 1910, subpart O.

*Gen. Motors Corp.* (“GM”), 22 BNA OSHC 1019, 1022, 2004-09 CCH OSHD ¶ 32,928, pp. 53,604-05 (No. 91-2843E, 2007) (consolidated).

Specifically, 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 cause injury to employees.” 29 C.F.R. § 1910.147(a)(1)(i). “Servicing and/or maintenance” is defined as “[w]orkplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment,” including “lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.” 29 C.F.R. § 1910.147(b). Although the phrase “*unexpected* energization” is not defined in the standard, the Commission has held that “[e]nergization is ‘unexpected’ in the absence of some mechanism to provide adequate advance notice of machine activation.” *GM*, 22 BNA OSHC at 1023, 2004-09 CCH OSHD at p. 53,606; *accord Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2139 n.4, 2004-09 CCH OSHD ¶ 32,922, pp. 53,561-62 n.4 (No. 04-1475, 2007).

On review, Dayton claims that the scope provision is unenforceably vague and that the activities performed by its employees are not subject to the LOTO standard's requirements. For the following reasons, we reject both arguments.

#### **A. Vagueness**

Dayton maintains that the phrase “*unexpected* energization,” as used in both the scope provision and the definition of “servicing and/or maintenance,” is unenforceably vague because neither the Secretary nor the LOTO standard adequately define what “threshold risk level” of unexpected energization triggers the standard's requirements. To determine whether a standard is unenforceably vague, the Commission first examines the language of the standard at issue, which is “viewed in context, not in isolation.” *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991-93 CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991); see *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec’y of Labor* (“*Faultless*”), 674 F.2d 1177, 1185 (7th Cir. 1982) (noting that “[w]hen considering remedial legislation such as the OSH Act and its implementing regulations, the purported vagueness of a standard is judged not on its face but rather in the light of its application to the facts of the case”). If the language is vague, then the Commission considers whether “‘a reasonable person,’ examining the generalized standard in the light of a particular set of circumstances, can determine what is required,” or whether “the particular employer was actually aware of the existence of a hazard and of a means by which to abate it.” *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2206, 1991-93 CCH OSHD ¶ 29,964, p. 41,025 (No. 87-2059, 1993) (consolidated) (citation omitted).

Dayton's vagueness challenge fails on two fronts. First, relying on the plain language of § 1910.147(a)(1)(i), and specifically emphasizing the standard's inclusion of the phrase “*unexpected* energization,” the Commission has held that the “Secretary must show that there is some way in which the particular machine could energize, start up, or release stored energy without sufficient advance warning to the employee.” *Gen. Motors Corp., Delco Chassis Div.* (“*GM-Delco*”), 17 BNA OSHC 1217, 1219-20, 1993-95 CCH OSHD ¶ 30,793, pp. 42,809-10 (No. 91-2973, 1995), *aff'd*, 89 F.3d 313, 315 (6th Cir. 1996) (affirming Commission and noting that, in context of LOTO standard, “use of the word ‘unexpected’ connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot start up without giving a servicing employee notice of what is about to happen”). Under this precedent, therefore, the LOTO standard's use of the term “unexpected” unambiguously

refers to the potential of a machine or equipment to “energize, start up, or release stored energy without sufficient advance notice to the employee.”<sup>3</sup> See *Ormet Corp.*, 14 BNA OSHC at 2135, 1991-93 CCH OSHD at p. 39,200. And the term does not require the Secretary to quantify the specific risk level associated with such an event. As the Commission noted in *GM*, “[a]s evidenced by the fatality that prompted OSHA’s inspection here, even momentary exposure to equipment that has not been fully deenergized and locked out poses a significant risk of serious harm or death.” 22 BNA OSHC at 1048, 2004-09 CCH OSHD at p. 53,627; accord *Burkes Mech., Inc.*, 21 BNA OSHC at 2142, 2004-09 CCH OSHD at p. 53,564 (finding significant risk of serious injury or death to laborers working under conveyor that was not locked out, as illustrated by fatality); see *Int’l Union, UAW v. OSHA*, 37 F.3d 665, 670 (D.C. Cir. 1994) (rejecting pre-enforcement challenge to OSHA LOTO standard, and noting that in its supplemental statement of reasons to its rulemaking OSHA stated that “workers face a significant risk of material harm every time they perform service or maintenance work on powered industrial equipment” (citing 58 Fed. Reg. 16,612, 16,620 (Mar. 30, 1993))). In any event, the record here shows that in contrast to the equipment at issue in *GM-Delco*, Dayton’s tire manufacturing equipment provided no advance warning that would affect the LOTO standard’s applicability.

Second, even if we were to accept Dayton’s argument that the phrase “unexpected energization” is vague as used in the LOTO standard, a reasonable employer could determine whether its machines are subject to unexpected energization. Indeed, such an employer could make this determination based on facts within its knowledge, including the circumstances under which machines could become energized and, after energization, the length and quality of any warning prior to movement or start up of the equipment. Cf. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2207, 1991-93 CCH OSHD at p. 41,026 (stating that even though “frequent” is nonspecific term, “a reasonable person familiar with the size of the worksite and the magnitude

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<sup>3</sup> We find no merit in Dayton’s assertion that the judge erred in relying on *GM-Delco* because it “was unavailable to Dayton until a year after the Citation in this case was issued.” As the Commission in *GM-Delco* merely examined the plain language of the LOTO standard, the timing of the Commission’s decision is irrelevant. See *United States v. Balint*, 201 F.3d 928, 935-36 (7th Cir. 2000) (finding court’s interpretation of statute was “not at all unpredictable” because it followed “plainly from the language of statute,” and thus its application to defendant in case of first impression did not violate due process).

of the ongoing construction activity would understand how often inspections would have to be conducted to keep track of safety hazards at the site”). We therefore reject Dayton’s vagueness challenge.

### **B. Applicability**

With respect to the servicing and maintenance activities at issue, Dayton argues that the Secretary failed to prove that “*unexpected* energization or start up of the machines or equipment, or release of stored energy” could have injured its employees.<sup>4</sup> 29 C.F.R. § 1910.147(a)(1)(i). Specifically, Dayton contends that parts of the TAMs, banbury machines, and curing presses moved so slowly that employees could avoid injury, and that TAM size-changers, radial doper attendants, and mold/bladder changers were visible to anyone standing at the machine control panels, obviating any risk that another employee would be unaware that servicing was in progress and activate the machine. Dayton’s contentions are unsubstantiated.

Evidence in the record, including extensive employee testimony, details how the machines started up and how certain machine parts moved, the employees’ proximity to those parts during servicing or maintenance, the circumstances under which machine parts could have moved unexpectedly, and examples of injuries that did result, or could have resulted, from the unexpected movement of machine parts or start up of the machines. This evidence, which the judge described in his decision and upon which he relied, fully supports his findings that injury resulting from unexpected energization or start up of the machines was possible on the TAMs, banbury machines, and curing presses, as well as on all of the other machines at issue.<sup>5</sup>

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<sup>4</sup> In Item 19, the Secretary alleged that the employee referenced in that training item was “a BEI [a]ttendant [who] perform[ed] servicing and/or maintenance on extruders and mills,” but “did not receive authorized employee lockout/tagout training.” Neither party called that employee as a witness, and no other individual who worked as a BEI attendant was called as a witness or referenced in a citation item. The parties stipulated that (1) the referenced employee worked as a BEI attendant in the tubing department during the relevant period; (2) employees in the tubing department received training at the affected level, but not the authorized level, prior to April 18, 1994; and (3) employees in the tubing department did not receive locks or tags prior to April 18, 1994. The record lacks evidence, however, as to whether the referenced employee, or BEI attendants in general, performed servicing or maintenance on a machine or equipment. 29 C.F.R. § 1910.147(a)(1)(i). We therefore vacate Item 19.

<sup>5</sup> Dayton had five beadwinder machines, three of the conventional type and two that were automated. The judge concluded that during a wire reel change, an automated beadwinder machine could not unexpectedly energize because, upon opening the gate leading to the area that

Moreover, testimony shows that the curing presses could close more quickly than Dayton alleges and that employees were not always able to avoid moving parts on any of the various machines.

As to employee visibility, Dayton correctly asserts that the employees performing certain servicing or maintenance activities could be seen from one or more of the control panels. But this did not prevent numerous instances where the employees themselves, while performing servicing or maintenance on the TAMs, radial dopers, and curing presses, inadvertently activated the machines during the performance of their job tasks. Nor did it prevent nearby employees or supervisors from prematurely restarting the machines. Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,647-48 (Sept. 1, 1989) (final rule) (delineating causes of inadvertent activation, including accidental movement of electrical switches, valves, or other controls by servicing employee or any other person). Also, Dayton's argument fails to account for other causes of unexpected start up or release of stored energy that occurred at its facility despite evidence in the record of numerous instances of equipment malfunctions that resulted in the unexpected movement of machine parts on almost all of the machine types at issue.<sup>6</sup>

In challenging the Secretary's evidence, Dayton also argues that alleged instances of unexpected energization were either not unexpected because the machine was in its automatic mode when the instances occurred or, in two specific instances, not subject to the LOTO standard because the activities could be performed only with the machine energized. The Commission already considered and rejected Dayton's first argument in *Burkes Mechanical, Inc.*, 21 BNA OSHC at 2139-40, 2004-09 CCH OSHD at p. 53,562. At issue in that case was whether employees who cleaned debris from underneath a conveyor were covered by the

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contained the wire reels, the machine would automatically deenergize. He came to the opposite conclusion regarding the conventional beadwinder machines, finding that employees changing wire reels could have been exposed to unexpected energization. He also found that employees working on both automated and conventional beadwinder machines could have been exposed to unexpected energization during chuck and ply block changes. We find the record fully supports the judge's factual and legal analysis on this issue.

<sup>6</sup> Similarly, we must also reject Dayton's argument that unexpected energization could not have occurred during servicing and maintenance activities that were "one man" jobs. As the evidence shows and the standard contemplates, all of the servicing and maintenance activities, including those that Dayton alleges were performed by a single employee, could have resulted in injury due to the "unexpected energization or start up of the machines or equipment, or release of stored energy." 29 C.F.R. § 1910.147(a)(1)(i); Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,647-48.

requirements of the LOTO standard where they were aware the conveyor was running while they performed their work. *Id.*, 2004-09 CCH OSHD at p. 53,562. The Commission held that the standard applied, noting that “[s]ervicing and/or maintenance which takes place during normal production operations is covered’ if, *inter alia*, ‘[a]n employee is required to remove or bypass a guard or other safety device . . . or where an associated danger zone exists during a machine operating cycle.’” *Id.* at 2139, 2004-09 CCH OSHD at p. 53,562 (quoting 29 C.F.R. § 1910.147(a)(2)(ii)). Moreover, as we noted above, the Commission explained in *GM* that the LOTO standard protections prescribed for servicing and maintenance activities were designed to seamlessly dovetail with the machine guarding protections that apply during normal production operations under 29 C.F.R. Part 1910, subpart O. *GM*, 22 BNA OSHC at 1022, 2004-09 CCH OSHD at pp. 53,604-05; *see* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,667 (“Because of the dovetailing of the requirements of this standard and the machine guarding requirements of subpart O, protection must be provided, regardless of whether the . . . operation is considered to be production or servicing.”). Thus, Dayton cannot evade a LOTO violation here by showing that its exposed employees performed service and maintenance on equipment they knew was activated where that equipment lacked necessary protective guarding. Indeed, the fact that Dayton employees may have left machines in automatic mode to perform certain servicing or maintenance activities merely shows that potentially hazardous energy was not, but should have been, adequately controlled.

As to Dayton’s second argument, the Secretary recognized in the preamble “that there are certain servicing operations which, by their very nature, must take place without deenergization, such as operational testing of machines or equipment,” and that “[l]ocking out or tagging out cannot be performed during these operations, since both lockout and tagout require . . . equipment to be deenergized.” Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,647; *see GM*, 22 BNA OSHC at 1041, 2004-09 CCH OSHD at p. 53,621 (noting that LOTO standard would not apply where servicing activity requires testing equipment that is “energized and in motion”). Here, Dayton does not dispute that most of the servicing and maintenance activities performed by its employees did not require the machines to remain energized. But it claims that certain servicing activities that employees performed on the TAMs and curing presses required energization.

We find the record establishes that, although the TAMs had to be energized while the size-changer made various adjustments to the machine and then produced a set of check tires, energization was unnecessary when the size-changer removed and installed machine parts during a tooling change. Also, regardless whether it was feasible to lockout the curing presses during a mold change, evidence in the record shows the presses could be deenergized and locked out during a PCI ring change. We thus conclude that employees working on each of these two machines performed at least one servicing or maintenance activity that did not require energization. *See GM*, 22 BNA OSHC at 1042, 2004-09 CCH OSHD at p. 53,622 (finding LOTO applied during troubleshooting operation, as evidence showed employee “was in the process of performing a servicing activity while the [machine] was stationary and for which deenergization and use of LOTO were possible but not used”).

Finally, Dayton argues that the machines referenced in the citation were incapable of unexpectedly energizing because an employee had to “engage in several steps in order to cause the equipment to move.” Evidence in the record shows, however, that after deenergization, a single individual could have restarted the machines at issue within a matter of seconds. *Burkes Mech., Inc.*, 21 BNA OSHC at 2139 n.4, 2004-09 CCH OSHD at pp. 53,561-62 n.4 (noting that deactivated machines at issue in *GM-Delco* were not covered by LOTO standard because they had “specific precautions designed to ensure employees had adequate notice to get out of the way before start-up occurred,” whereas the conveyor in *Burkes* was covered by standard because it was “neither deactivated nor ‘designed and constructed’ to eliminate unexpected energization”). Moreover, the proposition that a multi-step startup process rendered these machines incapable of unexpected energization is undermined by the specific and numerous examples in the record of the machines unexpectedly energizing during servicing and maintenance.<sup>7</sup> Accordingly, we conclude that the Secretary has established applicability of the

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<sup>7</sup> Dayton contends the Secretary relied on instances of unexpected energization that occurred so long ago, and with such dissimilar equipment, as to be irrelevant to the Secretary’s allegations. But the record also contains evidence of events that occurred within months of the citation’s issuance and involved the same equipment at issue in this case. Thus, in addition to the October 1993 accident that precipitated OSHA’s inspection here—which involved unexpected energization from the accidental flip of a limit switch—an employee testified that in early 1994 he was removing a tire from the grinder chuck when his leg accidentally hit the reset switch and activated the machine which, he stated, is “very easy” to do when you are leaning into the

LOTO standard's requirements because the employees performing servicing or maintenance activities on the different types of machines at issue could have been injured by the "unexpected energization or start up of the machines or equipment, or release of stored energy." 29 C.F.R. § 1910.147(a)(1)(i).

## II. The LOTO Standard: Minor Servicing Exception

Dayton contends that most of the "service and maintenance" work its employees performed falls within an exception to the LOTO standard's applicability and, alternatively, contends this exception is sufficiently vague to render the entire standard unenforceable. Dayton carries the burden of proof on these issues. See *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2194, 2000 CCH OSHD ¶ 32,134, p. 48,420 (No. 90-2775, 2000) ("The Commission has repeatedly held . . . that 'the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim.'" (citation omitted)), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Westvaco Corp.*, 16 BNA OSHC 1374, 1377-78, 1993-95 CCH OSHD ¶ 30,201, pp. 41,567-68 (No. 90-1341, 1993) (noting that employer bears burden of proving minor servicing exception's applicability); *Gen. Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2067 n.14, 1991-93 CCH OSHD ¶ 29,240, p. 39,167 n.14 (No. 82-630, 1991) (consolidated) (holding in enforcement proceeding that employer bears "burden of proving the invalidity of a cited standard").

Under the LOTO standard, servicing or maintenance that takes place "during normal production operations" is covered by the standard only if (1) "[a]n employee is required to remove or bypass a guard or other safety device," or (2) "[a]n employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually performed upon the material being processed . . . or where an associated danger zone exists during a machine operating cycle." 29 C.F.R. § 1910.147(a)(2)(ii). Additionally, an exception to this particular provision, known as the "minor servicing exception," states that:

Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See subpart O of this part).

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machine and "causes the machine to do all kinds of crazy things." In these circumstances, we find that Dayton's claim has no merit.

29 C.F.R. § 1910.147(a)(2)(ii) (note).

On review, Dayton claims that the LOTO standard's minor servicing exception is unenforceably vague and, alternatively, that certain work activities being performed by its employees fall within the exception. For the following reasons, we reject both arguments.

#### **A. Vagueness**

Dayton argues that the word “minor” and the phrase “alternative measures which provide effective protection,” as used in the minor servicing exception, are so vague as to render the LOTO standard unenforceable. As we noted above, a claim that a standard is vague is assessed not in the abstract, but in the particular factual context. *Faultless*, 674 F.2d at 1185. “Moreover, the [standard] will pass constitutional muster even though [it is] not drafted with the utmost precision; all that due process requires is a fair and reasonable warning.” *Id.*; *cf. Pitt-Des Moines, Inc.*, 168 F.3d 976, 987 (7th Cir. 1999) (holding that “[t]he addition of an alternative, less specific means of compliance does not make the regulation unconstitutionally vague,” and that employer relying on alternative “did so at its peril”).

We conclude that the challenged elements of the minor servicing exception are necessarily broad enough to cover the myriad servicing activities to which the LOTO standard might apply. *Cargill, Inc.*, 15 BNA OSHC 2149, 2152, 1991-93 CCH OSHD ¶ 29,941, p. 40,912 (No. 90-3191, 1993) (“[T]he due process clause does not impose drafting requirements of mathematical precision or impossible specificity.”); *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2205, 1991-93 CCH OSHD at pp. 41,024-25 (noting that Secretary needs to draft standard only “with as much exactitude as possible in light of the myriad conceivable situations which could arise and which could be capable of causing injury” (citation omitted)). Moreover, we conclude that a reasonable employer in the tire manufacturing industry could determine what constitutes “effective” alternative protection, given that the stated purpose of the LOTO standard is to prevent injury that could result from “unexpected energization or start up of the machines or equipment, or release of stored energy.” 29 C.F.R. § 1910.147(a)(1)(i); *see J.A. Jones Constr. Co.*, 15 BNA OSHC at 2206, 1991-93 CCH OSHD at p. 41,025. This link to the standard's purpose is reinforced by the exception's cross-reference to “subpart O of this part,” which prescribes machine guarding requirements. 29 C.F.R. § 1910.147(a)(2)(ii) (note). As such, a reasonable employer could determine, based on knowledge of its employees' specific servicing activities and the machines upon which they work, what alternative measures would achieve this

purpose and, thus, provide effective protection. *See J.A. Jones Constr. Co.*, 15 BNA OSHC at 2206, 1991-93 CCH OSHD at p. 41,025. We therefore reject Dayton's vagueness challenge.

### **B. Applicability**

Dayton argues that the servicing and maintenance activities performed by employees on the beadwinder machines, radial dopers, banbury machines, module machines, tread tubers and Dayton loaders are all covered by the minor servicing exception. To prove that a servicing or maintenance activity falls within this exception, an employer must show that (1) the tool changes and adjustments, or servicing activities, were minor; (2) they were performed during normal production operations; and (3) effective alternative protection was provided. *Westvaco Corp.*, 16 BNA OSHC at 1378, 1380, 1993-95 CCH OSHD at pp. 41,568, 41,570.

Initially, as described in Dayton's own "Job Evaluation Form" entered into evidence, part of the beadwinder operator's job is to "[s]et up" the beadwinder machine for production of a different-sized bead, a work activity that we find clearly meets the standard's definition of "setting up." 29 C.F.R. § 1910.147(b) (defining "setting up" as "[a]ny work performed to prepare a machine or equipment to perform its normal production operation"). Moreover, by definition, "setting up" occurs before normal production operations and, therefore, cannot fall within the minor servicing exception. *Westvaco Corp.*, 16 BNA OSHC at 1379-80, 1993-95 CCH OSHD at pp. 41,569-70.

As for the other servicing and maintenance activities Dayton claims were performed during normal production operations, Dayton has not demonstrated that any of these activities were "performed using alternative measures which provide effective protection." 29 C.F.R. § 1910.147(a)(2)(ii) (note). Dayton points out that its machines were equipped "with numerous safety features, including emergency stop devices, safety ropes, and a wide variety of guarding devices." To the extent Dayton claims that use of emergency stop devices and safety ropes were "alternative measures," we find that these measures were ineffective. As we previously noted, evidence in the record shows that, during servicing and maintenance, employees working at the machines could inadvertently activate them, or nearby employees or supervisors could prematurely restart them. And evidence shows that, in some cases, such energization did in fact occur. *See Control of Hazardous Energy Sources (Lockout/Tagout)*, 54 Fed. Reg. at 36,648 ("The generally accepted best means to minimize the potential for inadvertent activation is to ensure that all power to the machine or equipment is isolated, locked or blocked and dissipated at

points of control, using a method that cannot readily be removed, bypassed, overridden or otherwise defeated.”). With respect to guarding, which is explicitly contemplated as a form of “alternative protection” under the minor servicing exception, 29 C.F.R. § 1910.147(a)(2)(ii) (note), Dayton has not shown that any guarding provided on the beadwinder machines, radial dopers, banbury machines, module machines, tread tubers or Dayton loaders would have protected employees during their performance of servicing and maintenance activities. Indeed, given the nature of some of these activities—the removal and installation of grinding stones on the module machine, for example—it would have been impossible for guarding to provide any protection. In these circumstances, we conclude Dayton did not establish that these activities fall within the minor servicing exception.

Based on the foregoing factual evidence and legal analysis, we conclude that Dayton’s employees performed servicing and maintenance activities to which the LOTO standard applied during the period covered by the citation. Moreover, Dayton’s failure to utilize LOTO for these activities, and its actual knowledge thereof, is undisputed.

### **III. Infeasibility Defense**

Dayton argues that compliance with the LOTO standard was infeasible for certain servicing and maintenance activities performed on the TAMs and curing presses. To prove the affirmative defense of technological infeasibility, an employer must show that ““(1) literal compliance with the terms of the cited standard was infeasible under the existing circumstances and (2) an alternative protective measure was used or there was no feasible alternative measure.”” *Westvaco Corp.*, 16 BNA OSHC at 1380, 1993-95 CCH OSHD at p. 41,570 (citation omitted); *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160, 1993-95 CCH OSHD ¶ 30,042, p. 41,226 (No. 90-1620, 1993) (consolidated).

With respect to the TAMs, Dayton claims that a size-changer’s duties could not be fully performed without power and, therefore, Dayton could not feasibly comply with the LOTO standard. The record shows, however, that the TAM size-changers performed a number of different tasks, some of which required deenergization and others that did not. Although Dayton established that the TAM needed to be energized in order to make necessary adjustments to certain parts and to produce check tires, Dayton does not refute the Secretary’s rebuttal testimony showing that beginning in July 1994, size-changers started locking out the TAMs before performing the tooling changes that are necessary to equip the machine for production of

a different size tire. Indeed, several employees working as size-changers admitted that, during a tooling change, the various machine parts could be changed out while the TAM was deenergized. Dayton has therefore failed to establish that locking out the TAM during a tooling change was infeasible.

With respect to the curing presses, Dayton claims that it was not feasible to comply with the LOTO standard during mold and bladder changes. Dayton relies on the testimony of the curing department's production supervisor, who testified that electrical and pneumatic energy sources would have to be locked out twenty-seven times to complete one such change, which would increase by five hours the time necessary to accomplish this task. The judge characterized Dayton's argument as a claim of economic infeasibility, and rejected it based on his finding that Dayton failed to present evidence that instituting LOTO procedures for the curing presses would threaten the company's long-term profitability and competitiveness.

Dayton produced no evidence to show that the increased length of time necessary for a mold change would have had a "severe adverse economic effect" on the company. *See State Sheet Metal Co.*, 16 BNA OSHC at 1161, 1993-95 CCH OSHD at p. 41,227 (noting that compliance was not economically infeasible where employer failed to demonstrate that complying with standard would have "severe adverse economic effect"); *accord Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1203, 1993-95 CCH OSHD ¶ 30,052, p. 41,303 (No. 90-2304, 1993) (considering what effect compliance would have on company's "financial position as a whole" to determine whether company would be "adversely affected"), *aff'd*, 26 F.3d 573 (5th Cir. 1994). In fact, in contrast to the production supervisor's testimony, a mold/bladder changer testified that he deenergized and locked out the curing press as few as nine times during the mold change process, which would significantly decrease the length of time required to complete the task and further undermines Dayton's infeasibility argument.

But even if Dayton had established that it was economically infeasible to lock out the electrical and pneumatic energy sources on the curing press during a mold change, it produced no evidence that the steam and hot water powering the bladders would also have to be locked out multiple times. Thus, at the very least, energy control procedures could have been used to protect mold/bladder changers from the burns that sometimes occurred during bladder changes. And Dayton never argues that locking out the curing press during a PCI ring change, another one of the size-changers' responsibilities, was technologically or economically infeasible. We thus

conclude that Dayton has failed to establish that it was infeasible to lock out the curing presses during the mold/bladder changers' servicing and maintenance activities.

#### **IV. Per-Instance Citations**

The Secretary cited Dayton on a per-machine-type basis for violating § 1910.147(c)(4)(i), the LOTO standard's energy control procedure provision, and on a per-employee basis for violating § 1910.147(c)(7)(i), the standard's initial training provision. Dayton challenges the Secretary's decision to cite more than one violation of each of these provisions.<sup>8</sup> For the reasons that follow, we conclude that it was permissible for the Secretary to cite Dayton for these violations on a per-instance basis.

##### **A. Energy Control Procedures**

###### **i. Susceptibility of Standard to Per-Instance Citation**

It is well established under Commission precedent 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.” *GM*, 22 BNA OSHC at 1046, 2004-09 CCH OSHD at p. 53,625 (citations omitted). “The key . . . [is] the language of the statute or the specific standard or regulation cited.” *Id.*, 2004-09 CCH OSHD at p. 53,625 (citation omitted). The “unit of violation must reflect the substantive duty that a standard imposes.” *E. Smalis Painting Co.*, 22 BNA OSHC 1553, 1581 (No. 94-1979, 2009); accord *Nat'l Assoc. of Home Builders v. OSHA*,

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<sup>8</sup> The Secretary's “willful/egregious policy” is set forth in OSHA Instruction CPL 2.80, *Handling of Cases to be Proposed for Violation-by-Violation of Penalties* (Oct. 1, 1990). Dayton argues that the Secretary applied this policy in an arbitrary and capricious manner by “ignor[ing] the statutory penalty criteria in assessing over \$7 million in penalties against Dayton” and failing to “comply with . . . the criteria that the Agency itself has created for enforcing the policy.” The Commission has long held that while OSHA's internal manuals may “provide[] guidance to OSHA professionals,” they “[do] not have the force and effect of law, nor [do they] confer important procedural or substantive rights or duties on individuals.” *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 n.24, 1991-93 CCH OSHD ¶ 29,962, p. 40,999 n.24 (No. 87-0922, 1993). Therefore, as long as the Secretary's citation methodology is authorized under the law, she is acting within her prosecutorial discretion. See *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181-85, 2000 CCH OSHD at pp. 48,406-10 (treating Secretary's decision to characterize violations as willful as separate inquiry that had no bearing on her authority to issue per-instance citation); *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2202, 2213, 1991-93 CCH OSHD at pp. 41,021-22, 41,032-33 (same); *Caterpillar, Inc.*, 15 BNA OSHC at 2170-76, 1991-93 CCH OSHD at pp. 41,003-10 (same).

602 F.3d 464, 467 (D.C. Cir. 2010) (“The unit of prosecution is derived from the duty set forth in the Secretary’s standard.”).

The provision at issue here, § 1910.147(c)(4)(i), requires that “[p]rocedures . . . be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.” The LOTO standard specifies that in developing and documenting an energy control procedure, the employer must “clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance,” and include the following information:

- (A) A specific statement of the intended use of the procedure;
- (B) Specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
- (C) Specific procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and
- (D) Specific requirements for testing a machine or equipment to determine and verify the effectiveness of lockout devices, tagout devices, and other energy control measures.

29 C.F.R. § 1910.147(c)(4)(ii). The Secretary explained in the preamble why she used the term “specific” in describing a properly developed and documented energy control procedure:

In this final standard, OSHA has retained the word “specific” when detailing the elements of the [energy control] procedure. This was done to emphasize the need to have a detailed procedure, one which clearly and specifically outlines the steps to be followed. The procedure must detail that information which the authorized employees must know to accomplish the lockout or tagout. Overgeneralization can result in a document which has little or no utility to the employee who must follow the procedure. However, whereas the procedure is required to be written in detail, this does not mean that a separate procedure must be written for each and every machine or piece of equipment. Similar machines and/or equipment (such as those using the same type and magnitude energy) which have the same or similar types of controls can be covered with a single procedure.

Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,670, *amended by* 55 Fed. Reg. 38,677, 38,681 (Sept. 20, 1990) (final rule). The Secretary further explained that “the employer’s procedures may not need to be unique for a single machine or task, but can apply to a group of similar machines, types of energy and tasks *if* a single procedure can address the hazards and the steps to be taken satisfactorily.” *Id.* (emphasis added). Accordingly, although an employer may develop and document a single energy control procedure for machines that

have “the same type and magnitude of energy” and “the same or similar types of controls,” separate procedures would be necessary when there are no such similarities. *Id.* And the language of § 1910.147(c)(4)(i) specifically ties the duty to develop, document, and utilize LOTO procedures to the servicing and maintenance of particular “machines and equipment.” 29 C.F.R. § 1910.147(a)(1)(i) (noting that LOTO standard covers servicing and maintenance of “machines and equipment”).

We have previously affirmed the Secretary’s use of per-instance citation authority in a variety of analogous situations. For example, the Commission has long held that it is permissible for the Secretary to cite multiple violations of the same fall protection standard based on different places of occurrence. *Major Constr. Corp.*, 20 BNA OSHC 2109, 2110-11, 2004-09 CCH OSHD ¶ 32,860, p. 53,041 (No. 99-0943, 2005) (affirming multiples instances of fall protection standards based on different times or places of occurrence); *MJP Constr. Co.*, 19 BNA OSHC 1638, 1647, 2001 CCH OSHD ¶ 32,484, p. 50,036 (No. 98-0502, 2001) (affirming multiple instances of fall protection violations occurring on different dates), *aff’d*, 56 Fed. App. 1 (D.C. Cir. 2003). In *J.A. Jones Constr. Co.*, the Commission held that the Secretary could permissibly cite separate violations for each instance of violative fall protection where each alleged instance involved a different floor or even a different location on a floor. 15 BNA OSHC at 2212-13, 1991-93 CCH OSHD at pp. 41,031-33.

Here, the Secretary cited Dayton for six separate violations of § 1910.147(c)(4)(i), which requires the development, documentation, and use of LOTO procedures, based on her determination that each alleged violation relates to a unique type of machine or piece of equipment located in a separate department. We find the Secretary’s approach in issuing these citations on a per-instance basis is consistent with the duty imposed under the language of the standard and its preamble, and with our precedent. Accordingly, we conclude the cited standard is susceptible to per-instance citation.

#### **ii. Number of Procedures Cited**

The Commission has previously examined whether a single LOTO procedure can adequately guide servicing and maintenance personnel to shut down and lock out machines or equipment that are differently configured, have multiple energy sources, or are particularly complex. In *Drexel Chemical Co.* (“*Drexel*”), the Commission noted that Drexel had both electrically driven machines and an airmill driven by an air compressor. 17 BNA OSHC 1908,

1913, 1995-97 CCH OSHD ¶ 31,260, p. 43,876 (No. 94-1460, 1997). In light of these differences in power sources and resulting differences in lockout procedures, the Commission concluded that “[b]ecause the standard requires the lockout procedures for each type of machine to be specifically defined and because there are different types of machines at the plant, Drexel must have more than one lockout procedure.”<sup>9</sup> *Id.*, 1995-97 CCH OSHD at p. 43,876. Similarly, in *GM*, the Commission held that GM’s single procedure was “inadequate with respect to the plant’s more complex equipment,” and was particularly ineffective for employees attempting to utilize LOTO before servicing the particular piece of equipment at issue. 22 BNA OSHC at 1027, 2004-09 CCH OSHD at p. 53,609.

Here, there is extensive, detailed evidence in the record showing that all seven of the cited machine types are extraordinarily complex, vary in size and configuration, and have different combinations of energy sources, as follows:

- The beadwinder machine measures approximately 40 feet long, 8 feet wide, and 12 feet high, and includes large wire reels, an extruder, auger, chuck, and pulleys. It uses both pneumatic and electrical energy, along with gravity-driven stored energy, and has multiple control panels and control boxes.
- The TAM operates either in-line or on a swing arm depending on the particular machine style, and includes parts that grab, transfer, and stitch the tire. It uses electrical, pneumatic, hydraulic, and/or nitrogen-assisted hydraulic energy, and has up to two control panels.
- The radial doper, the primary component of which is a clamp arm that transports and spins the tire, uses electrical and pneumatic energy, and has three control panels.
- The curing press includes PCI rings, inflatable bladders, and two massive metal molds that can be removed only with the assistance of a forklift. It uses electrical, pneumatic, and steam energy, and has control panels on the front and back of the machine.
- The banbury machine occupies three floors of the plant and has an entire room dedicated solely to controlling its machinery. It includes rollers, a mixer, a knife, an auger and conveyors, and uses electrical, hydraulic, and pneumatic energy.
- The tread tuber and Dayton loader include mills, extruders, conveyors and a knife. The machinery uses electrical energy and has numerous control panels.

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<sup>9</sup> In *Drexel*, the Commission affirmed only one violation of 29 C.F.R. § 1910.147(c)(4)(ii), despite determining that different procedures would be necessary for different types of machines, because the Secretary’s citation alleged only one violation. 17 BNA OSHC at 1914, 1995-97 CCH OSHD at p. 43,876.

- The module machine measures approximately 25 yards long, 8 feet wide, and 16 feet high and is comprised of several independently operating pieces of machinery attached by conveyor, and includes grinding stones and chucks. It uses hydraulic, pneumatic, and electrical energy, and has multiple control panels.

Indeed, this evidence satisfies the very criteria identified by our dissenting colleague as necessary to support per-instance citations: that the machines do not have “the same or similar types of controls” or “the same type and magnitude [of] energy,” and “a single procedure would not satisfactorily ‘address the hazards and the steps to be taken.’” (Citation omitted.)

In light of the evidence in the record establishing the enormous complexity of each of these machines and the specifically enumerated differences in their configuration, energy sources and control mechanisms, we find the Secretary has shown that, at a minimum, each of the cited machine types would require its own procedure in order to “detail that information which the authorized employees must know to accomplish the lockout or tagout.” Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36,659, 36,670, *amended by* 55 Fed. Reg. at 38,678, 38,681 (noting also that “amount of detail in an employer’s procedure will depend on the complexity of the machine”).<sup>10</sup>

Accordingly, based on the parties’ stipulations and other record evidence, we find that the Secretary has established that Dayton had a duty to develop, document, and utilize six separate LOTO procedures for the cited machine types and that each cited failure to develop, document, and use such procedures was a separate violation.<sup>11</sup> Moreover, although Dayton challenged the

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<sup>10</sup> Indeed, our affirmance of each cited violation will result in an abatement order directing Dayton to develop, document, and utilize distinct LOTO procedures for the unique equipment covered by each citation item. In these circumstances, there can be no issue of duplicativeness, as abatement of any one of the citation items will not abate any of the others. *Compare MJP Constr. Co.*, 19 BNA OSHC at 1647, 2001 CCH OSHD at p. 50,306 (relying upon fact that abatement of one instance would not abate other violations at different locations to conclude that Secretary could permissibly cite separate violations), *with Hartford Roofing Co.*, 17 BNA OSHC 1361, 1364-65, 1995-97 CCH OSHD ¶ 30,857, pp. 42,934-35 (No. 92-3855, 1995) (relying on singular nature of abatement order to determine that roof-perimeter guarding standard could not be cited on per-employee basis). Given the disparate nature of the machine-types at issue here, and the disparate nature of the requisite procedures, there would be no overlap among abatement orders.

<sup>11</sup> As noted below, we restore Item 3—which the judge had divided into two separate citation items—to a single violation, as originally cited by the Secretary. Regardless whether the evidence may have supported two separate violations for the two machines included within this single citation item, the Secretary exercised her exclusive prosecutorial discretion to combine the

validity of the Secretary’s “willful/egregious policy,” it did not dispute or rebut the Secretary’s *prima facie* case by arguing or showing that the machines were similar enough that a “one size fits all” procedure would have been adequate for all of the cited machine types. Indeed, Dayton notes that “the Secretary could properly cite Dayton (if at all) for no more than seven violations of the LOTO standard—the violations resulting from its alleged ‘primary’ failure to develop proper energy control procedures with respect to seven pieces of equipment.”

Thus, the Secretary has made out an un rebutted *prima facie* case that based on (1) the operational complexities of the different machine types, (2) the widely varying nature of the energy sources powering them, and (3) the numerous means by which the machines are controlled, Dayton was required to develop, document, and utilize unique energy control procedures for each machine type at issue. Therefore, we conclude that the Secretary permissibly cited § 1910.147(c)(4)(i) on a per-machine-type basis, and we separately affirm Items 1 through 6.

### **B. Training**

Section 1910.147(c)(7)(i) requires that employers “provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees.” In *GM*, the Commission held that the same specific language in § 1910.147(c)(7)(i) “identifies the subject of the training obligation as ‘[e]ach authorized employee.’” 22 BNA OSHC at 1047, 2004-09 CCH OSHD at p. 53,626. The Commission thus concluded that § 1910.147(c)(7)(i) is “susceptible to per-employee citation” because, “regardless whether an employer chooses to provide required training to employees individually or collectively, the duty runs to each employee and, under the wording of the standard, any failure to train would be a separate abrogation of the employer’s duty to each untrained employee.” *Id.* at 1046-47, 2004-09 CCH OSHD at p. 53,626; *see E. Smalis Painting Co.*, 22 BNA OSHC at 1580-81 (overruling determination in *Eric K. Ho*, 20 BNA OSHC 1361, 1373-75, 2002-04 CCH OSHD ¶ 32,692, pp. 51,583-84 (No. 98-1645, 2003) (consolidated), *aff’d sub nom. Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005), that asbestos training standard was not susceptible to per-

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failure to develop, implement, and utilize LOTO procedures for these two machines into a single violation.

employee citation). As the same training provision is at issue here, the Commission's analysis in *GM* is equally applicable. We thus separately affirm Items 9 through 12, 14 through 17, 20 through 30, 32 through 48, 50 through 83, 86, 87, 89 through 98, 100 through 106, and 108.

## V. Characterization

“The hallmark of a willful violation is the employer’s state of mind at the time of the violation—an ‘intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.’” *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,406 (citation omitted).

[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation . . . . A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference . . . .

*Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256-57 (No. 89-433, 1993). This state of mind is evident where “‘the 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.’” *AJP Constr. Inc. v. Sec’y*, 357 F.3d 70, 75 (D.C. Cir. 2004) (emphasis and citations omitted). “An employer’s motive for failing to comply with the Act’s requirements, however, need not be evil or malicious in order to find a violation willful.” *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,407. But a willful characterization is not justified if an employer has “‘a good faith, albeit mistaken, belief that particular conduct is permissible.’” *Manganas Painting Co.*, 21 BNA OSHC 1964, 1991, 2004-09 CCH OSHD ¶ 32,908, p. 53,406 (No. 94-0588, 2007) (citation omitted).

The extensive record before us reveals that over a period of years, Dayton consciously disregarded the LOTO standard by operating its tire production line in a manner that was patently inconsistent with the requirements of the standard, and by failing to reexamine its violative practices despite receiving information and inquiries that should have led it to do so. This disregard began with safety manager Phillip McCowan and continued with his successor, Kelley Mattocks. As explained in detail below, Dayton’s safety managers initially made flawed assessments of the job tasks that employees performed and then blatantly ignored numerous admonitions and instructions to reassess the job tasks and the resulting need to provide LOTO

protection to their employees. Therefore, for the reasons that follow, we characterize all of the affirmed violations as willful.<sup>12</sup>

McCowan, who joined Dayton in the early 1970's, served as Dayton's safety manager at the time the LOTO standard was promulgated. In 1989, McCowan received a corporate-wide memorandum from the safety director of Dayton's parent company, Firestone, alerting all safety engineers to the requirements of the new LOTO standard. In response to this memorandum, McCowan made an initial determination that Dayton employees did not perform servicing and maintenance within the meaning of the LOTO standard, and therefore Dayton did not have to implement energy control procedures, provide locks, or train its employees at the authorized level. In contrast, McCowan concluded it was Ogden Allied, the company to which Dayton had contracted some of its maintenance work,<sup>13</sup> that was required to implement the full gamut of

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<sup>12</sup> In his decision, the judge characterized several violations at issue as willful based solely on a March 1993 memorandum from corporate headquarters that was distributed to all company presidents, including the president of Dayton's Oklahoma City plant. The memorandum addressed a LOTO citation issued by the Occupational Safety and Health Bureau of the Iowa Division of Labor Services to a Bridgestone/Firestone plant in Des Moines, Iowa. The citation, which was attached to the memorandum, alleged violations of § 1910.147(c)(4)(i), (c)(5)(i), and (c)(7)(i) (adopted by reference under Iowa Admin. Code r. 347-10.20 (1993)), and pertained to mold changes and unspecified activities performed on TAMs and banbury machines.

According to the judge, these documents provided the Oklahoma City plant's management with a "heightened awareness of hazardous conditions" relating specifically to the TAMs, curing presses, and banbury machines. Based on this conclusion, the judge affirmed as willful all citation items issued under § 1910.147(c)(4)(i), (c)(5)(i), and (c)(7)(i) that pertained to these machines. But as the judge correctly noted, the March 2003 memorandum and the Des Moines citation "were offered and entered into evidence without any testimony being elicited by either party regarding the actions of [Dayton], if any, upon receipt of the documents." Thus, the record is silent regarding the actions of plant management after receiving the memorandum and attached citation. Under these circumstances, we find that this evidence does not support the judge's decision to characterize these particular citation items as willful and, therefore, do not rely on it in our analysis of characterization.

<sup>13</sup> Dayton had contracted its maintenance work to Ogden Allied since the Oklahoma City plant opened in 1969. No document, however, defined what the term "maintenance" encompassed, and Ogden Allied's site manager admitted that no one had determined precisely what activities Dayton retained. Indeed, the contract between the two companies provided:

This contract shall not be construed in any manner as conferring upon Allied the right of exclusive performance of maintenance or operating functions in respect of [sic] Firestone's Oklahoma City plant. Firestone may, at its option, contract to

LOTO procedures pursuant to the standard.<sup>14</sup> According to McCowan, he reached this decision after: (1) reading the LOTO standard and discussing it with the corporate safety director, safety engineers at other Dayton plants, and Ogden Allied; (2) considering each job classification and safe operating procedure at the plant; and (3) reviewing the plant's OSHA 200 logs for injuries that were "caused by unexpected energy sources." McCowan reasoned that none of Dayton's own employees should be classified as authorized because, in his view, none of their job tasks constituted servicing or maintenance within the standard's definition, but instead were "minor tool changes and adjustments" that took place during normal production operations within the standard's minor servicing exception, § 1910.147(a)(2)(ii) (note). He also concluded that the job tasks did not subject Dayton employees to the hazard of "unexpected energization" within the meaning of the standard because the employees performed "one-man jobs," were in "complete control" of their machines, and were provided with safety ropes.

We find that McCowan's conclusions regarding the applicability of the LOTO standard to Dayton employees were plainly erroneous, and his adherence to them strains credulity. First, many of the tasks described in Dayton's job evaluation forms, which McCowan himself prepared, fall squarely within the standard's definition of "servicing and/or maintenance." The listed tasks include setting up, trouble shooting, tearing down, repairing, "performing required maintenance to restore to working condition," adjusting equipment, and removing and installing various machine parts. 29 C.F.R. § 1910.147(b) (defining "[s]ervicing and/or maintenance). Given McCowan's first-hand knowledge of the plant floor operations, his decades of experience at the plant, and his own description in the job evaluation forms of tasks that Dayton employees performed, we cannot fathom how McCowan could have concluded that the job tasks performed by Dayton employees and those performed by Ogden Allied were so perfectly divided between production on the one hand, and servicing and maintenance on the other. And any reliance on the 1969 contract with Ogden Allied to explain or justify this purported division of labor is

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others any or all of the maintenance or any other work, or may perform any or all of the maintenance or any other work with its own personnel.

<sup>14</sup> McCowan did institute changes at the Dayton plant in order to facilitate Ogden Allied's compliance with the LOTO standard. Thus, valves were installed on all pneumatic lines and LOTO points were color coded. However, only Ogden Allied employees were allowed to use the valves and the LOTO points.

belied by the contract itself, which explicitly reserved to Dayton the right to perform any or all maintenance work with its own personnel. Moreover, it would have been difficult to read the Firestone memorandum and still conclude that Dayton employees were excluded from LOTO coverage because their maintenance and servicing occurred “during normal production operations.” Indeed, the memorandum expressly states that such excepted work “would be covered under OSHA’s machine guarding standards,” which Dayton did not follow. Thus, from the LOTO standard’s inception, McCowan’s faulty analysis and unsupportable conclusions forced Dayton down a path of noncompliance with the standard’s fundamental requirements.

In September 1989, Dayton hired Mattocks to work alongside McCowan as a junior safety engineer. Mattocks had recently graduated from college with a degree in industrial safety, and when McCowan was given other duties in April 1990, Dayton assigned her to replace him. Mattocks then had primary responsibility for OSHA compliance at the plant and, in December 1992, she became the sectional manager for safety, security and fire protection and continued in her role as plant-wide safety manager through the period covered by the citation. Although Mattocks reported to Dayton’s human resources manager, ultimate responsibility for safety within the plant rested with her. Mattocks often consulted with Robert Walker, the director of health, safety and industrial hygiene for Bridgestone/Firestone, but he had no supervisory authority over her and thus acted only in an advisory capacity.

At the hearing, Mattocks testified that McCowan “instructed [her] in the operations of the machine[s] and what the responsibilities of the employees were,” and that she spent time on the shop floor—initially “every day”—“to become familiar with all ten departments.” Indeed, she stated that “within the first couple of months [she] felt like [she] had a . . . fair working knowledge of all of the jobs in the plant.” Nonetheless, Mattocks’s testimony was somewhat imprecise as to whether she had personally observed the particular job tasks at issue here, but she certainly knew of them based on her admitted review of the written descriptions in Dayton’s job evaluation forms and safe operating procedures directives. Moreover, she acknowledged that she had read the LOTO standard around the time she was hired by Dayton in the fall of 1989, and had read the preamble at some point. Although Mattocks admitted that she could not recall ever having had an in-depth conversation with McCowan regarding his LOTO compliance assessment for the plant, she nonetheless adopted and perpetuated his approach without ever conducting her

own assessment of the LOTO standard's applicability to Dayton's employees.<sup>15</sup> Indeed, even though the minor servicing exception explicitly refers the reader to OSHA's machine guarding standard, 29 C.F.R. § 1910.147(a)(2)(ii) (note), Mattocks did not recall taking even the "initial step" of looking at that provision before deferring to McCowan's conclusions regarding Dayton's compliance with the LOTO standard.

Beginning in 1992, however, at least five separate events confronted Mattocks with concerns and warnings about LOTO compliance at the Dayton plant. On those occasions, Mattocks was either explicitly instructed to review the LOTO standard's application to Dayton's operations or concerns were raised with her that should have prompted such a review. Because of the significance of these incidents to our conclusion regarding the characterization of the violations at issue here, we discuss each in some detail.

*1992 – Safety Consultant and Corporate LOTO Memorandum*

Questions about Dayton's LOTO compliance were first brought to Mattocks's attention in August 1992, when Dayton retained John Lepkowski, Bridgestone/Firestone's recently retired corporate safety officer, to provide affected-level LOTO training to Dayton employees. Following the training session, some concerns were raised about "whether employees performing mold changes on curing presses, size changes on [TAMs], and grinding stone replacements on [module] machines should continue to be treated as 'affected' employees," an issue which Mattocks specifically discussed with Lepkowski and the union representative. And second, just a few months later, Robert Walker, the new Bridgestone/Firestone director of health, safety, and industrial hygiene, sent a strongly worded memorandum to Mattocks and other

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<sup>15</sup> Mattocks testified as follows:

The distinction had been made that servicing and maintenance was delegated to Ogden Services. . . . [T]hat distinction has actually been there since the inception of the plant, some 26 years ago. Servicing and maintenance had always been a contract service to Ogden. . . . [Dayton Tire employees have] always been distinguished as production employees.

Nonetheless, in a July 1991 LOTO "Safety Contact" that Mattocks distributed to all Dayton departments, she displayed an understanding of LOTO by emphasizing its importance and including examples of preventable accidents. She also stated that "almost all" LOTO-required tasks at the facility were performed by maintenance personnel, thereby acknowledging that Dayton's own "production employees" performed some such tasks.

Bridgestone/Firestone safety personnel in which he issued the following admonition regarding the LOTO standard:

During a recent audit by a major customer, one of our plants was found in non-compliance with OSHA's lockout standard. I also recently talked with a plant engineering associate who was unaware of the requirements of the standard. Both situations are cause for concern . . . . Please revisit your plant's practice regarding this very important, fundamental safety procedure. Remember, this standard has been in effect for over two years, so you will have little defense for non-compliance in the event of an OSHA citation, and OSHA is aggressively enforcing this standard. Furthermore, and of greater importance, compliance with this [standard] will lessen the risk to our associates.

Walker attached a sample LOTO procedure, a copy of the LOTO standard, and OSHA's LOTO enforcement directive to this memorandum. In response, Mattocks simply asked Dayton's various production supervisors whether the nature of any of the jobs performed by Dayton employees had changed since McCowan had first determined that all of those employees should be classified as affected. Receiving no indication from supervisors that any of the jobs had changed, she ended her inquiry and took no further action.<sup>16</sup> Mattocks made no attempt to assess whether McCowan's original determination was correct.

*May through September 1993 – OSHA Ergonomics Inspection*

The third event occurred after OSHA commenced a lengthy ergonomics inspection of Dayton's plant in May 1993. See *Dayton Tire, Div. of Bridgestone/Firestone, Inc.*, 18 BNA OSHC 1225, 1998 CCH OSHD ¶ 31,515 (No. 93-3327, 1998) (ALJ). Mattocks conceded that she and CO Kearney, who conducted the ergonomics inspection, discussed LOTO issues at least three times between May and September 1993. Mattocks admitted that during these conversations, Kearney "suggested that [the plant had] some opportunities" with respect to LOTO, and "we should look at [LOTO] again." However, in contrast to Kearney's account of the conversations, Mattocks testified that Kearney spoke "more in generalities" and "[t]here were

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<sup>16</sup> Mattocks testified as follows:

I believed that we were within full compliance, and that we had taken every measure to address the issues or concerns within [the Walker memorandum]. I knew that our contractor was performing service and maintenance. I had audited those [Ogden Allied] individuals to ensure that they were following the standards outlined in the program and conducting lockout/tagout, and felt confident that, that we were well within the concerns . . . expressed in this memo.

no specifics directed at us in terms of what it would be that we would do.” Mattocks also testified that “[o]n a couple of occasions [CO Kearney] inquired as to our program. And I provided some instruction to her as to how we were structured, how we recognized our employees, the relationship that we had with our contractor, who provided servicing and maintenance.” Indeed, Mattocks acknowledged that Kearney had requested and received a copy of Dayton’s LOTO program. Moreover, Kearney’s testimony that she requested, received, and reviewed Dayton’s job evaluation forms, which she stated “describe[d] maintenance and service” tasks “in accordance with the standard,” is unrebutted. Mattocks denied, however, that Kearney had discussed LOTO-related hazards regarding specific machines. She also denied discussing the application of LOTO in a conference call with Kearney.

Kearney’s recollection of her conversations with Mattocks was quite different and more detailed.<sup>17</sup> Kearney testified that during the course of her inspection, she pointed out to Mattocks specific LOTO hazards involving several machine types. According to Kearney, Mattocks responded by asserting that the employees were “not doing service and maintenance; that Ogden Allied performed service and maintenance on the equipment; and that Dayton employees are affected employees.”<sup>18</sup> Kearney also testified that around October 1, 1993, she held a conference call with Mattocks, another OSHA CO, and another Dayton official, in which she impressed upon Mattocks her concerns about LOTO compliance in the areas of the plant she had pointed out during two “walk arounds,” and reiterated that there was a need to reevaluate the LOTO program as it related to certain machinery. Finally, Kearney’s testimony that she again mentioned her LOTO concerns to Mattocks at the closing conference, and told Mattocks she was

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<sup>17</sup> The judge made no demeanor-based credibility determinations regarding the conflict in testimony between Mattocks and Kearney. Indeed, he made only one finding of fact regarding Kearney’s repeated conversations with Mattocks about LOTO. He found that when Kearney alerted Mattocks that “LOTO procedures may be applicable to some work activities performed by Dayton employees, Ms. Mattocks contacted production supervisors and foremen to determine whether any job functions performed by Dayton employees had changed since McCowan’s evaluation.” Here, the judge conflated two separate events: (1) Mattocks’s response to the Walker memorandum, when she determined that job functions had not changed, and (2) Kearney’s warnings about the application of LOTO, about which Mattocks admitted she did nothing.

<sup>18</sup> Kearney testified that Mattocks “said that she was aware of the lockout/tagout standard and she fully understood it. And on one occasion she expressed that it was OSHA that was confused about the standard.”

referring those concerns to an OSHA safety specialist, is unrebutted.<sup>19</sup>

The record contains evidence showing that Kearney took certain actions during the inspection that lend credibility to her version of events. For example, the record establishes that Kearney raised concerns about Dayton's LOTO compliance with her supervisor and the OSHA Area Director at the time her inspection was ongoing in June 1993. Furthermore, in early July 1993, she prepared an OSHA worksheet describing what she believed to be willful violations of the LOTO standard specifying four of the seven machine types that are at issue here. Asked to explain the willful characterization, Kearney testified that she concluded Dayton's actions showed plain indifference to the standard based on Mattocks's failure to take any corrective action in response to Kearney's identification of LOTO hazards.<sup>20</sup> Finally, immediately following the October 1993 accident, Kearney submitted the referral that formed the basis of OSHA's LOTO inspection. In that referral, which was admitted into evidence, Kearney described LOTO hazards in the six departments that are the foundation of this case.

In these circumstances, we reject Mattocks's testimony that Kearney spoke "more in generalities" about "some opportunities" in LOTO, and that a conference call that included a conversation about LOTO never occurred. We find Kearney's testimony, which was specific, direct, and corroborated by her actions, to be more credible than Mattocks's testimony. *See Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1309-10, 1995-97 CCH OSHD ¶ 30,841, p. 42,892 (No. 93-128, 1995) (declining to defer to judge's findings that were not based on "demeanor or [factors] peculiarly observable by the hearing judge[,]") and resolving conflict in

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<sup>19</sup> Despite our dissenting colleague's contrary implication, Mattocks never denied that Kearney raised LOTO at the closing conference. And Dayton production manager John Dougherty testified that if he "remembered correctly," Kearney "said we had some lockout/tagout opportunities" at the closing conference.

<sup>20</sup> Indeed, in the OSHA worksheet, which is in evidence, Kearney wrote the following description of her observations and interaction at the plant.

CSHOs observed employee(s) performing maintenance & service on machinery w/o use of LO/TO hardware or tags to secure or block out machines from energy source. Supervisors & Safety Mgr. observed employees in the work place performing work activities that necessitated machinery lock out and made no comments regarding hazard nor did management initiate[] any corrective actions. Management contends that Dayton employees are not performing any jobs that require machinery lock out. . . . Management states that Ogden Allied . . . perform[s] all maintenance & servicing of equipment/machinery at the plant.

testimony based on other record evidence). But even if we were to credit only Kearney's un rebutted and/or corroborated testimony, we find that she specifically alerted Mattocks to possible LOTO violations involving Dayton employees. As she had on previous occasions, Mattocks simply dismissed these warnings, and made no attempt to determine whether, as CO Kearney suggested, Dayton was properly complying with the LOTO standard.

*October 1993 – Accident Follow-up and OSHA LOTO Inspection*

The fourth event culminated with Mattocks's inadequate response to yet another specific request from corporate safety director Walker to reevaluate the application of the LOTO standard to the entire Dayton operation. Once again, Mattocks concluded that LOTO requirements, other than training at the affected level, did not apply. Following the fatal accident on the TAM that led to OSHA's inspection in this case, Walker and various Dayton managers and supervisors met with Mattocks, members of the joint safety committee, and certain employees who performed the same job function as the decedent. Together, they investigated how the accident occurred and what safety "countermeasures" should be implemented. According to Walker, although LOTO was not viewed by those participating in the meeting as relevant to the accident, the participants committed to reexamining the application of LOTO to Dayton's entire operation. After the meeting, Walker reminded Mattocks of this commitment. Thereafter, despite some review of the LOTO standard, Mattocks concluded—based on what she described as her "own experience"—that setup operations on the TAMs were part of normal production operations rather than servicing or maintenance. Mattocks testified that, at the time, she believed the other job tasks at issue were either normal production operations or fell within the standard's minor servicing exception. There is no record evidence, however, showing that she sought any guidance or confirmation regarding her understanding of the job tasks or assessment of the standard's requirements.

The fifth event that alerted Mattocks to the fact that Dayton might be in violation of the LOTO standard arose during OSHA's inspection in this case. Mattocks admitted that CO George McCown, who had conducted the inspection, was "there solely [for] the purpose of the lockout/tagout inspection . . . [a]nd . . . express[ed] that he felt we had some opportunities in lockout/tagout." She also testified that McCown specified that Dayton "had some opportunities in [setting up the TAMs and conducting mold changes on the curing presses] to incorporate lockout/tagout." And Mattocks was asked directly "[w]hat operations in the plant [she and CO

McCown] review[ed] in connection with the alleged lockout/tagout violation[.]” After counsel reminded Mattocks of her earlier testimony in another case, which was entered into evidence here, Mattocks explicitly acknowledged that “in [their] closing conference” CO McCown reviewed with her the alleged LOTO violations in the banbury, tuber, bead winding, setup, mold change, and TUO module operator departments—each of which they had visited together in November 1993. The record indicates, however, that Mattocks never acted on McCown’s admonitions. Indeed, as of April 1994, when the citation in this case was issued, Dayton was still treating all of its employees as affected under the LOTO standard; lockout procedures for the job tasks at issue were not fully instituted until months later.

Taken together, this evidence shows that Dayton’s safety managers ignored repeated and explicit warnings that Dayton might be in violation of the LOTO standard, and twice disregarded specific instructions from safety director Walker, a high level corporate official, to review the LOTO standard’s applicability to Dayton employees. Mattocks’s steadfast refusal to reassess the basis of Dayton safety director Phillip McCowan’s decision to exempt Dayton from the bulk of the standard’s requirements was nothing short of obstinate. In contrast to the picture our dissenting colleague paints of a proactively safety-conscious manager who initiated reviews of her predecessor’s classification of Dayton employees, Mattocks invariably responded to each of the five events chronicled above with the erroneous assumption that McCowan’s initial decision had been correct and limited her inquiry to determining whether anything had changed since that decision was made. Thus, although Mattocks professed familiarity with the work activities at issue here, was well acquainted with Dayton’s written descriptions of the various job tasks and safe operating procedures, and discussed several of the job tasks with safety consultant Lepkowski and COs Kearney and McCown, Mattocks never ventured beyond her predecessor’s false dichotomy between Dayton and Ogden Allied to analyze whether the job tasks performed by Dayton employees actually fit within the meaning of servicing and maintenance *as defined by the LOTO standard*. *Calang Corp.*, 14 BNA OSHC 1789, 1791-94, 1987-90 CCH OSHD ¶ 29,080, pp. 38,870-74 (No. 85-0319, 1990) (affirming willful violation where employer ignored compliance officer’s warning that condition violated OSHA standard). Moreover, we have serious doubts that Mattocks actually could have compared the job tasks at issue here with the provisions of the LOTO standard yet not understood that the employees who engaged in these tasks fell within the authorized category under the standard. *See Falcon Steel Co.*, 16 BNA

OSHC 1179, 1182, 1993-95 CCH OSHD ¶ 30,059, p. 41,331 (No. 89-2883, 1993) (consolidated) (finding of willfulness based in part on “the uncompromising language of the standard itself”); *see also Johnson Controls, Inc.*, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30,018, p. 41,142 (No. 90-2179, 1993) (“A company’s conscious decision to adopt a policy deviating from that which OSHA has pronounced to be the correct course of action under a standard is willful behavior unless supported by a reasonable belief, held in good faith, that the company’s policy is correct.”).

Based on Mattocks’s knowledge of the LOTO standard and of the job tasks at issue in this case, and on the overwhelming evidence that she received repeated requests and warnings about the standard’s application to Dayton’s operations, we find that Mattocks either knew that her predecessor’s LOTO analysis was incorrect or chose to avoid such knowledge by refusing to conduct her own assessment. *See E. Smalis Painting Co.*, 22 BNA OSHC at 1572 (finding violation willful where evidence showed employer “had actual knowledge [of standard’s requirements] or failed to avail itself of several opportunities to learn [of them]”); *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) (“actual knowledge and deliberate avoidance of knowledge are the same thing” and “[b]ehaving like an ostrich supports an inference of actual knowledge” (citation omitted)); *NLRB v. Regal Aluminum, Inc.*, 436 F.2d 525, 527-28 (8th Cir. 1971) (“It is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received.” (quoting *The Lulu*, 77 U.S. 192, 201 (1869))). In contrast to our dissenting colleague, we simply cannot find that Mattocks’s feeble excuses for Dayton’s failure to comply with the LOTO standard add up to negligence. Rather, we find it far more likely than not that when faced with the steady stream of LOTO-related inquiries and warnings that confronted Mattocks, good faith would dictate more than cursory reviews of job functions and a thirty-minute chat with a safety consultant when life and limb are at stake. In these circumstances, we find that Mattocks’s failure to comply with the LOTO standard with respect to Dayton’s employees showed conscious disregard of the standard’s requirements and plain indifference to employee safety, in willful violation of the Act. *Hern Iron Works, Inc.*, 16 BNA OSHC at 1214, 1993-95 CCH OSHD at p. 41,257 (“A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of

conscious disregard or plain indifference.”). Given that Mattocks was responsible for the plant’s safety program and for its compliance with OSHA standards, her willful conduct is imputed to Dayton. *See Burkes Mech., Inc.*, 21 BNA OSHC at 2140 n.7, 2004-09 CCH OSHD at p. 53,563 n.7 (noting that worksite superintendent’s state of mind could be imputed to employer for purpose of finding that violation was willful). And as Dayton’s failure to comply with the cited provisions hinges on its reliance on Mattocks’s unfounded determination that no Dayton employee performed servicing or maintenance activities covered by the LOTO standard, this willful conduct extends to each one of the citation items that we affirm today. We therefore characterize all of those violations as willful.

## **VI. Penalty**

Under section 17(j) of the OSH Act, 29 U.S.C. § 666(j), the Commission must give “due consideration to the appropriateness of the penalty with respect to 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 the previous violations.” The principal factor in a penalty determination is gravity, which “is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201, 2004-09 CCH OSHD ¶ 32,880, p. 53,231 (No. 00-1052, 2005).

For each of the citation items, the Secretary proposed a penalty of \$70,000. The judge disregarded the Secretary’s proposed penalty amounts based on his determination that the Secretary failed to properly consider the statutory penalty factors. The judge separately considered each affirmed citation item and found that no penalty reductions were warranted based on size, history, or good faith, and that the gravity of the violations differed based on the job tasks that Dayton employees performed.

We agree with the judge that Dayton’s 1200-employee workforce precludes any reduction for size. We also find no basis to accord a reduction for good faith, as Mattocks persistently failed to heed repeated entreaties from high level corporate officials and OSHA to reassess Dayton’s LOTO compliance. We find, however, that a reduction for prior history is warranted because the record sheds little light on the circumstances surrounding the 1993 Des Moines citation, and there is no evidence that Dayton was cited for violating the LOTO standard on any other occasion. *See generally D & S Grading Co.*, 899 F.2d 1145, 1148 (11th Cir. 1990) (evaluating prior history for penalty purposes).

Based on the record, we also find that the gravity was high for all of the violations. The unexpected energization of any of the cited machines during the job tasks at issue could have resulted in serious injury or death to the Dayton employees exposed to this hazard, and at least ninety employees were responsible for performing one or more of these job tasks. Even momentary exposure to equipment that has not been fully deenergized and locked out poses a significant risk of serious harm or death, as illustrated by the fatality here. *See GM*, 22 BNA OSHC at 1048, 2004-09 CCH OSHD at p. 53,627 (“As evidenced by the fatality that prompted OSHA’s inspection here, even momentary exposure to equipment that has not been fully deenergized and locked out poses a significant risk of serious harm or death.”). Dayton, however, provided no energy control procedures for any of the job tasks that exposed its employees to the dangers of unexpected energization. And the record indicates that Dayton employees received no locks during the citation period. In fact, the record establishes that Dayton supervisors rebuffed a banbury operator’s safety concerns when they rejected the employee’s requests for a lock in the fall of 1993.

Dayton argues that the citation items alleging its failure to provide its employees with locks under § 1910.147(c)(5)(i) and train its employees at the authorized level under § 1910.147(c)(7)(i) are duplicative of the citation items alleging its failure to develop, document, and utilize energy control procedures under § 1910.147(c)(4)(i). We reject this argument because these provisions do not “require the same abatement measures” and “abatement of one citation item [would not] necessarily result in the abatement of the other item as well.” *See Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1082 n.5, 2002-04 CCH OSHD ¶ 32,657, p. 51,328 n.5 (No. 99-0018, 2003).

However, in calculating the penalty amounts for each citation item, we acknowledge that the requirement to use energy control procedures under § 1910.147(c)(4)(i) bears some relation to the requirements to provide employees with locks under § 1910.147(c)(5)(i) and to inspect, and certify the inspection of energy control procedures under § 1910.147(c)(6). Specifically, we note that (1) even though energy control procedures need not indicate who is responsible for providing locks to employees, the locks themselves are necessary to utilize such procedures; and (2) inspections of energy control procedures, and certification of such inspections, ensure that the

procedures remain effective when utilized.<sup>21</sup> 29 C.F.R. § 1910.147(c)(4)(i), (5)(i), (6). We have also considered that only one employee was exposed in each of the training citation items. 29 C.F.R. § 1910.147(c)(7)(i). Accordingly, we assess the following penalty amounts for the items we affirm: Items 1 through 6 - \$25,000 each; Item 7 - \$15,000; Items 8a and 8b - \$10,000 (grouped); and Items 9 through 12, 14 through 17, 20 through 30, 32 through 48, 50 through 83, 86, 87, 89 through 98, 100 through 106, and 108 - \$20,000 each.<sup>22</sup>

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<sup>21</sup> With respect to Item 3, which included allegations pertaining to both the curing press and the radial doper, the judge concluded that under OSHA's willful/egregious policy, "there is no rational or legal basis for placing two separate machine types in the same item." The judge therefore divided the violations alleged in Item 3 into two citation items and assessed two separate penalty amounts. Similarly, the judge divided the violations alleged in Item 7 into seven separate citation items based on machine type, grouped items with like characterization for penalty purposes, and assessed two separate penalty amounts. We find that the judge erred in this regard because he lacked the authority to alter the Secretary's lawful exercise of her prosecutorial discretion. *See Major Constr. Corp.*, 20 BNA OSHC at 2110-11, 2004-09 CCH OSHD at p. 53,041.

<sup>22</sup> We note that the judge's decision contains several technical inconsistencies which we resolve as follows. Although the Secretary withdrew Items 85 and 88, the judge stated in paragraph (l) under the order section of his decision that both items were affirmed as serious violations. Then, in paragraph (m) under that same section in his decision, the judge noted that the Secretary had indeed withdrawn Item 88, but failed to mention that the Secretary had also withdrawn Item 85. Also, in paragraph (l), the judge failed to mention, by number, Items 19 and 108, although his reasoning in the decision clearly shows that he intended to affirm these two items as serious violations. Finally, even though the judge noted in paragraph (l) that he was affirming fifty-nine violations and assessing \$1,000 for each one, he only listed fifty-eight items. The total number of listed items would have remained fifty-eight had the judge excluded Items 85 and 88 from, and included Items 19 and 108 in, paragraph (l). We thus construe the judge's decision as affirming Items 19 and 108 as serious violations, leaving Items 85 and 88 as withdrawn, affirming a total of fifty-eight violations in paragraph (l), and assessing a total penalty of \$517,000, which is \$1,000 less than what was ordered in paragraph (n).

**ORDER**

We affirm Willful Citation 1, Items 1 through 6, 7, 8a and 8b, 9 through 12, 14 through 17, 20 through 30, 32 through 48, 50 through 83, 86, 87, 89 through 98, 100 through 106, and 108 as willful, and we vacate Item 19. We assess a total penalty of \$1,975,000, as follows: Items 1 through 6 - \$25,000 each; Item 7 - \$15,000; Items 8a and 8b - \$10,000 (grouped); and Items 9 through 12, 14 through 17, 20 through 30, 32 through 48, 50 through 83, 86, 87, 89 through 98, 100 through 106, and 108 - \$20,000 each.

SO ORDERED.

\_\_\_\_\_/s/\_\_\_\_\_  
Thomasina V. Rogers  
Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
Cynthia L. Attwood  
Commissioner

Dated: September 10, 2010

THOMPSON, Commissioner, dissenting in part:

I join in the majority's decision in all but the following respects: (1) its decision to affirm the violations alleged under 29 C.F.R. § 1910.147(c)(4)(i) on a per-machine-type basis and (2) its decision to characterize all the affirmed citation items as willful.

#### **Citation on a Per-Machine-Type Basis**

Dayton organized the seven types of machines at issue into six production departments: (1) banbury machines in the banbury department, (2) Dayton loaders and tread tubers in the tubing department, (3) beadwinder machines in the beadwinding department, (4) tire assembly machines ("TAMs") in the setup department, (5) radial dopers and curing presses in the curing department, and (6) module machines in the final inspections department.

In Items 1 to 6 of the citation, the Secretary alleged violations of § 1910.147(c)(4)(i) on a per-department basis for Dayton's failure to document, develop, and utilize lockout/tagout ("LOTO") energy control procedures. The judge concluded that while the Secretary had the authority to issue per-instance violations under § 1910.147(c)(4)(i), the number of items should be based on the number of machine-types at issue rather than the number of departments. While I find that under appropriate circumstances, the Secretary has the authority to issue separate violations of § 1910.147(c)(4)(i), she has failed to establish in this case that each type of machine is so different that a separate procedure would be required for each department or machine-type.

The majority simply reasons that these machines are so large, complex and different that it is unfathomable an employer could use one procedure for all of the machine-types at issue. But that approach ignores that § 1910.147(c)(4)(i) is a performance-based standard stated in terms that refer to a single course of conduct rather than an individualized duty. *Gen. Motors Corp.* ("GM"), 22 BNA OSHC 1019, 1046, 2004-09 CCH OSHD ¶ 32,928, p. 53,625 (No. 91-2834E, 2007) (consolidated) (noting 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" (citation omitted)). As such, it allows the employer to determine the procedures necessary to provide effective LOTO protection for its employees. And the language of the standard does not focus on an employer's duty to control the energy sources of the separate machines, but instead requires the employer to develop and document LOTO procedures "for the control of potentially hazardous energy when employees are engaged in the activities covered by [§ 1910.147]." 29 C.F.R. § 1910.147(c)(4)(i); *GM*, 22 BNA OSHC at

1046, 2004-09 CCH OSHD at p. 53,625 (“The key . . . [is] the language of the statute or the specific standard or regulation cited.”) (citation omitted)).

Moreover, as the Secretary explained in the preamble to the LOTO standard, an employer does not always need separate procedures for each type of machine:

Where appropriate, [the sample procedure in Appendix to § 1910.147] may be used as written in the Appendix by simply filling in the blanks. This procedure is not considered unique and can be applied with considerable flexibility to groups of machines or tasks. . . . The sample would need only minor changes to methods, procedures and/or text to be acceptable for many different workplace situations.

Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,671 (Sept. 1, 1989) (final rule). As the Secretary acknowledges in the preamble, an employer’s procedures “can apply to a group of similar machines, types of energy and tasks if a single procedure can address the hazards and the steps to be taken satisfactorily.” *Id.* at 36,670. Indeed, as the majority recognizes in its decision, the Secretary further explained that,

whereas the procedure is required to be written in detail, this does not mean that a separate procedure must be written for each and every machine or piece of equipment. Similar machines and/or equipment (such as those using the same type and magnitude energy) which have the same or similar types of controls can be covered with a single procedure.

*Id.*, amended by 55 Fed. Reg. 38,677, 38,681 (Sept. 20, 1990) (final rule).

So, while it is possible that an employer would need separate energy control procedures for different machines, the Secretary must show that separate procedures are, in fact, necessary in order to support citation on a per-machine-type basis. The Secretary would have to provide evidence showing that the machines at issue neither have “the same or similar types of controls” nor “the same type and magnitude [of] energy,” and that a single procedure would not satisfactorily “address the hazards and the steps to be taken.” *Id.* at 36,670. Here, the Secretary has pointed to no such evidence. In fact, her only argument is that the machine-types at issue are all different merely because they are housed in different departments. It was never the Secretary’s theory that the violations were based on the number of machine-types; rather this was the judge’s theory alone.

Without more, I find that the Secretary has not established per-machine-type violations of § 1910.147(c)(4)(i) in this case.

### **Willful Characterization**

As an initial matter, in its consideration of characterization, I find no fault in the majority's decision to disregard the Des Moines citation and the accompanying memorandum that was sent to the Dayton plant's president. I believe, however, that the evidence upon which the majority does rely shows only that Dayton and its management acted negligently, conduct that does not rise to the level of willfulness. *See AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 75 (D.C. Cir. 2004) (“[A]lthough constructive knowledge or mere negligence suffices for a non-willful violation, willfulness requires conscious disregard or plain indifference to the Act’s requirements.”); *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003) (“Mere negligence or lack of diligence is not sufficient to establish employer’s intentional disregard for or heightened awareness of a violation.”); *GM*, 22 BNA OSHC at 1043, 2004-09 CCH OSHD at p. 53,622 (noting that “the Commission and courts distinguish ‘between mere negligence and willfulness, holding that the former is sufficient for affirming a non-willful violation, but that willfulness is characterized by an intentional, knowing failure to comply with a legal duty’” (citation omitted)). Moreover, the majority’s discussion ignores evidence that seriously undermines any conclusion that Dayton management manifested a willful state of mind.

According to the record, Dayton’s sole reason for not complying with the various provisions of the LOTO standard was its safety managers’ belief that Dayton employees were properly classified at the “affected” level under the standard. For this reason, Dayton did not (1) develop or document LOTO procedures for its employees under § 1910.147(c)(4)(i); (2) train its employees at the affected level, provide them with locks and tags, and require them to utilize LOTO procedures under 29 C.F.R. § 1910.147(c)(4)(i), (5)(i), (7)(i); and (3) inspect energy control procedures on at least an annual basis and certify them under 29 C.F.R. § 1910.147(c)(6). Thus, in my view, the central question here is whether Dayton either had actual knowledge that its employees should be classified at the “authorized” level, or possessed such a state of mind that it would not have cared even if it had been so informed.

#### *McCowan’s Assessment of LOTO Standard*

The majority’s willfulness analysis assumes that the language of the LOTO standard is so plain that Dayton, through its safety managers, must have understood that the job tasks at issue here fell within the definition of “[s]ervicing and/or maintenance.” 29 C.F.R. § 1910.147(b).

The Commission has indeed premised a willful violation on the “uncompromising language of the standard itself.” *Falcon Steel Co.*, 16 BNA OSHC 1179, 1182, 1993-95 CCH OSHD ¶ 30,059, pp. 41,330-31 (No. 89-2883, 1993) (consolidated) (characterizing violation as willful where employer used method of transport that was clearly prohibited under 29 C.F.R. § 1926.550(g)(2) and employer’s failed impossibility defense merely demonstrated its underlying motivation was “convenience and cost”). But I find it inappropriate in this case to characterize the violations at issue as willful based on any assumptions about Dayton’s assessment of the LOTO standard and its application to the job tasks in question.

Phillip McCowan was Dayton’s senior safety engineer responsible for safety management when the LOTO standard first went into effect. McCowan testified that soon after the LOTO standard’s promulgation, he read the standard several times and discussed it with Firestone’s corporate safety director, safety engineers at other Firestone plants, and Ogden Allied, a contractor at the plant responsible for performing maintenance work. In light of the new LOTO standard, he performed a hazard analysis for each of the different job classifications of Dayton employees and reviewed “safe operating procedures” for the various machines at the plant. As manager over the medical department, he performed a complete review of the plant’s OSHA 200 logs as well as every “medical pass” to look for any injuries “caused by unexpected energy sources,” and found none. Following this extensive review, McCowan reasoned that the job tasks at issue fell within the minor servicing exception, 29 C.F.R. § 1910.147(a)(2)(ii) (note), and that Dayton employees were not subject to unexpected energization because they performed “one-man” operations, were in “complete control” of their machines, were in plain view of operators when performing their job tasks, and were working on machines equipped with emergency stop devices and safety ropes. Thus, he concluded that Dayton employees should be classified at the affected level, while Ogden Allied employees should be classified at the authorized level. 29 C.F.R. § 1910.147(b) (defining “[a]ffected employee” and “[a]uthroized employee”).

The majority finds “conscious disregard” by Dayton because McCowan’s “flawed assessments” were “patently inconsistent” with the definition of “[s]ervicing and/or maintenance,” which references the types of activities that Dayton employees performed, such as setting up the machines for production and installing machine parts. But this reading of the definition ignores the further requirement that employees be potentially “exposed to the

*unexpected* energization or startup of the equipment or release of hazardous energy,” a requirement that is also included in the standard’s scope provision. 29 C.F.R. § 1910.147(a)(1)(i), (b). Indeed, McCowan’s assessment was premised in part on his finding after an extensive analysis that Dayton employees were not exposed to the hazard of unexpected energization. Although I agree with the majority’s conclusion that certain employees whom Dayton treated as “affected” should have been treated as “authorized,” evidence in the record show that McCowan’s application of the standard to Dayton’s operations was made in good faith.

On the issue of unexpected energization, the majority correctly cites evidence that the curing presses could close quickly, “within seconds.” I agree this refutes Dayton’s position that employees performing servicing and maintenance on slow moving TAMs, banbury machines, and curing presses were protected from unexpected energization. Also, the majority agrees that certain servicing and maintenance activities were visible from machine control panels, but refutes Dayton’s position by correctly pointing out that observing such activities from the machine control panels does not necessarily prevent possible inadvertent startup, a factor that McCowan did not consider. While such subtleties in the record evidence support a finding that the Dayton employees referenced in the affirmed citation items met the definition of “[a]uthorized employee,” McCowan’s failure to make this same finding following his extensive review of the job tasks, safe operating procedures, and injury logs does not justify the majority’s conclusion that Dayton willfully disregarded an obvious interpretation of the definition of “[s]ervicing and/or maintenance.” 29 C.F.R. § 1910.147(b); *see Johnson Controls, Inc.*, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30,018, p. 41,143 (No. 90-2179, 1993) (noting that “[w]illfulness is negated if the employer held a belief in good faith that its own interpretation was reasonable in the circumstances”; “[a] ‘colorable argument’ can be held in good faith” if it is “nonfrivolous”; and “[a]n employer may in good faith hold even an erroneous belief as long as the belief is plausible under the circumstances”).

Accordingly, I conclude that McCowan’s decision to classify Dayton employees at the affected rather than authorized level shows negligence, not conscious disregard, nor plain indifference to the requirements of the standard or to employee safety.

*Conduct of Mattocks, Dayton's Safety Manager*

The remainder of the majority's characterization analysis focuses at length on five "events" that occurred once Kelley Mattocks became responsible for OSHA compliance at Dayton. According to the majority, these five events "confronted Mattocks with concerns and warnings about LOTO compliance at the Dayton plant." I do not dispute the majority's recitation of factual matters pertaining specifically to the receipt of company memoranda, and Mattocks's conversations with the outside safety consultant and the corporate safety director. But I do disagree with the majority's decision to depart from the judge's findings and credit the testimony of OSHA industrial hygienist Faye Kearney over that of Mattocks. I also disagree with the majority's legal conclusion that these facts establish that Mattocks's conduct here evidenced plain indifference or conscious disregard.

Although the judge recognized that Kearney and Mattocks provided conflicting testimony regarding what occurred during the ergonomics inspection, he made no credibility determinations regarding this conflicting testimony. Ordinarily, the Commission will remand a case to the judge if it finds that credibility findings are necessary to resolve conflicting testimony. *See Schuler-Haas Elec. Corp.*, 21 BNA OSHC 1489, 1495, 2004-09 CCH OSHD ¶ 32,816, p. 52,601 (No. 03-0322, 2006). But where, as here, the judge who heard the testimony has retired, the Commission has proceeded without the benefit of credibility findings. *Id.*, 2004-09 CCH OSHD at p. 52,601 (resolving matter based on record where judge who heard case is deceased); *Sal Masonry Contractors Inc.*, 15 BNA OSHC 1609, 1611, 1991-93 CCH OSHD ¶ 29,673, p. 40,208 (No. 87-2007, 1992) (resolving matter based on record where judge who heard case has retired).

Given that the Secretary bears the ultimate burden of proving willfulness and that demeanor-based credibility findings were not made here by the judge, I see no basis to credit any testimony from Kearney that conflicted with Mattocks's version of events. *See Schuler-Haas Elec. Corp.*, 21 BNA OSHC at 1495, 2004-09 CCH OSHD at p. 52,601 (concluding that, without credibility findings, evidence was insufficient to establish willfulness in case brought under construction asbestos standard where foreman's testimony regarding his belief that area was safe or was no longer a "regulated area" could not be discredited). In crediting and relying on Kearney's conflicting testimony, the majority emphasizes that it is "specific, direct, and corroborated by her actions." The implication is that Mattocks's testimony exhibits none of

these characteristics. But while Kearney included some detail in her testimony regarding what occurred during the two walk-arounds, Mattocks did as well. Indeed, Mattocks specifically testified that (1) Kearney never told her of danger zones in the tubing, beadwinding, or setup departments; (2) as to the curing department, Kearney expressed concern only regarding employees who might stand on oily top hats; (3) as to the setup department, Kearney expressed concern only regarding the use of alligator clips to hold the manual switch on the TAM, a procedure that Mattocks acknowledged as inappropriate at that time of the inspection and for which she took immediate corrective action; (4) Kearney never advised her of LOTO-related hazards in any of the departments; and (5) Kearney never asked how any of the equipment at issue worked.

As the majority points out, evidence in the record shows that Kearney raised concerns about Dayton's LOTO compliance with her supervisors and prepared an OSHA worksheet describing several of the "violations" she observed. But this evidence does not establish, in my mind, whether she ever discussed specific LOTO hazards with Mattocks. In fact, other evidence in the record casts doubt on whether Kearney spoke in anything other than "mere generalities" about LOTO compliance to Mattocks. For example, Mattocks took twenty-six pages of notes during the various stages of the ergonomics investigation, and the only reference to LOTO was a notation that Kearney had requested a copy of the LOTO program. Additionally, Kearney's claim she confronted Mattocks after her OSHA inspection with "concerns" about LOTO compliance at the Dayton plant directly conflicts with undisputed evidence about the content of the OSHA closing conference. None of the notes taken during the closing conference by Kearney herself, or by a Dayton employee on behalf of Mattocks, included any reference to LOTO. Certainly, Kearney's testimony could be accurate in all respects, but I find nothing in the record that warrants crediting her testimony over the equally specific testimony of Mattocks. Accordingly, based on my review of the record, I would not defer to Kearney's version of events without the benefit of demeanor-based credibility determinations.

Unless Kearney's conflicting testimony is credited over Mattocks' contradictory testimony, the record overall shows only that Kearney and George McCown—the CO who subsequently conducted the LOTO inspection—made vague and general statements to Mattocks about LOTO "opportunities" at Dayton's plant. The majority suggests that "McCown reviewed with [Mattocks] the alleged LOTO violations" in the six departments. Mattocks testified,

however, that while she and McCown visited these departments, McCown merely discussed “some opportunities” or “situations” with respect to LOTO at the closing conference. Moreover, based on Mattocks’s testimony, it is not even clear that they observed all of the specific servicing and maintenance activities at issue here during McCown’s visit. Unfortunately, McCown was not called as a witness, and these ambiguities in the record therefore persist.

But even if Kearney’s testimony were credited, the Secretary still falls short of establishing that Mattocks’s conduct following her conversations with Kearney in any way demonstrated conscious disregard or plain indifference. Kearney’s comments to Mattocks were made in the context of an extensive ergonomics inspection, not a LOTO inspection. Kearney, an industrial hygienist, admitted that she specialized in health-related inspections, not safety-related inspections. Even the OSHA area director who received Kearney’s worksheet regarding possible LOTO violations admitted that he was not comfortable with her “level of expertise” because she “doesn’t normally look at mechanics’ things.” As such, it was not unreasonable for Mattocks, a safety manager, to continue to rely on Dayton’s extensive analysis concluding that Dayton employees were not exposed to the hazard of unexpected energization.

To ascribe a willful state of mind to Mattocks, the majority relies on precedent that equates “deliberate avoidance of knowledge” to actual knowledge. *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) (noting that “‘actual knowledge and deliberate avoidance of knowledge are the same thing,’” and that “[b]ehaving like an ostrich supports an inference of actual knowledge” (citation omitted)). But the majority either ignores or misconstrues evidence showing that Mattocks did not deliberately avoid Dayton’s obligations under the LOTO standard. Specifically, Mattocks discussed LOTO issues with the outside safety consultant for thirty minutes, and there is nothing in the record to show that he ever recommended that Dayton engage in any particular course of action. And even if the safety consultant had made such a recommendation but Mattocks chose to adhere to her own interpretation of the standard, it is inappropriate to cite such a choice as evidence of willful intent. If anything, Mattock’s decision to provide Dayton employees with training at the affected level and then pick the consultant’s brain for thirty minutes about the scope and application of the LOTO standard confirms her good faith intent to fully examine the continuing validity of McCowan’s analysis of the LOTO standard’s application to Dayton’s servicing and maintenance activities. *See Falcon Steel Co.*, 16 BNA OSHC 1179, 1182, 1187, 1993-95 CCH OSHD

¶ 30,059, pp. 41,331, 41,336 (No. 89-2883, 1993) (consolidated) (ascribing “neither credit nor blame” where, after hiring safety consultant, employer failed to respond to consultant’s warnings, because penalizing such behavior might discourage employer from creating and developing its own safety programs). Additionally, in response to a December 1992 memorandum regarding LOTO compliance, it was Mattocks who took affirmative steps to verify that the facts underlying McCowan’s legal conclusion classifying all Dayton employees at the affected level had not changed. It stands to reason that had Mattocks intended to turn a blind eye to the requirements of the LOTO standard, she would never have inquired and confirmed with Dayton’s production supervisors that the nature of their employees’ jobs remained the same. Finally, following the accident in October 1993, it was Mattocks who, yet again, reevaluated how the LOTO standard applied to Dayton’s servicing and maintenance activities.

Based on the foregoing, I believe that any shortcomings in Mattocks’s efforts to comply with the LOTO standard were mere negligence and do not evidence a state of mind that supports a finding of willfulness. *See Trinity Indus., Inc.*, 20 BNA OSHC 1051, 1068, 2002 CCH OSHD ¶ 32,666, p. 51,414 (No. 95-1597, 2003) (finding violation not willful where “the Secretary introduced no evidence that Trinity knew that its training program failed to comply with OSHA standards or that Trinity would have failed to correct deficiencies in its program had it known of the duty to do so”), *aff’d without publication*, 107 Fed. App. 387 (5th Cir. 2004).

Accordingly, I respectfully dissent.

Dated: September 10, 2010

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/s/  
Horace A. Thompson III  
Commissioner



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SECRETARY OF LABOR,  
Complainant,  
v.

DAYTON TIRE, BRIDGESTONE/ FIRESTONE  
Respondent.

UNITED STEELWORKERS OF AMERICA,  
LOCAL 998,  
Authorized Employee  
Representative.

OSHRC  
Docket No. 94-1374

Appearances:

James E. Culp, Esq.  
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Jones, Day, Reavis & Pogue  
Washington, D.C.  
For Respondent

Tony Carr  
USW Local 998  
Oklahoma City, OK  
For Employees

Before: Administrative Law Judge Robert A. Yetman

**DECISION AND ORDER**

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. § 651 *et. seq.*

As a result of an inspection of Respondent's worksite located at Oklahoma City, Oklahoma during the period October 19, 1993 to November 17, 1993, the Occupational Safety and Health Administration ("OSHA") issued one willful citation to Respondent dated April 18, 1994 alleging

one hundred and seven (107) violations of the so called lockout/tagout standard (LOTO) set forth at 29 C.F.R. § 1910.147 *et seq.* with a proposed penalty of \$70,000 for each violation. The total proposed penalty was \$7,490,000.00. Respondent filed a timely notice contesting the citation and a complaint was filed by the Secretary of Labor (“Secretary”) with this Commission on May 23, 1994. On June 15, 1994, Respondent filed its answer admitting the jurisdictional allegations, generally denying the allegations within the complaint and citation, and asserting ten affirmative defenses. In addition to filing its answer, Respondent filed a Motion to Dismiss and/or For Summary Judgment on the ground that the complaint and citation filed by the Secretary were time barred by the six-month statute of limitation set forth at section 9(c) of the Act. That motion was denied by the undersigned in an order dated July 26, 1994.<sup>1</sup>

The citation issued to Respondent was incorporated in its entirety as an exhibit to the complaint. As previously stated, the citation contained 107 separate alleged violations. These violations fall within five categories. First, violations 1 through 6 alleged separate violations of 29 C.F.R. § 1910.147(c)(4)(i); that Respondent failed to develop, document and utilize procedures for the control of potentially hazardous energy for seven distinct types of machines within the plant. (Respondent’s Statement of Position dated April 11, 1995) Second, violation 7 alleges that Respondent violated 29 C.F.R. § 1910.147(c)(5)(i) by failing to provide locks, tags, chains or other appropriate equipment to authorized employees in order to isolate, secure, or block machines or equipment from energy sources. This single item applies to all of the machinery and equipment which Complainant asserts were subject to LOTO procedures. Third, violations 8(a) and 8(b) allege violations of 29 C.F.R. § 1910.147(c)(6)(i) and (c)(6)(ii), respectively, in that Respondent failed to conduct an annual or more frequent inspection of its energy control procedure (item 8(a)) and failed to certify that said inspections had been conducted (item 8(b)). These violations apply to all of the machinery subject to LOTO and were combined for purposes of proposing a single penalty. The fourth category constitutes the bulk of the citation in terms of the number of alleged violations and the proposed penalty. Alleged violations 9 through 106 list 98 employees who, according to

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<sup>1</sup>Respondent’s Petition For Interlocutory Review and Stay of Proceedings regarding that decision was denied by the Review Commission on August 16, 1994.

Complainant, were not trained at the “authorized level” as required by 29 C.F.R. § 1910.147(c)(7)(i). Each separate violation of this standard has been assessed a proposed penalty of \$70,000 by the Secretary. The total proposed penalty for Respondent’s alleged failure to train its employees was originally \$6,860,000. Fifth, Respondent has been cited for one alleged violation of 29 C.F.R. § 1910.147(d) (item 107) in that Respondent failed to utilize LOTO procedures while an employee was engaged in setup operations on a specifically identified machine on October 19, 1993. Each alleged violation has been classified as “willful” and assessed the maximum proposed penalty of \$70,000.

During the course of this litigation, the Secretary moved to amend the citation and/or complaint on four occasions. By motion dated July 18, 1994, Complainant sought to amend the complaint by (a) adding the names of three additional employees exposed to alleged hazards, (b) identifying an additional hazardous activity, i.e., changing P.C.I. rings for items 3,7,8(a), 8(b), 35, 41, and 50 of the citation, and (c) adding an additional alleged failure to train violation (item 108).<sup>2</sup> By motion dated August 3, 1994, Complainant sought leave to correct a clerical error set forth at paragraph VI of the complaint. By motion dated February 10, 1995, Complainant sought to amend the citation by withdrawing the alleged violations set forth at items 13, 18, 31, 49, 84, 88 and 99 and the proposed penalty for each violation for a total penalty reduction of \$560,000. Complainant also corrected misspelled names at items 46, 48, 60, 72, 74, and 77 as well as the job classifications for employees listed in items 14 and 23 of the citation. By motion dated September 6, 1995 Complainant moved to amend the citation and complaint to conform to the evidence to include the “Dayton Loader” in the descriptive language of items 4, 19, 58 and 108 of the citation as a piece of equipment which present hazards to employees. All of these motions were granted.

The parties engaged in vigorous and lengthy pretrial discovery which raised several procedural disputes. These disputes were resolved and the matter was set for trial to commence April 11, 1995 at Oklahoma City, Oklahoma. Respondent filed a Motion For Summary Judgment prior to trial seeking judgment in its favor on the grounds that (1) the evidence developed by the parties during discovery failed to support the Secretary’s allegation that Respondent “willfully”

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<sup>2</sup>This violation alleges that Respondent failed to train a BEI attendant, who unjams the extruders and mills in the Tubing Department, at the authorized level.

violated the standards and (2) citing violations on an instance-by-instance basis is inappropriate in this case because all of the exposed employees were exposed to a single alleged hazard resulting from a single course of conduct. This motion was denied in a Decision and Order dated March 22, 1995.

The hearing commenced on April 11, 1995, at Oklahoma City, Oklahoma and concluded on September 12, 1995 after thirty-one days of trial and ninety witnesses. This was a complex litigation involving multiple legal and factual issues. Each member of the litigation team for both the Secretary and Respondent, as well as the employee representative, represented their respective clients in a vigorous but professional manner often under adverse conditions; not the least of which was being in close proximity to the site of the Oklahoma City bombing on the day of that tragedy.

### **BACKGROUND**

Respondent, Dayton Tire, is a division of Bridgestone/Firestone, Inc. and is engaged in the business of manufacturing tires. The Oklahoma City, Oklahoma facility which is the subject of this litigation, is approximately 72 acres in size, employs approximately 1,200 employees and produces an average of 35,000 tires per day. The plant was initially opened during 1969 and has continuously produced tires since that time. Tire building is a complex process from the initial mixing of the various grades of rubber to the final inspection function. The building of a tire was described by one witness as similar to building a shoe. The final product consists of a number of different components that are individually produced and assembled in stages along the production process. Hundreds of machines performing a large variety of tasks are involved in the process. The manufacturing process itself is divided into "departments" and certain types of machines are located in each department. The following is a description of those departments which are relevant to this proceeding.<sup>3</sup>

The first department in the production process is the Banbury department. In this department pigments and rubber used in the manufacturing process are weighed, sorted and mixed. Various machines to be described *infra* are used to perform these functions. After the rubber is mixed, it travels into a chute through a transfer mix and roller die to a slitter knife which cuts the rubber into

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<sup>3</sup>There are a large number of production processes within the plant which are not germane to this litigation. Only those departments which contain machinery relevant to this litigation are described herein. Therefore, this should not be considered as a complete description of the production process.

two sheets. The rubber sheets are placed into a lubricant solution and run through a cooling “festoon.” The rubber is “wig-wagged” by a Dayton loader machine onto pallets for transport to other departments. The rubber at this point has been formed into a long flat and thin sheet approximately four feet wide.

The next department in the production process is the tubing department. In this department rubber is fed into extruders and mills to produce sidewalls and treads for the tires. Rubber is also processed in the beadwinding department. This department produces “beads”; that is, that part of the tire which fits within the wheel rim. Employees in this department operate a wire winding machine which coats strands of wire and forms the coated wire into a circle. This circle of coated wire is assembled with other components during the tire building phase.

The tire building department assembles the various components into a “green” tire. This assembling process is performed on tire assembly machines (“TAM”) and is performed in two stages; the so called first stage TAMS and the second stage TAMS. Only the second stage TAM machines are relevant to this proceeding. In the second stage operation, the tire “carcass” produced in the first stage has placed upon it bands of steel belt and the tire tread. Respondent utilized three types of second stage TAMS: the “99”, the “85” and a modified 85 known as the “M-6.” These machines are described in greater detail *infra*. At this point in the process, the “green” tire, for the first time, resembles a finished product tire.

After the second stage tire building department, the green tires are moved to the radial doper department. At this point, a machine known as the radial doper applies a lubricant to the interior of the tire and paints the exterior of the tire. From the radial doper department, the tires proceed to the curing department where, by application of heat and pressure in the curing press, the tires are “cured,” the lettering is imprinted on the side walls and the tread design is formed. Finally, the tires are run through a machine known as the “tire uniformity optimizer” (“TUO” or “module”) which checks the tire for shape, grinds rubber from the white sidewalls and also paints the white sidewalls.

### **STIPULATIONS**

The parties stipulated to the following facts:

Module Operators (Joint Exh. #1)

1. Prior to April 18, 1994, Dayton Tire did not train its employees at the authorized level.
2. In 1992, Dayton Tire provided its employees with affected level training.
3. Between October 19, 1993 and April 18, 1994, Dayton Tire module operators did not change or install parts in the TUO section of the machine.
4. Dayton Tire module operators were not given locks prior to April 18, 1994.
5. During the procedure of changing the grinding stone on the white sidewall grinder, the module operator's hands generally come into contact with the grinding stone.
6. The white sidewall grinder section of the module machine is in its "manual" or "set-up" mode while the module operator performs a grind stone change.
7. The white sidewall grinder section of the module machine is in its "manual" or "set-up" mode while the module operator performs a dust scoop change.
8. The white sidewall grinder section of the module machine is in its "manual" or "set-up" mode while the module operator performs a brake pad change.
9. The white sidewall grinder section of the module machine is in its "manual" or "set-up" mode while the module operator performs a chuck change.
10. When a safety rope on a module machine has been "pulled" and has stopped or prevented the operation of the machine, the safety rope must be manually reset before the machine can again begin operations.

#### TAM Size Changers (Ct. Exh. #4)

1. The second stage TAMs are used for producing 13- to 15-inch passenger and light truck tires.
2. The 99 TAM and 85 TAM differ in that the 99 TAM has a stationary bandbuilder and the entire tire building process proceeds inline as contrasted to the 85 TAM, other than the M-6 which has the bandbuilder connected to a swing arm which takes the tread and belts to grab assembly. In the 99 TAM, a large transfer ring moves on a traverse in line with the bandbuilder to take the tread assembly from the bandbuilder and then moves across the traverse to the pie pans to transfer the tread package to the body ply assembly which is on the pie pans. In the 85 TAM (other than the M-6) the bandbuilder

moves on a swing arm to the transfer carriage, and then once the tread is transferred to the carriage, it moves down the traverse and places the tread over the body ply assembly. The M-6 is an 85 TAM but performs its functions in an inline fashion without a swing arm.

3. In order to build a tire of a different size or different specifications of the same size on a TAM, either a partial or full size change must be performed.
4. On the 99 TAM, when energized, the bandbuilder and hub can be rotated forward and reverse; the transfer carriage can be moved from the pie pans to the bandbuilder; the 6 grab segments can be moved from an open position (large gaps between the segments) to a close position (smaller gaps between the segments); and the pie pans can be rotated.
5. On the M-6 TAM, when energized, the bandbuilder and hub can be rotated forward and reverse and can be moved by the bandbuilder assembly on a rail system from the tread tray to the grab assembly.
6. On the M-6 TAM, when energized, the grab assembly can move on a rail system from a home position to and from the pie pans; the 6 grab segments can be moved from an open position (large gaps between the segments) to a close position (smaller gaps between the segments); and the pie pans can be rotated.
7. TAM size changes on the second stage TAMs vary from the simple change of the specifications of the computer program to a full TAM size change which include, inter alia, removing and replacing the bandbuilder, the hub, the grabs and the pie pans, removing and replacing the belts on the belt servers, adjusting the grabs and stitcher, and building the check tires.
8. ██████████ was employed by Dayton Tire as a TAM size changer on October 19, 1993. On that date, he was assigned to perform a full TAM size change on the M-6 85 TAM. ██████████ completed the removal and replacement of the components of the M-6 TAM.
9. In 1992, Dayton Tire provided its employees with affected level training.
10. A full size change includes changing the hub, pie pans, grabs and band builder.
11. When a safety rope on the TAM has been pulled, and has stopped or prevented the operation of the machine, the safety rope must be manually reset before the TAM can again begin operations.

12. The check tires built by TAM size changers which meet specifications are sold by Dayton Tire.
13. Immediately following the [REDACTED] accident, Dayton Tire began an investigation to analyze the possible causes of the accident.
14. On October 19, 1993, TAM size changer [REDACTED] was fatally injured on the Mike 6 TAM.
15. During the period of October 19, 1993 and April 18, 1994, Dayton Tire facility had first stage TAMs known as BPA or 88B TAMs, and second stage TAMs designated as 85, M-6 85 and 99 TAMs.
16. There are approximately 18 TAMs of the 85 TAM type and 39 of the 99 TAM type at the facility.
17. The first stage machines produce what is known as body ply assembly which consists of, inter alia, a inner liner, ply, beads and sidewall depending on the type of tire being built.
18. The purpose of the second stage machine is to produce what is known as the "green tire" or uncured tire. In general, the second stage TAMs perform this function by initially assembling the belts and tread for the tire and then transferring the belt and the tread to the body ply assembly which has been expanded on the pie pans to form the tire. A stitcher seals the tire components together by squeezing out the air in between the component parts to assure the parts have adhered together.
19. The person performing the TAM size change is known as a TAM size changer or setup person and TAM size changers worked in Department 134 or Setup.
20. During the period of October 19, 1993 to April 18, 1994, there were approximately 23 TAM size changers in Department 134.
21. A TAM size changer can be called upon to perform size changes on either the first or second stage TAM machines.
22. A partial size change consists of removing and replacing some, but not all, of the grabs, pie pans, and/or bandbuilder, individually or in any combination.

23. In order for the TAM size changer to perform a full size change on the 99 TAM, 85 TAM and the M-6 TAM, the Tam size changer must remove and replace the bandbuilder, grabs, pie pans, and hub, utilizing a wrench to remove and insert bolts. The TAM size changer must also lift, remove and insert these parts. During the course of these activities of removing and replacing these parts, the TAM size changer will at various times place parts of his body in the transfer area of the TAM.
24. The 99 TAMs have electrical, pneumatic, and hydraulic energy sources; the M-6 85 TAM has electrical and pneumatic energy sources; and the 85 TAM has electrical, pneumatic, and hydraulic power with some having gas (nitrogen) assisted hydraulic power as energy sources.
25. Prior to April 18, 1994, Dayton Tire did not train any TAM size changers at the authorized level for lockout/tagout purposes.
26. Dayton Tire TAM size changer employees were not provided with locks and/or tags prior to April 18, 1994.
27. During the period of October 19, 1993 to April 18, 1994, Terry Hughes, Willie Kinchion, Jackie Whitten, Darrell Mueller, Dennis Packham, Mark Ward, Lewis Contreras, Richard Parker, Fred Harris, III, Charles Brannum, Kevin Abrahamson, Larry Westrope, Albert Starry, Larry Henry, Richard Thompson, Joe Hacker, Jim Cossey and Helen Jones were employed by Dayton Tire as TAM size changers.

Radial Dopers (Ct. Exh. #4)

1. In 1992, Dayton Tire provided its employees with affected level training.
2. Radial doper machines are located in the curing department.
3. During the period of October 19, 1993 to April 18, 1994, there were seven (7) radial dopers in the curing department.
4. The purpose of the radial doper is to take the green tire produced by the second stage TAM machines and spray blem paint and dope on the tire.
5. The blem paint and dope sprayed on the tire is necessary to allow the tire to be cured properly.
6. The radial doper operator/attendant places the green tires on a conveyor leading to a clamp arm which picks up the tire and carries the tire into a spray

booth which sprays the blem paint and dope on the tire. The clamp arm spins the tire quickly so that the blem paint and dope can be sprayed throughout the tire.

7. As the clamp arm is spinning the tire, spray nozzles located around the exterior of the tire spray blem paint on the outside of the tire. During this process another spray nozzle rises up into the center of the tire and sprays dope on the inside of each tire.
8. Some of the spray booths of the radial dopers are enclosed in plexiglass and others are open.
9. Once the blem paint and dope have been sprayed on the green tire, the clamp arm drops the tire on a conveyor which leads back to the operator. The operator/attendant then removes the tires from the conveyor and places them on a rack.
10. A radial doper operator/attendant is expected to remove the buildup of blem paint and dope on the clamp arm and spray nozzles approximately every two (2) hours.
11. During the period of October 19, 1993 to April 18, 1994, the radial doper attendant/operator placed the machine in manual and brought the clamp arm into the booth in order to remove the buildup of blem paint and dope on the clamp arm.
12. Once the clamp arm was in the booth, the operator/attendant used a wire brush, knife and/or paper towels to remove the blem paint and dope buildup on the clamp arm. The operator/attendant had to place his hands, his arms, and at times his upper body in the cabinet to clean the clamp arm. During this process, the operator/attendant's body would come within a couple of inches from the clamp arm.
13. To remove the buildup of blem paint and dope from the spray nozzles, the radial doper operator/attendant reached into the cabinet and removed the collar around the nozzles. Using a wire brush, knife and/or paper towels, the radial doper attendant/operator removed the buildup of blem paint and dope from the nozzles and then reinstalled the collar.
14. The energy sources for the radial doper included electrical and pneumatic sources.

15. During the period of October 19, 1993 to April 18, 1994, the energy sources were not locked out during the removal of blem paint and dope from the clamp arm and spray nozzles.
16. During the period of October 19, 1993 to April 18, 1994, the following people were employed by Dayton Tire as radial doper operators/attendants: Herman Ashlock; Robert Pound; Phil Burrous; Kevin O' Connor; Brad Hall; Chris Guthery; Alfred Watson; Allen Van Meter; Mike Woody; and John Decesaro.
17. Radial doper operators/attendants employed by Dayton Tire between October 19, 1993 to April 18, 1994 removed the buildup of blem paint and dope from the clamp arm and spray nozzles as part of their duties.
18. Prior to April 18, 1994, none of the radial doper operators/attendants had been trained at the authorized level for lockout/tagout purposes.
19. During the period of October 19, 1993 to April 18, 1994, Dayton Tire considered all the radial doper operators/attendants to be affected employees, and none of the radial doper operators/attendants used lockout/tagout procedures when they removed the buildup of blem paint and dope from the clamp arm and spray nozzle.
20. Before April 18, 1994, none of the radial doper operators/attendants had been provided with locks, tags, chains, wedges, key blocks, adapter pins, self locking fasteners, or other hardware for isolating, securing, or blocking of machines or equipment from energy sources.
21. During the period of October 19, 1993 to April 18, 1994, Mr. Lee Jones was employed by Dayton Tire as a utility and service employee in the curing department.
22. As a utility and service employee for the curing department, Mr. Lee Jones was subject to and performed the duties of a radial doper attendant during the period of October 19, 1993 to April 18, 1994, including removing the buildup of blem paint and dope from the clamp arm and spray nozzles.
23. Prior to April 18, 1994, Lee Jones had not been trained at the authorized level for lockout/tagout purposes, and Dayton Tire considered Lee Jones to be an affected employee.

24. During the period of October 19, 1993 to April 18, 1994, Lee Jones never used lockout/tagout procedures when he removed the buildup of blem paint and dope from the clamp arm and spray nozzles.
25. Before April 18, 1994, Lee Jones had not been provided with locks, tags, chains, wedges, key blocks, adapter pins, self locking fasteners, or other hardware for isolating, securing, or blocking of machines or equipment from energy sources.

Mold/Bladder Changer (Ct. Exh. #4)

1. In 1992, Dayton Tire provided its employees with affected level training.
2. A mold changer never performs a PCI ring change without also performing a mold change.
3. The Dayton Tire plant at Oklahoma City, Oklahoma also includes Department 132, the Curing Department.
4. The Curing Department includes 220 curing presses of which 180 are normally in use.
5. The curing press takes the green tire from the radial doper area and vulcanizes the tire through heat and pressure into the shape of the finished tire.
6. The plant has curing presses of two sizes. The presses have a pair of either 40-1/2 inch or 43 inch diameter platens.
7. The curing press has two sides. On the front side is a large and heavy press which contains two molds primarily made of aluminum and steel which sit side by side. The upper part of the press can be moved up and down. Among the other parts of the front side of the curing press are the tire loaders which are attached to the front of the press. The tire loader can move with the upper portion of the press, and can move independently of the press. On the back side of the press are four post cure inflators.
8. Green tires are placed in front of the press and tire loaders move mechanically down on a motor and chain system to pick up the tires and place them in the molds for curing. Once inside and with the press closed, the bladder which is made of rubber, inflates and pushes the tire against the mold to form the tread design and lettering. The tire is vulcanized by a combination of steam, heat and pressure. When that process is complete, the

tires are removed onto post cure inflators (PCI) to be inflated and cooled. The PCI then mechanically places the cured tires onto a conveyor to be sent to final inspection.

9. Two functions which the mold/bladder changer must perform are changing the molds and PCI rings.
10. The molds are changed to accommodate a different type or size of tire. To accomplish a mold change, the mold/bladder changer removes the bladders, the ejector head, and the mold. Once those components are removed, the mold/bladder changer installs new molds, new ejector head and new bladders.
11. In order to accomplish these functions, the mold changer must reach inside the center of the mold to remove the bladder and ejector heads. During various parts of this function, the mold changer will have parts of his body directly below the tire loader. The mold changer must move the press up and down to remove the bolts to allow the mold to be removed. While loosening the bolts, the mold changer must reach across the mold. The employee uses a forklift to move the molds out of the press and place molds into the press. Similarly, the mold changer reverses the process to reinstall the parts which again caused him to be at times below the tire loader and the press itself.
12. At all times during the mold change the curing press is placed in manual and energized.
13. A PCI ring change is performed whenever the bead size of the tire being cured changes, e.g. 13 inch to 14 inches.
14. To perform PCI ring change, the mold changer places the PCI in manual and closes the yoke. The mold changer removes the two bolts on the top ring and two bolts on the bottom ring. The mold bladder changer opens the yoke then removes the old rings and installs new rings. The mold changer closes the yoke and reinstalls the four bolts. The mold changer would repeat this process for the other side.
15. The energy sources on the curing press are pneumatic, electrical and steam.
16. The PCI is energized throughout the installation of new rings.
17. The energy sources for the PCI are electrical and pneumatic.
18. During the period of October 19, 1993 to April 18, 1994, Mr. Daniel Trine, Ms. Stephanie Todd, Mr. Don Perkes, Mr. Tom Elwell, MR. Jim Lindsey,

Mr. Jodie Turner, Mr. Roy Weil, and Mr. Jim Earle were employed by Dayton Tire as mold/bladder changers.

### **DISCUSSION**

At the conclusion of the hearing, the parties filed post hearing memoranda of law and reply memoranda. Before discussing the particular merits of this case, it is necessary to consider two issues raised by Respondent in its memoranda which, if decided in Respondent's favor, would dispose of this matter without further analysis of the facts and the application of law.

First, Respondent renews its argument that the citation issued in this case was not timely issued in accordance with § 9(c) of the Act and, therefore, should be vacated. Respondent points to the testimony of compliance officer Kearney that she viewed conditions at Respondent's worksite which she believed presented "lockout/tagout hazards" as early as June 14, 1993. (Tr. 4632-33, 4667) Since the citation was issued more than six months after that date, Respondent argues that the citation is time barred by section 9(c) of the statute. This argument was made and considered at length by the undersigned in a decision issued July 26, 1994, in response to Respondent's Motion For Summary Judgment, wherein it was concluded that the citation was not time barred. Relying upon *Secretary of Labor v. Safeway Store No. 914*, 16 BNA OSHC 1504 (1993), this ALJ stated: "[A]ccording to the pleadings...the citation issued in this matter is based upon information gathered during the inspection conducted from October 19, 1993 to November 17, 1993. Section 9(c) does not bar the Secretary from citing the employer for violations observed during that inspection notwithstanding the fact that the same or similar violations were observed, but not cited, during an earlier inspection." Respondent has not raised anything at this point in the litigation which was not before the court prior to the issuance of that decision. Accordingly, there is nothing in this record which mandates a reconsideration and reversal of that decision.

The second dispositive issue raised by Respondent asserts that the LOTO standard is unenforceably vague by its terms and the citation and complaint, without any reference to the specific facts of this matter, should be vacated on that basis. Respondent points specifically to the

term “unexpected energization” set forth at 29 C.F.R. § 1910.147(a)(1)<sup>4</sup> and the terms “minor servicing activities” and alternative “effective” protection set forth in the note at 29 C.F.R. § 1910.147(a)(2)(ii)(B)<sup>5</sup> as being undefined, vague and imprecise. Respondent asserts that the aforesaid terms are subject to multiple interpretations and it is not possible to predict or anticipate the Secretary’s interpretation of those terms.

It is well established that “statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid.” *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978). The Commission has stated that “[a]n employer can only be required to comply with requirements of which it has either actual notice or notice derived from the language of the regulation and surrounding circumstances.” *Secretary of Labor v. J.A. Jones Construction Company*, 15 BNA OSHC 2201, 2205 (1993) (quoting *Diebold, Inc. v. Marshall supra*). See also *United States v. L. Cohen Grocery*, 255 U.S. 81 (1921). Moreover, “the applicability of penal sanctions in regulations is to be narrowly construed by the judiciary and...OSHA regulations must ‘be written in clear and concise language so that employees will be better able to understand and apply them’ ....” *Kropp Forge v. Secretary of Labor*, 657 F.2d 119, 122 (7th Cir. 1981) (quoting *Dravo Corporation v. OSHRC*, 613 F.2d 1227, 1234 (3rd Cir. 1980)). The Commission has held, however, that

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<sup>4</sup>29 C.F.R. § 1910.147(a)(1)(i) provides: This standard covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. This standard established minimum performance requirements for the control of such hazardous energy (emphasis in the original).

<sup>5</sup>29 C.F.R. § 1910.147(a)(2)(ii)(B) provides: (ii) Normal production operations are not covered by this standard (See subpart O of this part). Servicing and/or maintenance which takes place during normal production operations is covered by this standard only if:

\* \* \*

(B) An employee is required to place any part of his or her body into an area on a machine or piece of equipment where work is actually being processed (point of operation) or where an associated danger zone exists during a machine operating cycle.

NOTE: *Exception to paragraph (a)(2)(ii):*

Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations, are not covered by this standard if they are routine, repetitive, and integral to the use of the equipment for production, provided that the work is performed using alternative measures which provide effective protection (See subpart O of this part).

“[a]bsolute precision of language...is not required, and a standard is not impermissibly vague simply because it is broad in nature.” *J.A. Jones supra* at 2205. The Commission further stated that “a broad regulation must be interrupted in the light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person may be used to give meaning to such a regulation in a particular situation.” *Id.* In *Secretary of Labor v. R&R Builders Inc.*, 15 BNA OSHC 1383 (1991), the Commission stated that a standard is not vague and unenforceable “if ‘a reasonable person,’ examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of a hazard and of a means by which to abate it.” *Id.* at 1387.

Without any reference to the particular merits of this case or the specific operation of any of the machines cited by Complainant, Respondent broadly asserts that the lockout standard is unenforceable because the term “unexpected energization” (see footnote 4) is not defined. This precise issue was considered by the Review Commission in *Secretary of Labor v. General Motors Corporation, Delco Chassis Division*, 17 BNA OSHC 1217 (1995). The Commission concluded that “by its plain meaning, the standard applies only to those machines and pieces of equipment for which energization or start up would be unexpected by employees.” The Commission reasoned that “the standard clearly and unambiguously applies only where the Secretary shows that unexpected energization, start up or release of stored energy could occur and cause injury. Under these circumstances, we find it unnecessary to look outside the standard itself for guidance as to its meaning.” *Id.* at 1219. The Court of Appeals for the Sixth Circuit affirmed the Commission and stated:

We conclude that the plain language of the lockout standard unambiguously renders the rule inapplicable where an employee is alerted or warned that the machine being serviced is about to activate. In such a situation, “energization” of the machine cannot be said to be “unexpected” since the employee knows in advance that machine startup is imminent and can safely evacuate the area. The standard is meant to apply where a service employee is endangered by a machine that can start up without the employee’s foreknowledge. In the context of the regulation, use of the word “unexpected” connotes an element of surprise, and there can be no surprise when a machine is

designed and constructed so that it cannot start up without giving a servicing employee notice of what is about to happen.

*Secretary of Labor v. General Motors Corporation, Delco Chassis Division*, 17 BNA OSHC 1673 (1996).

Thus, contrary to Respondent's assertion, the term "unexpected energization" is not so vague as to render the standard unenforceable. However, whether the standard has been violated because an employee is exposed to "unexpected energization" is dependent upon the facts surrounding the alleged servicing and/or maintenance performed for each type of machine cited and whether an employee is exposed to injury without warning if said machine is activated. *Faultless Div. v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982). Moreover, the interpretation placed upon that language in light of the factual setting must be "consistent with the regulatory language and...the intent of the regulation." *Georgia Pacific Corp. v. OSHRC*, 25 F.3rd 999, 1004, (11th Cir. 1994). *See also Martin v. OSHRC*, 499 U.S. 144 (1991). These rules of construction have been applied in the analysis of each individual citation discussed *infra*.

Respondent also focuses upon the note accompanying the standard set forth at C.F.R. § 1910.147(a)(2)(ii)(B) (see footnote 5) as containing language which renders the entire LOTO standard unenforceably vague. Specifically, Respondent points to the phrases "minor servicing activities" and "effective" alternative protection for employees engaged in minor servicing activities as being so unclear and ambiguous that those terms require "men of common intelligence to guess at its meaning." *Secretary of Labor v. Culberson Well Service, Inc.*, 12 BNA OSHC 1535, 1536 (1985). *See also Connolly v. General Construction Company*, 26 U.S. 383, 391 (1926). Respondent makes this global assertion without any reference to the particular allegations contained in the complaint or the specific work activities performed by Respondent's employees.

In *Secretary of Labor v. Westvaco Corp.*, 16 BNA OSHC 1374 (1993), the Review Commission faced a similar attack upon the language of the note referenced by Respondent in this case. In *Westvaco*, Respondent had been cited for a violation of C.F.R. § 1910.147(c)(1) by failing to lockout the slitter section of a printer/slitter machine. The machine, during normal operation, printed and scored corrugated paperboard. An employee was required to make adjustments between "runs" in the slitter section. The Secretary alleged that the employee was exposed to unexpected

energization during that work activity. Respondent *Westvaco* claimed that the work activity fell within the exception which Respondent complains of in this case. The Commission stated that the burden to establish the exception falls upon Respondent. Moreover, based upon the facts of that case, the work activity performed by the employee was preparatory to normal production and constituted “set up.” Thus, the activity was not performed during normal production operations and, therefore, fell outside the exception to the standard. *Id.* at 1379.

It is clear that in *Westvaco* the Commission analyzed the exception “in light of a particular set of circumstances,” as well as the conduct to which the exception is applied. *R&R Builders Inc. supra.* See *J.A. Jones supra.* Respondent, however, boldly asserts that the LOTO standard is unenforceably vague for all times and circumstances without any reference to the particular facts of this case. Under these circumstances, Respondent has failed to meet its burden (a) to establish that the referenced exception applies to the particular work activities cited by the Secretary or (b) to establish that the language of the exception was so unclear when applied to those work activities that persons of common intelligence could not understand the meaning and intent of the exception. For these reasons, Respondent’s argument that the standard is unenforceably vague must be rejected.

## THE VIOLATIONS

### Item 1 TAMS

Item 1 of the Citation reads as follows:

29 C.F.R. § 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section: At the plant[,] a documented procedure to control potential hazardous energy for each type of machine was not being used by employees setting up tire assembly machines.

This alleged violation relates to the activities of employees engaged in the operation of machines known as tire assembly machines (TAMS). During the period of inspection, Respondent’s work place contained first stage and second stage TAM’S. The first stage TAMS are known as 88 and the second stage TAMS are designated as 85, 99 and, in one instance M-6. The first stage machines produce the body ply assembly consisting of an inner liner, beads and side wall. The second stage TAMS build upon the body ply assembly produced by the first stage TAMS.

Respondent's work place contained eighteen (18) 85 TAMS, thirty-nine (39) 99 TAMS and one M-6 at the time of Complaint's inspection, a total of 58 second stage TAMS. A "green tire" is produced at the completion of the work performed by the second stage TAMS. All of the alleged violations relating to this item result from the operation of the second stage TAMS.

Second stage TAMS attach the tire tread to the body ply assembly produced by the first stage TAMS. The machine operator operates the machine by using foot pedals placed at the front bottom of the machine. The machine operator places the body ply assembly produced by the first stage TAMS on two circular metal disks known as pie pans. Air is introduced into the machine spreading the pie pans apart and expanding the body ply assembly ("the carcass"). The operator then places the tire tread upon a circular drum known as the band builder. In the 99 TAM, a transfer carriage moves in a straight line over the band builder, removes the tread package, moves along a rail approximately three feet to the pie pans at which time the tread package is placed on the carcass. The machine seals the tire components together by squeezing out the air between the component parts to ensure that the parts adhere. The pie pans and the band builder are connected by a drum shaft which spins during normal operation and weighs in excess of 100 pounds. In the 85 TAM, the band builder moves on a swing arm to the transfer carriage and deposits the tread package on the transfer carriage. The transfer carriage then moves to the pie pans where the tread is placed on the carcass. One machine known as Mike-6 is a modified 85 TAM and is a one of a kind machine. The machine was modified by Respondent from a swing arm 85 to an in-line TAM.

The second stage TAM machines are used to produce 13, 14 and 15 inch passenger and light truck tires. In order to prepare the machines to produce a different size tire, employees known as TAM size changers must perform either a partial or full size change. Size changers do not operate the machine during normal production. This work activity varies from a simple change of specifications in the machine's computer to removing and replacing the bandbuilder, pie pans, the hub, grab segments of the transfer carriage, and other adjustments to the machine. Typically, a size changer will perform four or five full changes in an eight hour shift. It is during the performance of these activities that the Secretary alleges Respondent violated the LOTO standard.

The 99 and 85 TAMS are energized by electrical, pneumatic and hydraulic energy sources and the Mike 6 has electric and pneumatic energy. In order to change or adjust the bandbuilder, pie

pans and component parts of the transfer carriage, the employee places the machine in the “manual mode.” Each machine has a control panel which controls the movement of the machine in addition to the foot pedals. The M-6 machine has two control panels and a bandbuilder panel on the front of the machine. The machines are energized when placed in the manual mode and the transfer carriage for the 99 and 85 machines may be moved by depressing buttons on the control panels. Other machine parts including the pie pans may also be energized via the foot pedals or the applicable control panel while the machines are in the manual mode. The employee is required to place his/her arms, hands and upper body in the path of the transfer carriage (between the pie pans and the bandbuilder) while engaged in removing and attaching machine parts during a size change operation. The Secretary asserts that the employees are exposed to being crushed between the transfer carriage and non moving parts of the machine while engaged in a size change if the machine is unexpectedly energized. Moreover, parts of the transfer carriage known as “grabs” could open or close if the machine is unexpectedly energized resulting in hand injury to the employee. The employee would also be exposed to injury to arms, hands and upper body if struck by the swing arm of the TAM 85. The moving parts of the machines move instantaneously upon being energized leaving the employee little or no time to leave the zone of danger.

Respondent has no written procedure which employees are required to follow when performing a size change. Size changers are trained by fellow workers when first assigned as a size changer and each person develops his/her own system for performing the task. The machines, however, are basically identical; that is, all 99's are the same configuration as are all 85's. As previously noted the M-6 is unique. Thus, the work activity is performed in a similar fashion by all employees with slight variations among the size changers. Each machine is equipped with an emergency stop button located on the control panel and a safety line is strung along the length of each machine. The electrical power to each machine may be disconnected either by hitting the emergency stop button or by pulling the safety rope. Neither the stop button nor the safety rope are activated by employees to disconnect the electrical source during a size change. Employees are not required by Respondent to lockout machines while performing size changes.

Sufficient evidence has been presented by the Secretary to support the conclusion that Respondent's employees were exposed to serious injury or death while performing size changes on

the 99, 85 and M-6 tire assembly machines. Specifically, with respect to the TAM 99, employees were exposed to serious injury when placing parts of their bodies in the path of the transfer carriage while changing or adjusting machine parts. Moreover, employees were exposed to serious injury when working in close proximity to the grab segments. Since employees could be injured by the transfer carriage or the grab segments if the machines become unexpectedly energized, procedures should have been developed and utilized to prevent such energization as required by the standard. The TAM 85's also present the same hazards to employees; that is, employees were exposed to the swing arm of the bandbuilder and the grab segments. Employees performing size changes on the M-6 were exposed to similar hazards relating to the grab segments and movement of the bandbuilder.

The hazards presented by the M-6 machine have been tragically demonstrated by the death of an employee who was performing a size change on that machine. The machine became energized moving the transfer carriage and fatally injuring the employee.<sup>6</sup> *See* Item 107 Discussion *infra*. Moreover, other size changers testified that they experienced unexpected movement of the machines while performing size changes. Some of the movement was unexplained while other movements were accidental by inadvertently activating the machines via the foot pedals. In addition, many size changes were completed by two employees working together. This arrangement often increased the risk of inadvertent activation of the machines.

In order to establish that Respondent failed to comply with the cited standard, the Secretary must prove that (1) the standard applies; (2) the employer failed to comply with the terms of the standard; (3) employees had access to the cited condition; (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc.*, 1981 CCH OSHC ¶ 25,578, *aff'd* 681 F.2d 69 (1st Cir. 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29, 344 (1991). Although Respondent disputes the applicability of the standard on the ground that the employees are not engaged in “servicing or maintenance” while engaged in a size change, the activities of the

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<sup>6</sup>Respondent’s investigation of the accident concluded that the employee accidentally tripped a limit switch which activated the machine.

employees clearly fall within the definition of those terms as set forth at section 147(b) of the standard.<sup>7</sup> The facts clearly establish that employees are exposed to unexpected energization of the machine while performing set up operations. Moreover, the facts support the conclusion that the activities of the size changers as described above do not fall within the exception to the standard for minor servicing performed during normal operations for the simple reason that the second stage TAM machines are not engaged in producing anything while undergoing a size change. *See* footnote 4.

The record established that Respondent failed to institute the lockout procedures required by the standard during the size change when employee were exposed to the movement of the transfer carriage and the grab segments. The evidence supports the conclusion that employees were exposed to serious injury or death from the transfer carriage and the grab segments and the employer knew or with the exercise of reasonable diligence could have known of the violation. For the foregoing reasons, it is concluded that Complainant has sustained his burden of proof and the violation is affirmed.

#### WILLFULNESS

The Secretary alleges that this violation, as well as every other alleged violation disclosed during the inspection of Respondent's worksite, was committed in a "willful" manner within the meaning of section 17(a) of the Act. Although not defined in the Act, "willful" has been defined by the Courts as "conscious and intentional disregard of the conditions," "deliberate and intentional misconduct," "utter disregard of consequences" and other similar descriptions. *See Brock v. Morello Brothers Construction, Inc.*, 809 F.2d 161 (1st Cir. 1987). In order to establish a willful violation, it is necessary to determine the "state of mind" of the employer at the time of the violations. The

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<sup>7</sup> Servicing and maintenance is defined as:

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

Setting up is defined as:

Any work performed to prepare a machine or equipment to perform its normal production operation.

standard of proof requires that the Secretary produce evidence establishing that the Respondent displayed an intentional disregard for the requirements of law and made a conscious, intentional, deliberate and voluntary decision to violate the law or was plainly indifferent to the requirements of the statute. *A. Schenbek and Company v. Donovan*, 646 F.2d 799, 800 (2nd Cir. 1981); *Morello Brothers Construction supra* at 164; *Georgia Electric Co. v. Marshall*, 595 F.2d 309, (5th Cir. 1979). Willful violations are distinguished by a “heightened awareness of illegality - of the conduct or conditions - and by a state of mind-conscious disregard or plain indifference.” *Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶ 27,893. The Tenth Circuit has determined that an employer’s failure to comply with a safety standard under the Act is “willful” if done knowingly and purposely by an employer who having a free will or choice, either intentionally disregards the standard or is plainly indifferent to the requirements. *United States v. Dye Construction Co.*, 510 F.2d 78, 81 (10th Cir. 1975).

Complainant’s burden to establish a willful violation has been defined by the Commission as follows:

To establish that a violation was willful, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1215, 1993 CCH OSHD ¶ 30,046, p. 41,256 (No. 89-433, 1993). A violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective one - whether the employer’s belief concerning a factual matter, or concerning the interpretation of a rule was reasonable under the circumstances. *General Motors Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39, 168 (No. 82-630, 1991).

*Secretary of Labor v. S.G. Loewendich and Sons*, 16 BNA OSHC 1954, 1958 (1994).

Although an employer’s good faith belief that alternative protective measures are superior to the requirements of a safety standard will not relieve that employer of a finding of a willful

violation, *Secretary of Labor v. Trinity Industries, Inc.*, 16 BNA OSHC 1670, 1673, (11th Cir. 1994), the Review Commission has held that “[a] willful charge is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard even though the employer’s efforts are not entirely effective or complete” (citations omitted), *Secretary of Labor v. Keco Industries, Inc.*, 13 BNA OSHC 1161, 1169 (1987). In other words, an employer who knowingly and in good faith substitutes its own safety measures to provide employee protection in place of the requirements of a standard may be found in willful violation of the standard; however, an employer who seeks, in good faith, to comply with the standard and fails may not be found to have willfully violated the act.

The failure to comply with the lockout standard during the set up of the TAM machines, as well as every other violation alleged by the Secretary, has been characterized as a willful violation; that is, the Respondent consciously disregarded or was plainly indifferent to the requirements of the lockout standard as it may apply to all of the production activities at the Oklahoma City plant. Mr. Barrien Zettler, the Deputy Director of the Directorate of Compliance Programs, testified that he was responsible for reviewing the file developed in this matter by the Department of Labor and authorized the issuance of the citation by the Area Director, William White. Mr. Zettler is a high ranking official within the national office of the Occupational Safety and Health Administration with responsibility for the review and issuance of citations listing violations on an instance by instance basis. (See Tr. 5334 *et seq.*) In this case, Mr. Zettler was briefed by his staff prior to issuance of the citation and concluded that all of the alleged violations uncovered during the inspection of Respondent’s worksite should be characterized as willful with a maximum penalty of \$70,000 per violation. Mr. Zettler did not, however, analyze each individual violation to determine whether sufficient facts exist to support each willful finding. Rather, Mr. Zettler “grouped them all together” and concluded that the facts support a finding that Respondent was in flagrant violation of the lockout standard throughout the Oklahoma City plant as a matter of policy. (Tr. 5357-59, 5450)

The Secretary’s conclusion that Respondent either intentionally disregarded or was plainly indifferent to the requirements of the LOTO standard as a matter of corporate policy throughout the Oklahoma City facility is based upon the following factors. First, Respondent’s Oklahoma City site had corporate knowledge of the existence and requirements of the standard. The standard was

promulgated as a final rule on August 31, 1989 with an effective date of October 31, 1989. By memo dated September 15, 1989, Mr. John Lepkowski, Respondent's Corporate Safety Director, informed all of Respondent's manufacturing facilities, including the Oklahoma City site, of the existence of the new standard and attached a copy of the standard and its preamble to his memo. By memo dated November 8, 1990 from R.M. Schall, corporate headquarters requested all manufacturing facilities, including Oklahoma City, to review manufacturing equipment for lockout capabilities. Complainant asserts that a memo dated December 7, 1992 from Robert Walker, Corporate Manager of Safety, Health and Industrial Hygiene to all plants including Oklahoma City is particularly significant. In that memo Mr. Walker states with regard to the LOTO standard:

Please revisit your plant's practice regarding this very important, fundamental safety procedure. Remember, this standard has been in effect for over two years, so you will have little defense for noncompliance in the event of an OSHA citation, and OSHA is aggressively enforcing this standard. (Exh. C-91)

Complainant also points to a Corporate Safety Manager's conference which was held on June 14, 1993. The Safety Manager for the Oklahoma City location, Ms. Kelley Mattocks, was at the conference and attended a presentation by Corporate Safety Manager Walker wherein the LOTO standard was discussed (Tr. 4924, Exh. C-94).

Second, Complainant relies upon a visit to the Oklahoma City plant during August 1992 by John Lepkowski to support the willful finding. Mr. Lepkowski, at the time, had retired as Corporate Safety Director and was engaged by Respondent as a safety consultant to provide LOTO training to its production employees at the so called "affected level."<sup>8</sup> Mr. Lepkowski spent approximately one week at the Oklahoma City plant. As a result of information obtained during a training session, the union representative, Mr. Tony Carr, expressed concern to Mr. Lepkowski regarding certain machine operations and whether the activities were subject to LOTO requirements. Mr. Lepkowski and Ms. Mattocks accompanied Mr. Carr to the production floor and observed the machines.

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<sup>8</sup>"Affected employee" is defined as:

An employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed. (29 C.F.R. § 1910.147(b))

According to Mr. Carr, Mr. Lepkowski recommended to Ms. Mattocks that the job functions should be reviewed to determine whether the employees engaged in those activities should be trained at the "authorized level."<sup>9</sup> (Tr. 4535)

Third, Complainant points to a safety citation issued to Respondent's Des Moines, Iowa plant by the State of Iowa Occupational Safety and Health Department as support for a willful finding. By memo dated March 1, 1993, Respondent's Vice President of Human Resources forwarded a copy of the citation to all manufacturing plants including Oklahoma City with a cover memorandum.

Moreover, Respondent received other warnings from OSHA compliance officers. During June 1993, compliance officer Faye Kearney, an industrial hygienist, initiated an inspection of Respondent's worksite for so called ergonomic violations. Ms. Kearney conducted "walk arounds" of the facility accompanied by Respondent's Safety Director Mattocks and observed employees placing parts of their bodies "in the point of operation" of various machines. (Tr. 4633-34) Ms. Kearney pointed these occurrences out to Ms. Mattocks and expressed her opinion that employees were exposed to injury if the machines were to be unexpectedly energized. Ms. Kearney discussed the LOTO issues with Ms. Mattocks on at least three separate occasions. (Tr. 4965, 5007) Complainant also relies upon statements made to Ms. Mattocks by the safety compliance officer, George McCown, who conducted a safety inspection of Respondent's plant commencing November 16, 1993. His inspection forms the basis for the citation issued in this matter.

Fourth, Complainant points to the reaction of Respondent to a fatal injury sustained by one of its employees as support for willfulness. [REDACTED] sustained fatal injuries while performing a size change on a second stage tire assembly machine on October 19, 1993. Respondent declined to institute LOTO procedures, according to Complainant, "even in the face of [REDACTED] death and the resulting OSHA inspection by George McCown." (Complainant's Brief at pg. 95)

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<sup>9</sup>"Authorized employee" is defined as:

A Person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section. (29 C.F.R. § 1910.147(b))

Fifth, Complainant asserts that the job evaluations created by Respondent for the TAM size changer and the mold/bladder changer establish that “these jobs constitute primarily setup operations” and therefore, fall within the LOTO standard requirements. (Complainant’s Brief at pg. 96) Lastly, Complainant argues that injuries and “near-misses” experienced by Respondent’s employees should have alerted Respondent to hazards presented by various machines and the need for implementation of LOTO procedures for those machines.

Respondent, on the other hand, argues that the evidence supports the conclusion that it attempted in good faith to comply with the provisions of the LOTO standard and that good faith negates the Secretary’s allegations even if they fell short of full compliance. (Respondent’s Brief at pg. 30 citing *Secretary of Labor v. Morrison-Knudsen Co./Yonkers Contracting*, 16 BNA OSHC 1105, 1124 (1993)) Respondent relies heavily upon the fact that as early as 1969, when the Oklahoma City plant commenced operations, a distinction was made between production work and service and maintenance work performed upon the large number of machines in the plant. At that time Respondent entered into a contract with an outside contractor, Ogden Allied, to perform all of the servicing and maintenance functions on the machines. Ogden maintained a permanent work force of approximately 190 employees at Respondent’s plant and was paid approximately one million dollars a month by Respondent to service and maintain the machines. This work activity included preventative and breakdown service and maintenance. Thus, Respondent argues that as early as 1969 and continuing until the time of the inspection which initiated this litigation, there was a dichotomy of work functions performed on the manufacturing machines: major servicing and maintenance performed by Ogden Allied and production activities including minor servicing and maintenance performed by Respondent’s employees. Moreover, Respondent ensured that Ogden Allied complied with LOTO procedures when servicing or maintaining the machines. According to Respondent, this relationship with Ogden Allied “is central to the facts of this matter and Dayton’s state of mind.” (Respondent’s Brief at pg. 37) Respondent also points to the fact that after a complete inspection of Respondent’s worksite, Complainant alleges LOTO violations for only seven discrete job functions of the hundreds of machine operations performed by Respondent’s employees.

With respect to the grounds relied upon by the Secretary to support a plant wide intentional disregard or plain indifference to the LOTO standard, Respondent freely acknowledges that it had

corporate and plant knowledge of the LOTO standard. "Dayton has argued over and over again that it was at all relevant times knowledgeable of the standard." (Respondent Reply Brief at pg. 7) Respondent agrees that it received the memoranda from Messrs. Lepkowski, Schall and Walker *supra*. The Lepkowski memo was received shortly after the LOTO standard was promulgated. Mr. Phil McCowan, Respondent's Safety Manager reviewed the memo and conducted an analysis of the machinery within the plant for LOTO compliance. Mr. McCowan was the author of the safe operating procedures for each classification of machine in the plant and had significant experience in the operation of those machines. Mr. McCowan concluded, based upon his reading of the new standard, that Respondent's employees were engaged in production activities and that Ogden Allied personnel were engaged in service and maintenance within the meaning of the standard. McCowan contacted Ogden Allied to ensure that they complied with the standard when performing servicing and maintenance activities as required. Mr. McCowan did not perform a formal analysis of each machine; rather, he relied primarily upon his experience and discussions with Mr. Lepkowski to arrive at the conclusion that none of the activities which are the subject of this litigation required that the machines be lockout. (Tr. 4411- 37, 4454, 4458) The Schall memo, *supra*, was received by Mr. McCowan after he had completed his review of the machines in relation to the LOTO standard. This memo requested a review of equipment to determine which machinery "cannot be physically locked out." (Exh. C-85) Mr. McCowan testified that Ogden Allied locked out all machines as required to perform servicing or maintenance. Ms. Kelley Mattocks, Respondent's Safety Manager during December 1992, received and reviewed the Walker memo *supra*. Ms. Mattocks had succeeded Mr. McCowan and, upon receipt of the Walker memo, she contacted the supervisors of the production departments to determine whether any of the production activities performed by the Dayton Tire machine operators had changed. She made this inquiry because she knew that a distinction had been made at the time the plant had opened between service and maintenance activities and production work and that division of labor had been confirmed by her predecessor, Phil McCowan, during 1989. (Tr. 4939, 4994) She also knew that service and maintenance work was to be performed by the outside contractor, Ogden Allied, and production work was performed by Respondent's employees. It was her belief, upon being notified by the production supervisors that no change had been made in the work activities of machine operators, that the company remained in compliance with the

LOTO standard. (Tr. 4939, 4970) Moreover, Ms. Mattocks knew that the Oklahoma City plant was in a “unique situation”; that is, most of the other manufacturing plants within the company performed their own servicing and maintenance activities and the Oklahoma site contracted these activities out to Ogden Allied. (Tr. 4945) Ms. Mattocks also participated in the hiring of Mr. Lepkowski as a consultant to train Respondent’s production employees at the so called “affected” level. *See* footnote 8. In addition, Ms. Mattocks required Ogden Allied to conduct periodic inspections as required by the standard (1910.147(c)(6)(i) and (ii)) to ensure that they (Ogden Allied) complied with the LOTO standard. (Tr. 4961-62)

Respondent also disputes the Secretary’s argument that the events surrounding the visit of John Lepkowski to Respondent’s worksite during August 1992 supports the willful allegations. According to the union representative, Tony Carr, he accompanied Kelley Mattocks and John Lepkowski onto the production floor and observed the TAMS, the curing presses and the module machines. According to Mr. Carr, Mr. Lepkowski stated that these operations should be considered for training at the authorized level. (Tr. 4533-35) Ms. Mattocks, on the other hand, acknowledged that she accompanied Messrs. Carr and Lepkowski onto the production floor; however, they did not view a size change on the TAM nor a mold change on the curing press or a stone change on the module machine. (Tr. 4997-98) It is alleged by the Secretary that these activities in part, exposed employees to injury or death. Respondent argues that Carr’s testimony, in his capacity as the employee representative, is hearsay<sup>10</sup> and should not be given any weight. Moreover, Mr. Lepkowski was listed as a government witness but was not called to testify. According to Respondent, Lepkowski’s statements were “equivocating and merely suggestive,” and not notice of noncompliance with the LOTO standard.

With respect to the citation issued to Respondent’s Des Moines, Iowa plant by the State of Iowa and distributed to Respondent’s Oklahoma plant, Respondent asserts that the Secretary failed to establish any similarity between the operations at the Iowa plant and the Oklahoma City location. Indeed, in Respondent’s view, the face of the citation itself removes any probative value of the document by stating “the issuance of this citation does not constitute a finding that a violation of the

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<sup>10</sup>Respondent’s objection to this evidence was over ruled pursuant to Rule 801(d)(2)(D) FRE.

Act has occurred....” (Exh. C-92) The Secretary also failed to present any evidence as to the disposition of the Iowa citation and, Respondent argues, the citation should not be used as notice that violations were present at the Oklahoma City plant. Respondent also argues that the concern expressed by Industrial Hygienist Faye Kearney and Ms. Mattocks’ reaction to those concerns are consistent with Respondent’s good faith effort to comply with the LOTO standard. Ms. Mattocks believed in good faith that all servicing and maintenance activities requiring LOTO procedures were performed by employees of Ogden Allied. Moreover, Ms. Kearney had not concluded that the activities that she observed violated the LOTO standard and she referred the matter to a safety specialist in her office. (Tr. 4651, 4653) Indeed, the Area Director, Mr. White did not place any reliance upon Ms. Kearney’s observations because he was not “comfortable” with her level of expertise in the recognition of safety hazards. (Tr. 4731-32) Ms. Mattocks also testified that Ms. Kearney did not tell her that employees working in the tubing department, the beadwinding department, the set up department (TAMS ), the banbury department or the curing department were exposed to hazards or were working in a zone of danger with respect to those areas with the exception that employees could slip and fall on oil accumulated on the “top hat” of the curing press. (Tr. 5002-05) In addition, the other “warning” received by Respondent was conveyed by compliance officer George McCown whose investigation formed the basis for the citation. Respondent clearly disagrees with Mr. McCown. Moreover, Mr. McCown did not testify at the trial in this matter; thus, there is no direct evidence of the statements made by Mr. McCown, if any, to Respondent’s representatives.<sup>11</sup>

Respondent also disagrees that its reaction to the death of employee [REDACTED] supports a willful finding in this case. Respondent points to the fact that an investigation was immediately conducted by Respondent to determine the cause and necessary corrective action. As a result of its investigation, Respondent reprogrammed the machine’s computer and instituted pinning devices which prevent machine parts from moving during size changes. (Tr. 4497-4500, 4976-78, 5743-46, 5761-64; Exh. C-17)

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<sup>11</sup>This evidence was elicited from Area Director White who obtained the information from the investigation file.

With respect to the written job descriptions (Exhs. C-9, 14, 15,16), Respondent argues that the job tasks that Complainant describes as “clearly” falling within the definition of servicing or maintenance are on the face of those job descriptions, just as easily characterized as minor servicing within the meaning of the standard and, therefore, fall within the exception to the standard. Moreover, with respect to the so called “near misses” and injuries cited by Complainant in support of the claim that Respondent had knowledge of the hazards to which its employees were exposed, Respondent asserts that none of the instances listed by Complainant support the conclusion that noncompliance with the LOTO standard caused the injuries or near misses.

Based upon the foregoing, it cannot be concluded that Respondent intentionally disregarded or was plainly indifferent to the standard as a matter of corporate policy throughout the Oklahoma City location. Complainant ignores the fact that since 1969 Respondent had assigned the service and maintenance function to Ogden Allied which maintained approximately 190 permanent employees on site at the plant. According to Ms. Mattocks, service and maintenance was and is performed by Respondent’s employees at other manufacturing plants within the corporate family. (Tr. 4948) It is undisputed that Respondent had corporate knowledge of the LOTO standard. It cannot be said, however, that the facts support the conclusion that it was Respondent’s state of mind to disregard the standard nor was it plainly indifferent to its requirements throughout the Oklahoma City site. The various memoranda from corporate headquarters to all of the production locations as well as the actions of Mr. McCown and Ms. Mattocks, in light of the memoranda, indicate an effort was made to comply with the standard on a plant wide basis. The management team at the Oklahoma City location relied, in large measure, upon the division of labor between Ogden Allied and Respondent’s production employees and all of Respondent’s production employees were trained at the affected level. The evaluation of that division by Mr. McCown in relation to the new LOTO standard was not, in retrospect, sufficiently thorough to disclose activities performed by Respondent’s employees which required LOTO procedures; however, the Secretary, after a complete investigation of Respondent’s worksite, discovered only seven discrete work activities which, he believes, necessitates LOTO procedures. Those findings, in a 72 acre manufacturing facility containing hundreds of different types of machines, do not support a conclusion that, as a matter of

corporate policy, Respondent had the state of mind to intentionally disregard or be plainly indifferent to the requirements of the LOTO standard on a plant wide basis.

This is not to say, however, that the Secretary has failed to establish willful conduct on the part of the Respondent with respect to individual violations cited by the Secretary. Although the Secretary has failed to establish a intentional disregard or plain indifference and a state of mind to violate the LOTO standard plant wide as a matter of policy, the facts supporting each alleged violation must be analyzed, assuming that a violation has been established, to determine whether a sufficient basis exists to conclude that the Secretary was correct in characterizing each violation as willful. I turn now to an analysis of the facts surrounding Respondent's violation of the standard with regard to the TAM machines to determine whether Respondent's violation of the standard, as found above, is willful.

As previously stated, a willful violation is characterized by a heightened awareness of conduct or conditions which present hazards to employees and by a state of mind consistent with an intentional disregard or plain indifference to the violative conduct or conditions. *Williams Enterprises, Inc. supra*. Because Respondent was in a unique corporate situation by contracting the service and maintenance functions out to another contractor, it is reasonable to conclude, as is strongly argued by Respondent, that its actions were consistent with a good faith belief and effort to comply with the LOTO standard throughout the Oklahoma City plant. The issue, however, is whether Respondent had notice of possible violations of the LOTO standard within its Oklahoma City plant relating to specific machines or activities. In other words, did Respondent possess information which created or should have created a heightened awareness of hazardous conditions relating to specific machines or work activities within the plant. That information was transmitted to Respondent via a memorandum dated March 1, 1993 from C.R. Ramsey, Vice President of Human Resources to all company presidents including the manager of the Oklahoma City location. (Exh. C-93) Attached to the memorandum was a copy of a citation issued to Respondent's Des Moines, Iowa manufacturing plant wherein, *inter alia*, various violations of the LOTO standard were alleged with respect to specific machines. (Exh. C-92) It is remarkable that these significant documents were offered and entered into evidence without any testimony being elicited by either party regarding the actions of Respondent, if any, upon receipt of the documents.

The Ramsey memo expressed concern regarding the number of violations and the size of the penalty assessed as a result of the Des Moines safety inspection conducted by the State of Iowa. Included in the memo is the following language:

I ask that you share this information with your plant managers and have them review all of the specific violations (attached) and implement countermeasures to correct similar deficiencies; and establish methods to maintain compliance in the future. Under OSHA law, should you have similar violations as Des Moines, you could be subject to a repeat citation which carries a penalty of up to \$70,000 per violation.

The citation attached to this memo lists violations of the LOTO standard relating to machines and production activities with the same identity as machines and production activities located at Respondent's Oklahoma City facility.<sup>12</sup> Moreover, one of the alleged violations should have alerted the management team at the Oklahoma City location that service and maintenance functions were also performed by an outside contractor at the Des Moines plant, if they were not already aware of that fact. The alleged violation stated that "outside contractors on site had not signed an agreement to assure an exchange of LOTO programs with the employees." (Exh. C-92, Item 24 alleging a violation of § 1910.147(f)(2)(i)) Thus, the same division of job functions between service and maintenance and production work existed at the Des Moines and Oklahoma City locations and should have; indeed, must have, heightened the awareness of Respondent's management personnel at the Oklahoma City plant that the violations cited at the Des Moines location were likely to exist at their location. There is nothing in the record indicating that Respondent took any action after receiving the Ramsey memo to determine whether the conditions described in the Des Moines citation were present at the Oklahoma City plant. That failure to act, notwithstanding a heightened awareness of possible LOTO violations at the plant, strongly supports the conclusion that

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<sup>12</sup>The Des Moines Citation alleged in relevant part, violations of (a) 1910.147(c)(4)(i) for failing to provide procedures to control hazardous energy for tubers, calenders, banbury, curing press and tire building machines (Exh. C-92, item 19); (b) 1910.147(c)(5)(1) for not providing locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners or other hardware to employees changing molds in the curing press (Exh. C-92, item 20); (c) 1910.147(c)(5)(ii) failure to identify lockout devices with the person using said devices (Exh. C-92, item 21); (d) 1910.147(c)(6)(1) failure to conduct annual or more frequent inspections of the energy control procedure to ensure that the procedure and requirements of the standard are followed (Exh. C-92, item 22) and (e) 1910.147(c)(7)(i) failure to provide appropriate training to employees working on the curing presses, tubers, calenders and banbury (Exh. C-92, item 23).

Respondent was, at the least, plainly indifferent to the requirements of the LOTO standard for the activities and machines listed in the citation. *See United States v. Dye Construction Co. supra; Georgia Electric Company supra; Williams Enterprises, Inc. supra.* Moreover, Respondent's failure to act in response to the Des Moines citation undermines its good faith defense regarding conditions in its Oklahoma City plant which were similar to the violations uncovered at the Des Moines location. *See Secretary of Labor v. Mel Jarvis Construction Co. Inc.*, 10 BNA 1052 (1981); *Secretary of Labor v. Morreson-Krudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA 1105 (1993).

For the foregoing reasons, it is necessary to analyze each alleged violation in relation to the Des Moines citation to determine whether the across the board finding of willful conduct by the Secretary can be sustained by the facts. With respect to the tire assembly machines (TAMS), it is clear that the Des Moines citations cited the failure of that manufacturing facility to institute hazardous energy control procedures (LOTO) for the tire building machines located within that plant. A review of that citation by the Oklahoma City management team should have "heightened" their awareness of the need to evaluate the work activities of their TAM operators and provide necessary LOTO procedures. In light of Respondent's failure to act responsibly under the circumstances, item 1 of the citation is affirmed as a willful citation. The issue of "willfulness" for each of the remaining violations will be discussed seriatim.

### **Item 2 Beadwinder**

Item 2 of Citation I reads as follows:

29 C.F.R. § 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section: At the plant[,] a documented procedure to control potential hazardous energy for each type of machine was not being used by employees setting up bead winding machine.

This alleged violation relates to the activities of employees engaged in the operation of the bead winding machine which produces beads (circles) of bronzed steel wire coated with rubber. The beads are similar to fan belts and are designed to secure the tire at the rim of the steel wheel. Specifically, Dayton Tire is cited for a failure to implement LOTO procedures when employees are changing reels of wire, chucks and ply blocks as well as rethreading broken wires.

### Background

During the inspection period of October 19, 1993 through April 18, 1994, there were five beadwinder machines located at the Respondent's plant. Nos. 3, 4 and 5 are conventional winders which require an operator to remove the finished bead from the machine as well as to change the wire reels, chucks and ply blocks. Nos. 1 and 2 are automated machines with a fence and interlocked gates surrounding the area where large reels of wire are located. Thus, there is no evidence that employees are exposed to hazards from the automated beadwinders when changing reels of wire because Nos. 1 and 2 are de-energized when the gates are opened. However, employees are required to change the chuck and ply blocks on Nos. 1 and 2 as they do for the conventional beadwinders. The beadwinder is a large machine, measuring approximately 40' long x 8' wide x 12' high and operates at high speed. The beadwinder consists of the wire letoff area, extruder, slab stock feeder, auger type screw, drive motor, Festoon assembly and the winder head assembly which consist of the chuck and pulleys. Reels of wire located in the letoff area feed four or five strands of wire parallel to each other through a number of pulleys. These wires are coated with rubber in the extrude head assembly, travel across the precast wheel, through the slit assembly and feeder bar, and then as a "bead", rotates four or five times on a circular disk known as a chuck. (Tr. 3571-80; Exhs. 1E, 1F, 1G, 1H, 2C1, 2C2 and 2C3)

The beadwinder is energized by electrical and pneumatic power as well as gravity, and produces approximately 6,000 to 8,000 beads in a 10 hour day. During normal operations, the beadwinder operator is seated to the right of the chuck which is approximately three (3) feet above the floor, and removes the bead from the chuck after they are formed. (Tr. 3570) The temperature of the beads is approximately 150 degrees as they come off the chuck and the operator usually has gage tape around his/her fingers to prevent burning. (Tr. 3625) In order to produce different size beads for different size tires, the beadwinder operator must change the chuck size and the ply blocks. He also has to increase or decrease the size of the wire depending on the specifications. The machine must be stopped to perform these activities. (Tr. 3646-48)

#### 1. Reel change

The operator is required to replace the reels of wire in the letoff area when the reel is empty. Reel changes occur as frequently as 10 times a day. The operator must also "rethread" the wire

when it breaks. The wire reels are located in the letoff area which is enclosed by protective gates. However, unlike the automated beadwinders, the gates on Nos. 3, 4 and 5 are not interlocked and will not disengage the machine when opened. Rather, a magnetic sensor switch in the letoff is designed to shut the beadwinder down automatically when a wire breaks or is defective. The machine will also stop if a reel runs out of wire. There is testimony that occasionally the magnetic sensor will not function and the beadwinder continues to run notwithstanding a problem with the wire or the reels. (Tr. 3594-98)

When a reel change is required, the operator turns the beadwinder switch off and unlocks the fenced letoff area so that he can raise the clamps and remove the old reel. The wire reels weigh between 350 and 1025 lbs. Once the reel is pulled out, the operator removes the shaft and bearing from the old reel and reinserts them in the new reel. The new reel is rolled onto slicer ramps, loaded into the staging area and clamped in place. The operator threads the wire from the reel across groups of pulleys in a figure eight pattern and through the extrude to the extrude head assembly where the wires are coated with rubber. A typical reel change takes about 6 minutes. (Tr. 3599-3601) The Secretary asserts that employees are exposed to being struck by the moving parts in the letoff area and are exposed to nip points between the rolls and the wire resulting in serious injuries if the machine is unexpectedly energized during a reel change.

In the event that a wire strand parts during production, the operator turns the beadwinder switch off, cuts the wire and removes the wire remnants from the system. The operator rethreads the wire from the point where it broke through the extruder head assembly where it is coated with rubber. (Tr. 3594-3601) The Secretary asserts that employees are exposed to the hazard of being jerked or pulled into the other tensioned wires resulting in amputation or lacerations of the fingers when engaged in rethreading a broken wire.

## 2. Chuck and Ply block change

The chuck change requires the operator to manually jog the chuck to the top center position by operating the manual control on the winder head control panel above the chuck. The power on the control panel is turned off and the two bolts on the chuck are removed. The old chuck is removed and a new one is inserted. The chuck is aligned and the bolts are tightened. (Tr. 3648-50) The Secretary asserts that employees were exposed to being struck by the chuck if it unexpectedly

energized when the bolts were removed. The Secretary also alleges that employees were exposed to the hazard of having their hands entangled in the chuck if the beadwinder unexpectedly energized during the chuck change.

The operator follows the same procedure for changing the ply block located in the arm that rotates the chuck. First the ply block is jogged into position from the control panel. The operator then switches the power off at the control panel and proceeds to the back of the winder head assembly. The operator cannot see the control panel from this position. By bending over the ply block lugs and inserting a T-handle tool to rotate the ply block counterclockwise, the operator physically forces the ply block out and inserts a new one. (Tr. 3652-55) The Secretary alleges that employees engaged in this activity are exposed to having their arms struck by the rocker assembly or fingers crushed by the ply block in the event that the machine is unexpectedly energized.

Beadwinder operators are trained by other employees when they first start operating the machine. Dayton Tire has no written LOTO procedures for reel, chuck or ply block changes. Employees were never trained at the authorized level or required to lockout the beadwinder during tool changes. (Tr. 3661-62) Only Ogden Allied personnel were authorized to lock out the on/off power switch on the main control panel. (Tr. 3633-34) Dayton Tire has equipped the beadwinders with emergency stop buttons, a kick plate and safety ropes. Emergency stop buttons are located on the winder head control panel and the electric control panel for the drive motor. An emergency switch is also located on the control panel for the drive motor. A kick plate to stop the machine is located at the foot of the chuck. Safety ropes are strung above the chuck, the catwalks where the slab stock is feed into the overhead converter, and above the drive motor to the letoff area; however, the layout of the safety ropes differs from one beadwinder to the other. An employee hitting a stop button, kicking the safety plate, or pulling a safety rope or switch can disconnect the electrical power to the machine. (Tr. 3683-87; Exh. C-144) These safety measures are not usually used by employees during reel, chuck or ply block changes if the machine is unexpectedly energized. The only beadwinder who testified stated that he would release the wire and back away rather than pull the safety rope in the event the machine became unexpectedly energized. (Tr. 3690-91)

### Discussion

Respondent contends that the activities performed by operators of the beadwinder are not service and maintenance as defined by the standard. As stated at footnote 7 *supra*, tool changes, where the employee may be exposed to the unexpected energization or release of hazardous energy, constitutes service and maintenance under the LOTO standard. Respondent has failed to establish that the tooling activities on the beadwinder fall within the exception of minor servicing, footnote 5 *supra*, for the simple reason that the beadwinder is not engaged in production during the chuck and ply block change or during the rethreading of the wire when it breaks. Further, the beadwinder is not in production during the reel change.

In order to prevail on this violation, the Secretary must prove that: (1) the standard applies; (2) Dayton Tire failed to comply with the terms of the standard; (3) employees had access to the cited condition; and (4) Dayton Tire knew or, with the exercise of reasonable diligence, could have known of the violative condition. *Astra Pharmaceutical Products, Inc. supra*; *Gary Concrete Products supra*.

The Secretary has presented sufficient evidence to support the conclusion that employees were exposed to the hazards of unexpected energization of the beadwinders Nos. 3, 4 and 5 during reel changes. These conventional beadwinders do not have a multiple step process to activate the machine. See *General Motors Corp., Delco Chassis Div. supra*. The sensors in the letoff area which shut the machine down when a wire breaks allows the machine to operate when wire is rethread in a figure 8 around the pulleys. (Tr. 3612-13) Thus, employees rethreading wire have no foreknowledge of an accidental start up until the machine is energized with an immediate exposure to injury. Employee testimony established that employees changing a wire reel in the letoff area could be struck by a rotating post, the brake arm assembly moving back and forth or the movement of the pulleys if the beadwinder was unexpectedly energized. Further, employees were exposed to hazards of having fingers severely cut or amputated by the wires or pulleys by a sudden startup. Finally, the operator could be pulled and jerked into the other wires and sustain serious lacerations while engaged in rethreading the wire if the machine was unexpectedly energized. (Tr. 3612-13)

The only beadwinder employee who testified stated that he has experienced unexpected energization during reel changes but was not injured. The employee stated that on a number of

occasions, supervisors and maintenance people have accidentally activated the beadwinder while he was working in the letoff area. Moreover, the letoff sensor shut off switch does not prevent unexpected startups once the wire is rethread through the pulleys in a figure eight pattern. The drive motor control panel is located 20 feet to the left of the letoff area and is not readily accessible to the employee during a reel change. (Tr. 3610-13)

With regard to changing the chuck and ply block, the Secretary has established that employees were exposed to serious injuries while performing these changes on all five beadwinders. Unexpected energization of the beadwinder during a chuck change would likely throw the chuck onto the employee or the employee's hands could be entangled in the rotating chuck with resulting serious injuries. (Tr. 3651) Moreover, employees were exposed to the hazard of having fingers crushed by the ply block if it unexpectedly rotated. Employees were also exposed to the danger of being struck on their arms by the rocker assembly during a ply block change if the machine became unexpectedly energized. (Tr. 3656-68)

Although the beadwinder operator testified that he has not experienced unexpected movement of the machine during chuck and ply block changes, unexpected energization could occur if someone accidentally hit a control button and energized the beadwinder when the operator is engaged in a chuck change. (Tr. 3673) Further, there is testimony that the location of the beadwinder control panel to the chuck would not prevent hazards of unexpected energizations because another employee could reset the control panel without the operator's knowledge. (Tr. 5139) Likewise, an operator changing the ply block is exposed to the hazard of another person unexpectedly energizing the beadwinder since the operator is behind the winder head assembly and can not be seen from the control panels at the front of the machine.

Employee testimony also established that safety ropes, stop buttons, stop switch and kick plates are not reliable alternative means to LOTO procedures because they do not always deactivate the machine. These safety measures were designed to stop the machine in an emergency. They were not designed to prevent unexpected energization of the machine. (Tr. 3697-98) Moreover, employees have little or no time to get out of the zone of danger in the event of an unexpected energization of the machine.

The facts establish that Dayton Tire failed to implement the required LOTO procedures for tool changes on beadwinders. Dayton Tire employees were exposed to the unexpected release of hazardous energy from the conventional beadwinders (Nos. 3, 4 and 5) while changing wire reels, chucks and ply blocks, and they were exposed to unexpected energization during chuck and ply block changes on the automated beadwinders (Nos. 1 and 2). Based upon the record, there is insufficient evidence to find a violation as to the automated Beadwinders Nos. 1 and 2 during reel changes since the machines are de-energized when the gates are opened. However, employees were exposed to unexpected energization during chuck and ply block changes on Nos. 1 and 2. For the foregoing reasons, the Complainant has met his burden of proof and a violation of the standard as to the aforesaid Beadwinders is affirmed.

The Secretary alleges that Respondent willfully failed to institute LOTO procedures when employees were engaged in performing the aforesaid work activities on the bead winding machine. This allegation is based upon Complainant's belief that Respondent, as a matter of plant wide corporate policy, intentionally disregarded or was plainly indifferent to the requirements of the LOTO standard (supra pgs. 24-27). As previously discussed the evidence does not support the conclusion that Respondent, as a matter of plant wide corporate policy, willfully violated the LOTO standard. Moreover, there is nothing in the record in support of the conclusion that Respondent possessed a "heightened awareness" that LOTO procedures should have been instituted when beadwinder operators were engaged in the activities described above. Beadwinders were not included in the "Des Moines citation." Therefore that citation did not provide the Respondent with a "heighten awareness" of the violation. Thus, there is no basis for concluding that this violation is "willful" within the meaning of the Act.

It is clear, however, that a violation of the standard has been established and Respondent's employees were exposed to serious physical harm. Section 17(k) of the Act defines a serious violation as follows:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are

in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

29 CFR § 666(k).

The Secretary does not have to prove that there is a substantial probability that an accident will occur, but rather that death or serious physical harm could occur. See *East Texas Motor Freight, Inc. v. OSHRC*, 671 F.2d 845 (5th Cir. 1982); *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069 (3rd Cir. 1979). Employee testimony supports the conclusion that failure to implement LOTO procedures could cause serious physical harm to the employees such as severe lacerations of the hands and arms or amputations of fingers. (Tr. 3612-14, 3657-58) According to the testimony, employees reported that supervisors and maintenance would unexpectedly energized the beadwinder while the operator was engaged in a tool or reel changes. (Tr. 3610-12, 3643-46) This evidence was elicited by Complainant's Counsel without objection by Respondent that the evidence was irrelevant to the willful litigation, or was beyond the scope of the citation.<sup>13</sup>

Although the pleadings allege that Respondent "willfully" violated the alleged standard, the Secretary also presented evidence in support of a serious violation; that is, (a) that the employer knew or with exercise of reasonable diligence, should have known of the violations and (b) that employees were exposed to serious physical harm or death. The first element was satisfied by Complainant in his attempt to establish willfulness. The second element was established by employee testimony. Therefore, it is concluded that the parties tried this item by implied consent as a serious violation of 29 CFR 1910.147(c)(4)(i). See *Secretary of Labor v. Dye Construction Co.*, 6 BNA OSHC 1685 (1978); *Secretary of Labor v. Central Plains Contracting*, 1 BNA OSHC 2188 (1981). See also *Secretary of Labor v. Dye Construction Co.*, 4 BNA OSHC 144 (1976). Accordingly, the citation and complaint are amended pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to allege a serious violation and the citation, as amended, is affirmed.

**Item 3(a) Curing Press and 3(b) Radial Doper**

Item 3 of Citation I reads as follows:

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<sup>13</sup>Respondent objected to the admission of any employee's opinion regarding possible injuries that could be sustained while performing work activities deemed hazardous by the Secretary on the ground that the testimony was pure speculation. That global objection was overruled pursuant to Rule 701 FRE. (Tr. 1266-67, 2285)

29 C.F.R. § 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section: At the plant[,] a documented procedure to control potential hazardous energy for each type of machine was not being used by employees setting up curing presses and cleaning doper machines.

This violation relates to the alleged service and maintenance functions of setting up and changing the PCI rings, mold and bladder in the curing press and the activities of employees engaged in cleaning doper machines. Although the Secretary issued a separate violation of the above standard for each type of machine for which LOTO procedures are required (Tr. 5401), in this instance two distinctly different types of machines have been combined into one item.<sup>14</sup> Based upon the evidence presented as well as a personal view of Respondent's plant, the functions of the machines as well as the employee's work activity are clearly different and require separate analyses. For these reasons, item 3 of the citation will be separated into item 3(a) curing press and 3(b) doper machine.

### **Item 3(a) Curing Press**

#### **Background**

During the period of inspection, Respondent's plant contained two hundred and twenty curing presses of which one hundred and eighty are normally in use. (Tr. 3894; Ct. Exh. 4-Curing Press 4) The curing press vulcanizes treated green tires by heat and pressure into a finished tire. A curing press is 10 feet long, 12 feet wide and 20 feet tall and consist, in pertinent part, of two molds, two tire loaders, two "top hats" and a post cure inflator (PCI) unit. (Tr. 3899-3900; Exh. C-149) The molds, adjacent to each other and located inside the press, are made of aluminum and steel and weigh approximately 400 pounds. Inside each mold is a rubber bladder which is inflated with steam to press the tire into the side of the mold. The top half of the molds are bolted to 2 inch thick metal platens on the top half of the curing press. The bottom half of the molds are bolted to the bottom half of the press. The tire loaders are attached to the top half of the press. Top hats sit on the floor

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<sup>14</sup>During oral argument, Complainant's Counsel attempted to explain the inclusion of two different machines into one item by stating that they are located in the same department. (Tr. 5575) However, there is no rational or legal basis for placing two separate machine types in the same item under the instance by instance (egregious) program, nor is it a sufficient basis to combine these machines in one item because they are in close proximity to each other.

in front of the press. (Tr. 3897-99) The four PCIs located at the rear of the curing press cool the tires upon completion of the curing process. A PCI has a top and bottom chuck, PCI rings and PCI ring bolts. Two bolts secure a PCI ring to a chuck. The PCI rings have teeth or gears that must line up to close the rings.

A bull gear and a side link located on the right side of the curing press rotate to move the top half of the press up and down. (Tr. 3900-04; Ct. Exh. 4-Curing Press 7) A safety bar surrounding the tire loader and a safety bar located near the bottom half of the press will stop the press and the loaders if an employee pushes either bar. To open the press, an employee pushes the bar until the press is opened to the desired width. A T-shape safety rope is located inside the tire loader safety bar and an emergency stop button is located on the front control panel. (Exhs. C-149; C-2F1; Tr. 3958-64, 4026-27, 4153-54)

The curing press is energized by electric, pneumatic, and steam energy. Both the top half and the bottom half of the press move up and down. The tire loaders move with the top half of the press or they can move independently along a chain system. The rubber bladders are inflated with steam and hot water from the bag well to press the tire into the mold. (Tr. 4101-03) Electrical and pneumatic energy power the PCI rings. The bottom PCI ring moves up to a close position and down to an open position while the top PCI ring remains stationary. (Tr. 3904) The curing press main control panel is located on the right front of the press; however, the PCI unit has its own control panel at the rear of the press. (Tr. 4059) The two control panels are separate and distinct except that both contain a tire loader button. (Tr. 4060-63) If the tire loader is malfunctioning and cannot be activated from the curing press control panel, it can be activated from the PCI control panel as long as the press is in automatic, the stop/play switches are in a certain position, and if there are no tires on the loader. (Tr. 4228, 4264)

A Curing press operator is responsible for approximately 50 to 60 curing presses. The operation is initiated by placing the green tires on the top hats. (Tr. 4071) The tire loaders move on a motor and chain system and pick the green tires from the top hats and set the tires in the center of the bottom mold. The rubber bladder inflates and presses the tire into the mold to form the tread design and lettering. As the tire is stretched, the top half of the press comes down to meet the bottom half of the press. The tire is then vulcanized by a combination of steam, heat and pressure. Upon

completion of this process, the tires are transferred from the molds to the PCI unit. Air is inflated into the tires until they are cooled. Finally, the PCI rings release the cooled tires onto a conveyor which moves them to the Finally Inspection Department. (Tr. 3905-06)

An employee known as a mold/bladder changer changes the molds and the PCI rings consistent with the type or size of tire that is produced. Mold/bladder changers are trained by fellow employees. (Tr. 4000, 4016) There are not written procedures for a mold and PCI ring change except that Respondent requires its employees to tagout the curing press during this process. (Tr. 4031-32) To complete a mold change, an employee must change the mold, the bladder, ejector head, the heat shield, the split rings, the ball nose and the rings around the dowel pins. The mold/bladder changer stands on the tophats and is positioned between the press and a safety bar. (Exh. C-2F1) The curing press is placed in the manual mode but remains energized. The mold/bladder changer jogs the press approximately 25 times into different positions during a mold change. First, the changer opens the press and removes the bladder, the split rings and the bottom mold bolts. At this point, the top half of the press is approximately 4 feet above the changer's head. The mold/bladder changer's arms and upper body are positioned beneath the tire loader while loosening and tightening the bolts for the bottom mold. The changer then jogs the press into a half open position to remove the ball nose. At this point, the tire loader is approximately 2 feet above the mold/bladder changer's head. To change the ejector head, the press is lowered 18 inches and is right above the changer's arm. The top mold bolts are then loosened which requires the mold/bladder changer to work directly underneath the tire loader. (Tr. 3908, 3968, 3979-85)

After the bolts are loosened, a forklift is used to lift the molds out of the press and insert the new top mold. The top mold bolts are tightened and the press is raised approximately 18 inches to install the new ejector head. The press is raised another foot to install the ball nose. The press is then fully opened so that the bottom mold can be inserted and tightened. Finally, the mold/bladder changer inserts a new split ring and bladder. A mold change takes approximately two hours to complete. (Tr. 3996-99) The Secretary argues that mold/bladder changers are exposed, in the event of unexpected energization, to the hazards associated with movement of the top half of the press which could cause serious bodily injury (crushing) when performing setup operations on the curing press. The Secretary asserts that employees are also exposed to the hazard of the tire loaders

unexpectedly descending on the employee while performing tool changes. Finally, the Secretary alleges that employees are also exposed to the unexpected release of steam and hot water which could cause severe burns.

To change the PCI rings, the mold/bladder changer places the PCI unit in manual. Next, the changer pneumatically opens the chuck and turns the air off. The bottom chuck and ring are lowered in order to open the chuck. The top chuck and ring are stationary. (Tr. 3904) The bolts are loosened and the yoke is then opened to remove the old rings. After the new rings are inserted, the mold/bladder changer closes the yoke and reinserts the bolts. This process is repeated until all four PCI have been serviced. A PCI ring change takes approximately 2 hours to complete. (Tr. 3908, 4013-15; Ct. Exh. 4-Curing Press 14) The Secretary contends that employees performing PCI ring changes are exposed to the unexpected movement of the PCI which could result in broken fingers or hands caught between the pinch points of the two rings.

#### Discussion

Respondent disputes the applicability of the LOTO standard to the curing press and asserts that the above described tool changes fall within the minor service and maintenance exception. Dayton Tire argues that mold/bladder changers were not exposed to unexpected movement of the top half of the press or the tire loader for the following reasons. First, Respondent argues that the top half of the press and the tire loader cannot fall or move unexpectedly because they are geared in such a manner that they can only be lowered by the curing press motor. Respondent points to the fact that the configuration of the track on which the side link travels keeps the press open and placing the press in manual prevents it from moving unless an employee pushes the control button. Moreover, a pneumatic safety device on the top of the curing press prevents the loader from descending unexpectedly. (Tr. 4029-30, 4084) Respondent also argues that emergency stop buttons, safety ropes and bars are alternative measures to LOTO since they will stop all movement when engaged. In addition, Dayton Tire requires mold/bladder changers to tagout the machine to prevent other employees from starting up the machine. (Tr. 4040-44) The Respondent also asserts that mold/bladder changers were not exposed to unexpected movement during PCI ring change. Finally, Dayton Tire argues that it is infeasible to lockout the curing press because it will take an entire shift to complete a mold and PCI ring change and therefore, compliance will unreasonably disrupt

production. Respondent states that blocking the top half of the mold and the Dayton Loader will cause the entire press to jack out of the floor, breaking the mechanism holding the loader, and causing the loader to crash to the floor. (Respondent's Post-Trial Brief at pg. 64-66)

The Secretary has established that the LOTO standard, which covers service and maintenance in which unexpected energization of equipment could cause injury to employees, applies to the curing press. The tasks performed by mold/bladder changers constitute service and maintenance as defined by the LOTO standard. See footnote 7 *supra*. The mold, bladder and PCI ring changes are basic setup operations required to be performed in order to prepare the curing press for production. Although Dayton Tire argues that these activities are minor, they have failed to establish that mold and PCI ring changes fall within the minor servicing exception standard for the simple reason that the curing press is not engaged in production during these servicing activities. *Westvaco supra*. Moreover, the work activity clearly constitutes major modifications to machine components and go far beyond the minor machine adjustments made during production operations that are contemplated by the "minor adjustment" exception to the standard.

The Secretary has presented sufficient evidence to establish a violation of the cited standard. Mold/bladder changers were exposed to unexpected energization of the curing press which could result in serious bodily injury or death when placing their bodies in the path of the press during a mold change. The evidence indicates that an employee could inadvertently hit a button on the front control panel and unintentionally energize the press. (Tr. 4042-46) Furthermore, the curing press has continued to descend unexpectedly even though the mold/bladder changer had released the close button. (Tr. 4077-80, 4274-75) The top mold has descended because of brake failure. (Tr. 4295-97) The press has unexpectedly closed with such force as to break the dowel pins. (Tr. 4342-44)

Employee testimony reveals that the tire loader could unexpectedly energize during a mold change if an employee accidentally puts the curing press in automatic and turns the tire loader switch on the PCI control panel while a mold/bladder changer is working on the other side of the press. (Tr. 4090, 4228, 4264) Mold/bladder changers have inadvertently pressed the wrong button on the front control panel and caused the tire loader to descend rather than ascend. (Tr. 4081) On one occasion, the tire loader fell because the chains broke. (Tr. 3937-38, 4009, 4057) The cause of some machine movements were unexplained. (T. 4342-44) The facts are clear that mold/bladder changers could

sustain crushing injuries from unexpected energization of the curing press because their upper body is in the path of the press and the tire loader during a mold change.

The Secretary has also established that employees have sustained severe burns from the hazardous release of steam and hot water during a bladder change. Employees were not required to control the steam and hot water in the bag well when removing the bladder. (Tr. 4119, 4260, 4307, 4324) Employee testimony reveals that steam and hot water were frequently released during a bladder change which caused severe burns. (Tr. 4101-03, 4011-12, 4222, 4278, 4312)

With regard to the PCI rings, employees were exposed to serious injury such as broken or crushed fingers and hands when they place their fingers in the path of the rings during the ring change. (Tr. 4017) Employee testimony reveals that in the past the PCI unit has unexpectedly energized during a tool change. Some movements were unexplained while other movements were accidental. (Tr. 4247-48) On one occasion, an employee completed a ring change and attempted to line up rings when the rings snapped shut and crushed his thumb. (Tr. 4018)

The evidence does not support a finding that utilization of a tagout system in this case coupled with alternative safety measures provided full employee protection as required by section (c)(2)(ii) of the standard. Dayton Tire failed to rebut the conclusion that the safety rope, safety bars and the emergency stop button at the front of the press do not provide effective means of protection against unexpected energization and the hazards associated therewith. The facts support a finding that these safety measures are not alternative means of protection. During a mold change, the employee must stand on the tophats and is positioned between the curing press and the safety bar. If the press is accidentally energized at that time, the employee is exposed to being struck without warning by the tire loaders before he can push the safety bar. (Tr. 4007; Exh. C-2F1)

Respondent has asserted the affirmative defense of infeasibility and argues that it did not violate the standard because it is infeasible to lockout the curing press during a mold/bladder change. In *Secretary of Labor v. Seibel Modern Manufacturing & Welding Corp.*, 15 OSHC 1218, 1991 OSHD 29,442 (1991), the Commission held that the employer must meet the standard of proof regarding both elements of the defense, i.e., the infeasibility of the abatement measure required by

the cited standard and the infeasibility of any alternative measure.<sup>15</sup> *Id.* at 1228. See also *Westvaco supra* at 1380 (quoting *Mosser Construction Co.*, 15 BNA OSHC 1408, 1416, 1992 CCH OSHD ¶19,546, p. 39,907). Respondent states that a mold/bladder change using lockout measures takes 6.5 hours to complete. (Tr. 6113) Respondent argues that this unreasonably interferes with the work activities since it normally takes 1.5 hours to complete a mold/bladder change and therefore, it is infeasible to comply with LOTO. Although a mold/bladder change may take 6.5 hours to complete, Respondent cannot argue that this is unreasonable in light of the fact that employees are exposed to serious bodily injury or death during a mold/bladder change in absence of LOTO procedures. It is clear that Respondent is not arguing technological infeasibility since the mold and PCI ring change may be achieved while the machine is locked out. See *Ace Sheetmetal and Repair Co. v. OSHRC*, 555 F.2d 439 (5th Cir. 1977); *General Electric Co. v. OSHRC*, 540 F.2d 67 (2nd Cir. 1977); *Castle and Cooke Foods*, 692 F.2d 641 (9th Cir. 1982). Respondent is apparently arguing that increasing the time to complete the work from 1.5 hours to 6.5 hours constitutes economic infeasibility. However, there is no evidence in the record that instituting LOTO procedures for the curing press will threaten Respondent's long term profitability and competitiveness. *RMI Co. v. Secretary of Labor*, 594 F.2d 566 (6th Cir. 1979). The fact that compliance with the standard may inconvenience Respondent is no defense. *U.S. Steel Corp. v. OSHRC*, 1976-1977 CCH OSHD ¶20,865 (3rd Cir. 1976); *Sheet Metal Specialty Co.*, 1974-75 CCH OSHD ¶19,546 (Rev. Com. 1975). Further, Respondent has failed to establish that alternative measures are infeasible as required by the second part of the infeasibility defense. Although Respondent presented evidence that blocking is not feasible (Tr. 5877-84), there is no evidence that it looked at other alternatives or that it attempted to develop other alternative measures. Therefore, Respondent has not met its burden of proof regarding both elements of the infeasibility defense.

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<sup>15</sup>The Commission in *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949, 1986-87 CCH OSHD ¶27,650, held that the Secretary of Labor had the burden of proof to show the feasibility of an alternative abatement measure if the employer proved that compliance with the cited standard was infeasible. *Id.* at 1956-59. In *Seibel Modern Manufacturing & Welding Corp. supra*, the Commission required the employer to establish both elements of the infeasibility defense.

Based on the record, the Respondent has failed to institute the lockout procedures required by the standard during the mold and PCI ring change when employees were exposed to the unexpected movement of the top half of the press, the tire loaders and the PCI rings. The evidence supports the conclusion that employees were exposed to serious injury or death from the curing press and the PCI unit, and the employer knew or, with the exercise of reasonable diligence, could have known of the violation. For the foregoing reasons, it is concluded that the Secretary has sustained his burden of proof and the violation as to the curing press and the PCI unit is affirmed.

As previously discussed, a willful violation is defined as “intentional disregard” or “plain indifference” toward the standard. *See Willful Analysis Section supra* pg. 22. On February 12, 1993, Dayton Tire’s Des Moines, Iowa plant was issued a citation for failure to implement LOTO procedures which included the curing press. The facts support a finding that the Respondent had a heightened awareness that mold/bladder changers were exposed to hazardous energy. However, the Respondent was indifferent towards the standard and did not take any measures to protect their employees from unexpected energization of the curing press. Therefore, the violation as found above constitutes a willful violation within the meaning of the Act.

### **Item 3(b) Doper Machine**

#### **Background**

During the period of inspection, Respondent’s plant contained seven radial dopers (“doper machines”). Each doper machine operates substantially in the same manner; however, the layout of Nos. 1, 2, 3, 5, and 7, as depicted in Exh. C-146, is the mirror image of the layout of Nos. 4 and 6. Respondent reversed the layout of two doper machines to efficiently use the space available in the plant. (Tr. 3704, 3711-12) The doper machine applies lubricant to the interior of the green tire and paints the exterior to facilitate the curing process. Specifically, “blem” paint is sprayed on the sidewalls, tread wash is applied to the treads, and dope is sprayed on the interior of the tire. (Tr. 3704-05)

The doper machine is 25 feet long and 20 feet wide. (Tr. 3713) It consists of a U-shaped conveyor system, load table, clamp arms, a cabinet which contains the dope gun, blem spray nozzle (also referred to as the paint gun) and tread wash applicator, exit conveyor and accumulator conveyor. Green tires are transported on beehive racks from the tire room to the doper machine.

During normal operations, the operator stands at the end of the conveyor belt and loads the tires onto the conveyor which moves the tires to the load table. The clamp arm picks each tire from the load table and rotate as the tire is transported into the cabinet where blem, tread wash and dope are applied. After this process is completed, the clamp arm traverses out of the cabinet, releases the tire onto the exit conveyor and cycles back to the load table to pick up another tire. From the exit conveyor, the treated tire travels to the accumulator conveyor where the operator stacks it on a beehive rack. (Tr. 3704-05, 3713-14)

The doper machine is energized by electric and pneumatic energy. (Tr. 3753-54; Ct. Exh.4-Radial Doper 14) Pneumatic energy powers the traverse on which the clamp arm travels to the dope gun, the blem spray gun and the tread wash roller. (Tr. 3754) The dope gun moves up and down inside the cabinet to spray dope on the interior of tire. The tread wash roller flips onto the tire. (Tr. 3745)

There are five control panels on the doper machine. Control panel 1 is located near the beginning of the conveyor system where the tires are loaded onto the machine and contains a manual button and an emergency stop button. Control panel 2 is a cabinet that holds the computer system for the doper and is located in the U-shaped area of the conveyor system. Control panel 3 is located on the front of the load table and contains an emergency stop button, an automatic start button, a manual stop button, a button to jog the conveyors, a button to run the traverse in and out of the cabinet and one to move the dope gun up and down. Control panel 4 is located at the upper left hand corner of the paint cabinet and has a number of switches to move and test the dope and spray guns. Finally, control panel 5 is located on the right hand corner of the end of accumulator conveyor. From this location, a doper attendant can turn the tread wash and the paint gun on and off, switch the machine into manual and move the paint gun up and down. (Exh. C-146; Tr. 3706-10, 3722-23, 3756-57)

In addition to the emergency stop buttons located on the control panels, the doper machine is also equipped with safety ropes, safety switches and photo eyes. Safety switches are located on both ends of the U-shaped conveyor and the upper right hand corner of the cabinet. Safety ropes are also strung from above the cabinet across to the right hand corner of the load table. Additional safety ropes starting from the exit conveyor are strung on both sides of the accumulator conveyor

and on both sides of the U-shaped conveyor. (Exh. C-146) Photo eyes are located on both sides of the load table interior to start and stop the conveyor so that only one tire at a time moves onto the load table. (Tr. 3786-89)

The violations alleged by the Secretary with respect to the doper machine relate to cleaning the paint cabinet and its component parts. Respondent has no written procedures which employees are required to follow when cleaning the clamp arm, spray gun, dope gun and the paint cabinet floor. Employees were not trained at the "authorized level" and are not required to utilize lockout procedures when engaged in these activities. (Ct. Exh. 4-Radial Doper 15; Tr. 3722-23) In order to clean the various pieces of equipment in the cabinet, the doper attendant places the machine in manual from either control panel 1 or 3. (Tr. 3754) The doper machine is not deenergized either pneumatically or electronically. The clamp arm is manually jogged into the cabinet and cleaned in the open position. The doper attendant is positioned in front of the cabinet to clean the equipment. Some doper attendants use a long handle wire brush approximately 10 to 12 inches long to remove the blem and dope build up on the clamp arm while others use their hands, a scraper and paper towels. (Tr. 3743) With regard to cleaning the cabinet floor, the attendants use either a 3-4 foot long scrapper or a short scrapper which requires the employee to lean into the cabinet. To clean the spray nozzle, the doper attendant removes the nozzle collar and using a wire brush, knife and/or paper towels, removes the blem and dope buildup before reinstalling it. (Ct. Exh. 4-Radial Doper 13) It is necessary for the employee to lean into the cabinet to clean the clamp arm, the spray nozzle, dope gun and the cabinet floor. (Tr. 3746-53)

The doper attendant is required to load green tires onto the machine, unload the treated tires, monitor the machine and clean various pieces of equipment inside the cabinet. Specifically, the doper attendant is required to clean the clamp arm and the paint guns approximately every two hours. The clamp arm takes about five minutes to clean. The dope gun and the cabinet floor are usually cleaned at the end of the shift. (Tr. 3748-50; Ct. Exh. 4-Radial Doper 10) The Secretary asserts that employees removing build up on the clamp arm are exposed to the hazard of unexpected movement of the clamp arm which could result in lacerations or broken bones of the hand or arm. Further, the Secretary contends that unexpected energization of the clamp arm during the spray nozzle cleaning could break or bruise an employee's hand. The Secretary also alleges that employees are exposed

to unexpected movement of the clamp arm when cleaning the cabinet floor which could result in serious injury. Finally, the Secretary argues that employees are exposed to the hazard of unexpected movement of the clamp arm and the dope gun when cleaning the tip of dope gun.

#### Discussion

Respondent argues that cleaning the clamp arm, the spray nozzles, the dope gun and the cabinet floor does not constitute service and maintenance as defined by the standard but rather fall within the exception of minor servicing, *see* footnote 5 *supra*, on the ground that cleaning the clamp arm and the dope gun constitutes minor servicing and maintenance because these activities are performed at routine intervals and are integral to the function of the doper machine. Moreover, Dayton Tire argues that alternative safety measures to LOTO procedures such as safety ropes, safety switches and emergency stop buttons provide effective means of protection.

The LOTO standard covers service and maintenance in which unexpected energization of equipment could cause injury to employees. *See* footnote 4 *supra*. Removing the buildup of blem, tread wash and dope from the clamp arm, dope gun, spray nozzle and the cabinet floor fall within the definition of service and maintenance which includes cleaning of machines where employees are exposed to unexpected energization. *See* footnote 7 *supra*. Although Dayton Tire argues that these activities are minor, they do not fall within the minor servicing exception standard because the doper machine is not engaged in production during these servicing activities. Moreover, safety ropes, switches and emergency buttons do not provide effective means of protection. First, doper attendants cleaning the clamp arm, dope gun, spray nozzle and the cabinet floor cannot simply reach up and pull the safety rope or the safety switch. The ability to reach the safety ropes also depends on type of the tool used for cleaning. Although an employee is able to keep his body outside the cabinet and away from the zone of danger by using a long handle scraper or brush, an employee using a short handle scraper or brush would have insufficient time to step back from the cabinet and pull the safety rope. There are no emergency stop buttons on control panel 4, the control panel on the lefthand side of the cabinet opening. (Tr. 3774-77; Exh. C-146)

The Secretary has established that the doper machine unexpectedly energized during service and maintenance activities. *See General Motors Corp. supra* at 1219. The evidence supports the finding that doper attendants were exposed to the hazard of being struck by moving clamp arms

when cleaning the clamp arm, spray nozzle, dope gun and the cabinet floor. During the clamp arm cleaning process, an employee's body would come within a couple of inches of the clamp arm. (Ct. Exh. 4-Radial Doper 12) Further, employees were exposed to the hazard of being hit on the head, shoulders or hands during a dope gun cleaning by rotating clamp arms. Employee testimony reveals that the clamp arms have moved unexpectedly due to a leak in the air cylinder in the traverse or as a result of other employees accidentally jogging the clamp arms. (Tr. 3768, 3876-79, 3891) Employees are also exposed to the unexpected rotation of the clamp arm because another employee could unexpectedly switch the doper machine into automatic during the cleaning process (Tr. 5259). In one instance, a leak in the traverse air cylinder caused the clamp arm to jog in towards the cabinet approximately 6 inches. (Tr. 3892) The clamp arm can fully traverse into the cabinet depending on the amount of pneumatic energy in the air cylinder. According to testimony, an employee accidentally jogged the clamp arm in and out of the cabinet while another employee was cleaning the equipment in the cabinet. (Tr. 3876-79)

Respondent acknowledges that employees were not required to lockout the doper machine when cleaning the clamp arm, dope gun, spray nozzle and the cabinet floor. The evidence establishes, however, that employees were exposed to serious physical harm in the event of unexpected energization while engaged in these activities. Moreover, as previously stated, the activities do not fall within the "minor maintenance" exception to the standard. For these reasons, the citation is affirmed.

Although a violation exists as to the doper machine, the Secretary has failed to prove that it is a willful violation. As discussed above, a willful violation is defined as "intentional disregard" or "plain indifference" toward the standard. The Respondent has made a good faith effort to comply with the LOTO standard by hiring Ogden Allied to perform all service and maintenance activities on all the machines and training their employees at the affected level. *See Willful Analysis Section supra* pgs. 23-27. Moreover, the facts support a finding that Dayton Tire did not have a heightened awareness that it was violating the standard as to the doper machine since the doper was not cited in the Des Moines, Iowa plant. *Supra* pg. 25-26. *See also* footnote 12 *supra*.

The evidence does support the conclusion, however, that failure to implement LOTO procedures could cause serious physical harm such as severe lacerations of the hands and arms or

impact to the head and shoulder in the event of unexpected energization. Therefore, the violation as found above constitutes a serious violation within the meaning of the Act. Moreover, this item was tried as a serious violation by the implied consent of the parties. *Dye Construction Co.*, 6 BNA OSHC 1685 (1985). Accordingly, the citation and complaint are amended pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to reflect a serious violation of the cited standard.

#### **Item 4 Tread Tuber and Dayton Loader**

Item 4 of the Citation reads as follows:

29 C.F.R. § 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section: At the plant[,] a documented procedure to control potential hazardous energy for each type of machine was not being used by employees unjamming mills and extruders.

This alleged violation relates to the activities of employees engaged in unjamming mills and extruders of the tread tubers. The citation was amended to include the Dayton Loader. The tread tubers and the Dayton Loader make up the Tubing Department where white sidewall, black sidewall and treads are produced. During the period of inspection, Respondent's plant contained four tread tubers which are essentially the same. The tread tuber is a large machine consisting of mills, extruders, conveyors and a mechanical knife. Tubers Nos. 1, 2, and 3 have four mills and extruders. However, No. .5 has two extruders and a conveyor system. (Tr. 2294-97) Each mill consists of two stainless steel rotating drums which are also known as mill rolls. A drive is located between each mill. (Tr. 2342; Exh. C-135)

#### Background

The Dayton Loader transports rubber stock from the Banbury Department and feeds it into the tread tubers. A take away conveyor transfers the rubber from the Dayton Loader into the mills. The mills breakdown (heat) the rubber stock on two counter-rotating stainless steel drums approximately eight feet long and two and a half feet diameter. The rubber is transferred onto a feed conveyor which brings it to the knife area where it is cut into different size strips. The strips of rubber are then fed into an extruder which contains an eight to ten-inch auger or worm screw that spins the rubber and pushes it out onto the conveyor that leads to the calender. The calendar applies veneer to the treads and the white sidewalls. A "cushion" is also applied to the white sidewalls.

After this process is completed, the white sidewalls and the treads go through the marker wheels where labels are put on the treads. The rubber moves onto an elevated cooling conveyor where it is sprayed with water. The cooled rubber descends by conveyor to the skiver knife which cuts the rubber into appropriate lengths. Cement is applied to the treads and “booked” (stacked) into trays. The sidewalls are also wound up on spools. (Tr. 2295-2326; C-135)

A group of 4-5 employees consisting of mill operators, BEI attendants and mill attendants operate a tuber. The tuber employees work in a protective hearing area and communicate via intercom. (Tr. 2355) Mill attendants supply blackwall, veneer and cushion for the extruder and the main sidewall extruder and monitor the tuber for malfunctions. Mill operators, BEI attendants and mill attendants clear rubber jams on the mills, extruders, Dayton Loader and conveyors (feed and take away).<sup>16</sup>

Various parts of the tuber are energized.<sup>17</sup> The mill rolls rotate counterclockwise. The auger spins at approximately at 60-70 rpms. (Tr. 2394) Pinch points are located between the Dayton Loader conveyor and the roller. There are also pinch points between the feed conveyor and the take away conveyor and rollers. (Tr. 2353-71, 2383-85, 2391-97) Safety ropes, stop buttons and belly bars (safety bars) are located at various points on the tuber. Belly bars surround the mill rolls and will stop the mill rolls when actuated. Each belly bar has a single reset button on the side of the mill. Safety ropes are strung over the mills, extruders, Dayton Loader and the conveyors. There are thirteen stop buttons and thirteen start buttons on the tuber. They are located at the end of each mill, on each drive, on the Dayton Loader, on the feed conveyor and the extruder. The control box for the take away conveyor is located on the right side of the mill. The control box for the Dayton Loader is located on the left side of the mill. The reset box for the belly bar is located under the Dayton Loader control box. (Tr. 2351-52; 2419-66; Exhs. 2B1, C-135)

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<sup>16</sup>It is noted that the Secretary continues to assert that a violation exists as to the take away and feed conveyors of the tuber. However, an objection to the testimony on conveyors was sustained because they are beyond the scope of the citation. Item 4 deals only with mill and extruders. (Tr. 2399-2401) Therefore, this decision does not address whether there is a violation as to the feed conveyor and the take away conveyor.

<sup>17</sup>The Secretary failed to established the source of energy for the tuber. However, based on the record as a whole, an inference can be made that the source of energy for the tuber is electrical.

Rubber jam ups occur at various points of the tuber and the Dayton Loader. Depending on the severity of the jams, it may take up to two hours to unjam the tuber. Rubber is often jammed on the first roll leading to the Dayton Loader and at the roll where it is dropped into the mills stalling the loader or causing the motor to overload. Jams on the Dayton Loader occur a couple of times a week. To unjam the loader, the mill attendant hits the stop button and cuts the rubber out with a knife as the mill operator runs the belt backwards. Mill attendants also stand on top of the mill roll to unjam the Dayton Loader. In order to stop the mill roll, the belly bar is actuated. Mill attendants use their left hand to pull the conveyor belt down as they cut with their right hand. After the loader is unjammed, the belly bar is pulled back into place, the safety is reset and the tuber is activated. (Tr. 2348-72) The Secretary asserts that mill attendants are exposed to the hazard of unexpected energization when unjamming the Dayton Loader which could result in crushing injuries to the hand.

Rubber also adheres to the serrated roller and jams the mill rolls. To unjam the mill rolls, a mill attendant cuts across one of the serrations of the mill roll. Next, the mill attendants partially peel off the sheet of rubber roll by hand. The mill operator jogs the mill roll on one side of the mill as two mill attendants knock the rubber off with flat metal tip poles on the other side of the mill. The mill attendants hit the belly bar as the mill operator jogs the mill roll to prevent it from over rotating. (Tr. 2373-76) Some mill attendants roll the rubber by hand. (Tr. 2423-27) The Secretary asserts that if the mill roll unexpectedly energized while employees' hands were on the roll, they would sustain burns or crushing injuries.

Finally, rubber jams occur in the extruder hopper. Rubber tends to stick to the auger which is located inside the hopper. Mill attendants either physically pull the rubber out of the augers while it is still operating or turn the machine off and use a pry bar. To pull the rubber out, the mill attendant reaches into the hopper and down to the auger. One employee testified that his hands were approximately 3 inches away from the moving auger when removing the rubber. If the rubber was severed, the mill attendants would hit the stop button and use a pry bar to remove the rubber. Once the rubber is cleared out, the auger is activated by hitting the start button. (Tr. 2394-97, 2500-01) The Secretary asserts that employees are exposed to the hazard of being pulled into the auger or having their arm amputated by the auger while it is operating or unexpectedly energized during the unjamming process.

Respondent has no written procedures which employees were required to follow during the unjamming process on the Dayton Loader, mills and extruders. Respondent's safe operating procedures for the Tubing Department during the period of inspection did not specify which tools to use in unjamming. Employees were trained by fellow employees in the Tubing Department when assigned to that department and were not required to utilize LOTO procedures when unjamming rubber. (Tr. 2377, 2384, 2391-92, 2397, 2486, 2502-03)

#### Discussion

Respondent disputes the applicability of the standard to the cited job tasks. It contends that unjamming activities on Dayton Loader and the tuber are not service and maintenance activities as defined by the standard. Assuming that the standard is applicable, Respondent argues that these cited job tasks fall within the minor servicing exception which is defined as unjamming activities that are minor, routine, repetitive and integral to the production process. See footnote 5 *supra*. Respondent argues that minor unjamming activities are performed by the employees, whereas, major unjamming activities are performed by Ogden Allied, the service and maintenance contractor.

The LOTO standard covers service and maintenance in which unexpected energization of equipment could cause injury to employees. See footnote 4 *supra*. The Secretary has established that the standard applies to the unjamming activities on the tuber and the Dayton Loader. Unjamming and removing rubber from the mills, the extruders and the Dayton Loader clearly falls within the definition of service and maintenance which covers unjamming of machines or equipment where employees are exposed to unexpected energization. See footnote 7 *supra*. Although Dayton Tire argues that these activities are minor, they do not fall within the minor servicing exception standard because the tuber is not engaged in production during the removal of the rubber jam ups. (Tr. 2487-90)

The evidence supports the finding that mill operators, mill attendants and BEI attendants were exposed to the hazard of being pulled into the mills and extruders, or sustaining crushing injuries from pinch points. Specifically, during the unjamming of the Dayton Loader, employees' hands were inches away from the moving parts of the machine. If the Dayton Loader accidentally started up during the unjamming, an employee's right hand could be caught between the rolls resulting in a broken hand. In the event that the Dayton Loader unexpectedly started in reverse, the

employee's left hand would be caught and sustain possible crushing injuries to the fingers or a broken wrist. (Tr. 2371) Further, employees were exposed to the unexpected start up of the mill roll while standing on it to unjam the Dayton Loader. Employee testimony established that in the event that the mill unexpectedly started, the employee could be pulled into and crushed between the mill rolls. (Tr. 2372) Finally, employees were exposed to the auger's point of operation which could result in crushing injuries or amputation of the hand. Specifically, employees were exposed to the spinning auger as they pull the rubber from the extruder hopper. One employee testified that on one occasion his hands were approximately 3 inches from the moving auger as he attempted to remove the jammed rubber and his glove was pulled into the auger. Fortunately, his hands were not pulled into the auger and he was able to pull the safety rope to stop the machine. (Tr. 2507)

Testimony revealed that employees were exposed to unexpected energization of the mills, extruders and the Dayton Loader because another employee could accidentally or unexpectedly hit a start button during the unjamming process. (Tr. 2482-84, 5259) Given the size of tuber and the number of employees (4 or 5) operating it, there is risk that one of the employees could inadvertently activate the machine while another is in the zone of danger. The Dayton Loader, the mills and extruders move instantaneously upon being energized leaving the employees little or no time to leave the zone of danger or to remove their hands from the points of operation. The evidence supports the conclusion that employees were exposed to serious injury or death during these unjamming activities and the employer knew or with the exercise of reasonable diligence could have known of the violation. For the foregoing reasons, the Complainant has met his burden of proof and the violation as to the aforesaid Tread Tuber and Dayton Loader is affirmed.

The Secretary alleges that this violation is "willful" within the meaning of the Act. As discussed above, a willful violation is defined as "intentional disregard" or "plain indifference" towards the standard. With regard to the Tread Tuber and the Dayton Loader, the facts support a finding that Dayton Tire did not have a heightened awareness that it was violating the standard for the reasons stated *supra* at pg. 25-26 and footnote 12 *supra*. Moreover, Respondent was not placed on noticed of this violation by the "Des Moines" citation. A serious violation, however, exists if there is a substantial probability that death or serious physical harm could result from a condition which exists unless the employer did not, and could not with the exercise of reasonable diligence, know of

the presence of the violation. 29 CFR § 666(k) *supra*. The Secretary does not have to prove that there is a substantial probability that an accident will occur, but rather that death or serious physical harm could occur. See *East Texas Motor Freight, Inc. supra*; *Bethlehem Steel Corp. supra*. The evidence supports the conclusion that failure to implement LOTO procedures when unjamming the tuber and the Dayton Loader could cause serious physical injuries such as broken bones, amputation or being pulled into the equipment resulting in death. Moreover, for the reasons stated *supra* pg. 41, this item was tried as an alleged serious violation by the implied consent of the parties. See *Dye Construction Co.*, 6 BNA OSHC 1685 (1985). This item is amended pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to reflect a serious violation of the standard cited. The citation as amended is affirmed.

#### **Item 5 Banbury**

Item 5 of Citation I reads as follows:

29 C.F.R. § 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section: At the plant[,] a documented procedure to control potential hazardous energy for each type of machine was not being used by employees unjamming mixers and feed belts.

This alleged violation relates to the activities of employees engaged in the operation of the first and second floor Banbury. During the period of inspection, Respondent's Oklahoma plant contained three banburys known as 271, 272 and 273. The banburys are basically the same. (Tr. 1921, 1943-44) The Banbury Department mixes pigments and raw rubber together to produce slabs of rubber to be processed into treads and sidewalls in the Tubing Department. (Tr.5669-70)

#### **Background**

Banbury is electrically, hydraulically, and pneumatically energized. (Tr.1982) It occupies three floors and consists of the following equipment. On the third floor, pigment is measured and weighed and sent down a chute to the second floor mixer. Pigment bins are either automatic or manual. Dayton Loaders, weight and charge conveyor belts and mixers are located on the second floor. Skids of re-mill (previously mixed) rubber are fed through the Dayton Loader which consist of a series of conveyors and a knife. Rubber is then transferred onto the weigh conveyor belt and is cut by the Dayton Loader knife once it reaches the pre-programed weight. The charge conveyor

belt takes the cut re-mill rubber to the mixer. If master batch rubber is being used then seventy to ninety pound bags of raw rubber are loaded directly onto the weigh belt bypassing the Dayton Loader. From the mixer, the rubber drops down a chute to the first floor auger. In addition to the auger, the roller die, slitter knife, soap tank and festoons are located on the first floor banbury. Rams push the rubber through the auger screw to the roller die which is made up of two mill rolls about 5-6 feet long and 3-5 feet in diameter which flatten out the rubber. The roller dies can be hydraulically raised and lowered. (Tr. 2230; Exh. C-153) The auger and roller die are located in a pit. The roller die take away conveyor belt takes the rubber to the slitter knife, where it cuts the rubber into slabs. The slabs of rubber are sent through a soap tank and then travel on the chain conveyor belt to two sets of festoons where it is draped between bars and dried by cooling fans. A festoon is made up of a series of bars six inches apart and configured in an oval. (Tr.1925-29, 1964-70, 2033, 2118, 2131, 2186-93; Exh. C-133)

The actual number of employees overseeing the banbury operations is not clear from the record. On the third floor, compounders measure and weigh the pigments and monitor the manual pigment bins. Belt loaders and lead belt loaders monitor the speed of the belts and the mixer on the second floor. Depending on the type of rubber used, they either feed re-mill rubber through the Dayton Loader or directly load bags of raw rubber onto the weight belt for master batch rubber. (Tr.1972) Transfer mixer attendants (T-mixers) monitor the operations on first floor banbury. They control the speed of the auger, roller die, and the conveyors as it takes the rubber slabs through the slitter knife, soap tank and the festoons to ensure that production runs smoothly. Belt loaders are required to remove jams on the second floor and T-mixers are required to clear jams on the first floor banbury. Belt loaders and wigwags assist T-mixers with severe jams on the first floor. (Tr.1923, 2033, 2188, 2113-20) For the purposes of this discussion, there are at least three employees that monitor the first and second floor banbury: the lead belt loader, belt loader and T-mixer.

The Dayton Loader control panel is located on the side of the loader and contains nine buttons which include the power button, start button and other controls. (Tr.2088, 2109; Exhs. 2A2, C-127, C-163) The T-mixer control panel located at the end of the roller die controls the speed of the rams, auger, roller die take away belt, chain belt, stitcher wheel (which secures the rubber on the festoon bars) and coolant fans. The T-mixer can stop the entire production process on the first and

second floor banbury by engaging the on/off switch on the control panel. However, activating the stop button on the control panel does not shut down the Dayton Loader on the second floor. Another control panel for first floor operations is located near the festoon area.<sup>18</sup> (Tr.2119-21, 2144-46, 2178; Exh. C-133)

Banbury operations on the first and second floors are either enclosed, guarded or equipped with safety ropes. The Dayton Loader knife is in the loader and is surrounded by a guard. Operations from the second floor mixer to the first floor roller die are enclosed except for the area where the rubber comes out between the rolls. Safety ropes are strung around the Dayton Loader, mixer, weigh belt and charge belt on the second floor. The skid shifter which feeds rubber into the rear of the Dayton Loader is also surrounded by safety ropes. A mesh wire area holds the empty skids. (Exh. 2A7) On the first floor, safety ropes run from the roller die along the conveyor system to the festoon area. Pinch points are located between the rolls of the roller die, the soap tank and chain belt, the chain belt and the festoons. There are no guards around the roller die or the festoons. (Tr.1964, 2134, 2209-18, 2258-80; Exh. C-133)

During the banbury production process, rubber accumulates or jams up at the Dayton Loader, roller die, slit knife, soap tank and festoons. On the first floor, rubber jams occur at the rear of the Dayton Loader where slabs of rubber are fed in and at the top of the loader where the rolls are located near the knife area. To unjam the rear of the Dayton Loader, the belt loader, with the assistance of the lead belt loader, pulls the safety rope and uses a mill knife to cut the rubber across the length of the rolls. (Tr.1976-80) The Secretary asserts that employees are exposed to the nip point between the conveyor and rollers which could result in injuries ranging from crushing or degloving (skin removal) to amputation of the hand if the Dayton Loader unexpectedly energized when unjamming the back of the loader.

In order to remove a rubber jam at the top of the loader, the belt loader pulls the safety, hits the emergency stop button, climbs onto a bale cutter ("S" marked on Exh. 2A6) and stands on top of the Dayton Loader ("T" marked on Exh. 2A6) to cut the rubber from the rolls of the loader. The bale cutter is a bench on wheels that cuts rubber. The belt loader uses a mill knife and a hay hook

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<sup>18</sup>There is no further testimony regarding the control panel for first floor operations near the festoons.

to remove the jam. There is no guard or obstruction where the conveyor drops the rubber down to the knife in the Dayton Loader. The belt loader's hands are approximately a foot from the knife. Depending on the severity of the jam, the belt loader will climb up and down the Dayton Loader a number of times to pull the rubber out and to jog the belt in reverse until the jam is cleared. Each time the belt loader climbs up or down, he has to reactivate or deactivate the loader. (Tr.1974-2009; Exhs. 2A2-2A6) The Secretary asserts that employees are exposed to the unexpected energization of the Dayton Loader when unjamming the top of the loader which could result in broken bones or a concussion from falling off the side of the loader. The Secretary also asserts that employees could be pulled into the Dayton Loader knife area and suffer amputation.

Rubber accumulates at the roller die which is located in a pit on the first floor approximately 40-50 feet from the T-mixer control panel. Rubber backs up into the roller die because the roller die take away conveyor hesitates, causing the rubber to pile up. To unjam the roller die, the T-mixer turns the power off at the T-mixer control panel and pulls the safety rope. The T-mixer stands next to the roller die take away conveyor in the pit and reaches across the belt to unjam the rubber. The belt loader cuts and pulls the rubber from the rolls using a mill knife and hay hook. If the jam is severe then the T-mixer climbs onto the conveyor belt to remove the rubber from the rolls. Occasionally, the T-mixer or the belt loader raises the rolls up to pull the rubber out from underneath. (Tr.2033-40, 2081-82, 2141-47) The Secretary contends that employees are exposed to the pinch points of the rolls and could sustain injuries such as degloving, crushing or amputation.

Rubber jams occur under the slitter knife because the roller die is ragged or cold. In order to unjam the slitter knife, the T-mixer turns the power off and hits the stop button at the control panel. The T-mixer pulls the safety rope and removes the rubber with a mill knife or hay hook. For a severe jam, the T-mixer climbs onto the conveyor belt and lifts the knife to clear the jam. The T-mixer's hands are inches from the knife and sometimes touches it when unjamming the rubber. (Tr.2046-48, 2153-55) The Secretary asserts that employees are exposed to the unexpected energization of the slitter knife which could result in crushed or amputated fingers.

Rubber sticks and builds up underneath the belts between the soap tank and the chain belt resulting in a jam. In order to unjam the point where the soap tank belt transfers to the chain belt, the T-mixer turns the power off and hits the stop button on the control panel. He engages the safety

rope and removes the rubber from the side of the conveyor. If the jam is severe, the T-mixer climbs onto the chain belt which is approximately three feet above the ground to remove the rubber between the two conveyor belts. (Tr. 2041, 2155-58) The Secretary alleges that the employee could be caught between the pinch points of the belts and the rollers and sustain crushing injuries or broken bones if the conveyors unexpectedly energized.

Finally, rubber jams occur at the end of chain belt at the festoon drop off area. The chain conveyor belt drops half of the rubber slabs over the first set of festoon bars and transfers the other half to the second set of festoon bars. Rubber from the chain belt occasionally hits the top of the first set of festoons and wraps around the chain belt. In order to remove the jam, the T-mixer pulls the safety rope and climbs onto the catwalk to cut the rubber out from in between the belts. If the T-mixer cannot reach the rubber from the catwalk, he climbs onto the conveyor belt to straighten out the slabs so that they drape between the festoon bars. (Tr.2042, 2048-50, 2159-62) The Secretary asserts that employees are exposed to the hazard of unexpected energization of the festoons which could result in crushing injuries from the stitcher wheel.

Respondent has no written procedures which employees are required to follow to unjam the various parts of the banbury. Banbury employees are not trained at the *authorized* level or required to lockout the equipment when clearing a jam. Belt loaders and T-mixers are trained to operate and unjam the banbury by fellow employees when they first start. (Tr.1981, 2050, 2276)

#### Discussion

The Respondent disputes the applicability of the standard to the unjamming activities on the banbury. Dayton Tire argues that unjamming the Dayton Loader, the roller die, slitter knife, the area between the soap tank and the chain belt, and the festoons are not service and maintenance activities as defined by the standard. *See* footnote 7 *supra*. Even if the LOTO standard is applicable, Respondent argues that these unjamming activities occur only during normal production operation and thus, fall within the minor servicing exception which is defined as unjamming activities that are minor, routine, repetitive and integral to the production process so long as alternative safety provide effective protection. *See* footnote 5 *supra*. Finally, Dayton Tire states that Ogden Allied services severe jams that halt production on the banbury.

The Secretary has established that the LOTO standard applies to the unjamming activities on the first and second floors of the banbury. See footnote 4 *supra*. Unjamming and removing rubber from the Dayton Loader, roller die, slitter knife, between the soap tank and chain belt, and the festoons constitute service and maintenance. See footnote 7 *supra*. Although Dayton Tire argues that these activities are minor, they do not fall within the minor servicing exception standard because the banbury is not engaged in production during the unjamming process. Safety ropes and emergency buttons are not alternative means of protection to LOTO. Safety ropes and emergency buttons can malfunction or be reset and will not prevent someone from unexpectedly starting up the banbury. The record shows that safety ropes have failed to deactivate the machine when pulled on the first and second floor banbury. (Tr.2198-2202, 2227, 2240-41)

The evidence supports the finding that banbury employees were exposed to the hazards of unexpected energization of the Dayton Loader, roller die, the area between the soap tank and chain belt, and the festoons in the banbury when unjamming rubber. The record shows that employees unjamming the Dayton Loader could sustain crushing injuries from the pinch points between the rolls and conveyor. Specifically, during the unjamming of the Dayton Loader, employees' hands were inches away from the moving parts of the machine. If the Dayton Loader accidentally started up during the unjamming, the employee's right hand would be caught around the roll which could result in a broken hand. If the Dayton Loader accidentally started in reverse, the employee's left hand would get caught and the employee would sustain crushing injuries to the fingers or a broken wrist. (Tr. 2371) With respect to unjamming the top of the loader, employees' hands could be caught between pinch points or under the knife and sustain serious injury. Further, employees could fall off the Dayton Loader if it unexpectedly energized when unjamming and sustain serious physical harm.

In addition, if the roller die unexpectedly started up when employees were unjamming it, they could be pulled under the unguarded bottom roll and the scraper blades sustaining severe cuts or crushing injuries to the hand. (Tr. 2167, 2241-43) Employees were exposed to the hazards of having their hands severely cut or amputated by the slitter knife if it accidentally descended during the unjamming process. (Tr. 2284) While unjamming the area between the soap tank and the chain belt, employees were exposed to the pinch point created by the soap tank belt circling back around

the chain belt which could result in a mangle or broken arm. Employees were also exposed to the pinch point created by the belts in the festoons and could sustain serious hand injuries. (Tr. 2285)

Although there is no testimony that the Dayton Loader or the slitter knife has unexpectedly energized during unjamming activities, the record shows that the Dayton Loader has unexpectedly cycled without explanation. (Tr. 2228) Employee testimony reveal that the banbury has unexpectedly energized while employees were unjamming the roller die, the area between the soap tank and chain belt and festoons. With regard to unjamming the roller die, maintenance has reset the safety and accidentally energized the banbury while a T-mixer was unjamming the rolls in the pit. An individual at the T-mixer control panel cannot see the T-mixer in the pit. (Tr. 2164-67) In another incident, an individual reset the safety and accidentally started the banbury while a T-mixer was unjamming the area between the soap tank and the chain belt. Only the T-mixer's knees could be seen from the T-mixer control panel since he was under the exhaust hood trying to unjam the rubber. (Tr. 2170-76) On two occasions, the banbury unexpectedly energized while employees were unjamming the festoons. In the first incident, maintenance reset the safety and unexpectedly energized the banbury while the T-mixer was removing a rubber jam in the festoons. An individual standing at the T-mixer control panel cannot see the festoons. In the second incident, an employee accidentally started the banbury when a supervisor was standing on the belt in the festoons. (Tr. 2178-85) Given the fact that the banbury consist of three floors and at least three employees monitoring the first and second floor banbury operations, there is risk that someone will inadvertently reset the safeties and activate the machine while an employee is in the zone of danger. (Tr. 2272-74) The banbury moves upon being energized leaving the employees little or no time to leave the zone of danger or to remove their hands from the points of operation.

The facts establish that Dayton Tire failed to implement the required LOTO procedures during unjamming activities on the first and second floors of banbury 271, 272, and 273. Employees were exposed to unexpected energization of the banbury while unjamming the Dayton Loader, roller die, area between the soap tank and chain belt and the festoons on said machines. For the foregoing reasons, the Complainant has met his burden of proof and the violation as to the aforesaid banburys is affirmed.

A willful violation is defined as “intentional disregard” or “plain indifference” toward the standard. See Willful Analysis Section *supra* pg. 22. The facts support a finding that the Respondent had a heightened awareness that banbury employees unjamming operations on the first and second floors were exposed to the hazard of unexpected startups of the machine since Respondent received notice that the Banbury Department was cited in the Des Moines, Iowa citation for failure to implement LOTO procedures. Based on the evidence, Respondent did not take any measures to protect their employees from unexpected energization of the banbury in light of the Des Moines citation; therefore, the violation as found above constitutes a willful violation within the meaning of the Act.

### **Item 6 Module Machine**

Item 6 of the Citation reads as follows:

29 CFR 1910.147(c)(4)(i): Procedures were not developed and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:

At the plant[,] a documented procedure to control potential hazardous energy for each type of machine was not being used by employees installing parts and unjamming module machines.

A module machine is approximately twenty-five yards long, eight feet wide and sixteen feet high and consists of three sections; a tire uniformity optimizer (TUO), a white side wall grinder and a side wall painter. There are 21 module machines at the Oklahoma City location. As implied by its name, the tire uniformity optimizer ensures that each tire passing through the machine is of the same size; the white side wall grinder removes the black rubber veneer covering the white side walls of the tire and the painter paints the side walls. The Secretary alleges that employees operating the module machine are exposed to serious injury or death if the machine becomes unexpectedly energized while (1) unjamming tires that become jammed at any point along their passage through the machine, (2) when installing grinding stones, dust scoops and brake pads in the white side wall grinder and (3) when changing the chuck on the white side wall grinder.

The record reveals that tires are fed into one end of the machine on a conveyor belt and enter the TUO. Upon exiting the TUO each tire proceeds by conveyor belt to the white wall grinder and thence to the painter. The tire is then ejected from the machine via conveyor belt. Employee

testimony established that tires occasionally become “jammed,” that is, the progress of the tire through the machine operation is impeded because stop pins fail to operate properly or photo eyes become obstructed. Tires also become jammed in the “chuck” mechanism of the white side wall grinder, and the TUO (mischucks). Upon the occurrence of a jam, the operator places the machine in “manual” mode thereby stopping the machine’s movement although the machine remains energized (electrical, pneumatic and hydraulic). The tire causing the jam is removed by the operator by hand or with a metal hook and the machine is activated in the automatic mode thus resuming normal production. The operator’s hands are in close proximity to moving parts such as the grinding stones and the top and bottom chucks when unjamming tires in the white side wall grinder and the chucks in the TUO. The employees are exposed to severe lacerations to the hands and arms while unjamming tires in the TUO and the white side wall grinder in the event that the machine is unexpectedly turned on. Several employees testified that they personally experienced “near-misses” when the module machine was unexpectedly activated by other employees while engaged in unjamming tires. Based upon the evidence, it is concluded that Respondent’s employees were exposed to serious injury while engaged in unjamming tires in the TUO and the white side wall grinder and Respondent failed to institute appropriate LOTO procedures, as alleged, to protect employees from injury in the event of unexpected energization of the machine. Moreover, the unjamming activities did not occur during normal production; that is, the machines were placed in the manual mode and were not engaged in the production process during unjamming. Contrary to Respondent’s assertion, the employees were not engaged in “minor servicing” activities and, therefore, exempt from the requirements of the LOTO standard. *See* footnote 5 *supra*. The record clearly establishes that employees were exposed to injury while unjamming tires and that exposure could be eliminated by instituting lockout procedures.

Employees were also exposed to serious injury while changing the grinding stones, dust scoops, brake pads and the chucks in the white side wall grinder. The chucks must be changed whenever a different size tire is processed through the machine. The grinding stones, dust scoops and brake pads must be replaced when they become worn. Each of these activities exposes the machine operator to moving parts in the event that the machine is unexpectedly energized. The grinding stone is a round disk with a sandpaper like edge which rotates at high speeds to remove the

rubber from the white side walls. Over time, the disk wears down and must be replaced. In order to remove and replace the grinding stone, the operator must place his or her hands on the stone. Activation of the stone at this point of the removal and replacement process would result in severe injuries to the operator's hands. In addition, the operator's hands and arms are in close proximity to the grinding stone while changing the brake pads and the dust scoops. Similarly, the employees are exposed to severe injury to arms and hands in the event that the grinding stone is activated during the replacement of dust scoops and brake pads.

The chuck in the white side wall grinder consists of two rotating steel cylinders. The lower chuck which the tire sits upon raises the tire to the top rotating chuck in order for the grinding stone to perform its rubber removal function. During a chuck change, the operator places the machine in the manual mode and removes the screws holding the top and bottom chucks in place. The chucks are then manually removed by the operator. This process requires the employee to place his or her hands directly on the perimeter of the chucks. In the event that the machine became energized at this point, the operator would be exposed to the spinning motion of the chucks as well as the upward motion of the bottom chuck to the top chuck thus exposing the employee to severe injury to the arms, hands and fingers including amputation.

Several employees testified as to their personal experiences regarding the energization of the module machine while engaged in changing chucks, grinding stones, dust scoops and brake pads as well as when unjamming tires. In each instance, the employee was exposed to the unexpected movement of the machine. (Tr. 276-79, 283, 305-06, 371-75, 440-41, 459-60, 483, 547-48, 557-58, 737-38, 750, 775-84, 854-59, 911-12, 937-38, 990-93, 1013-14, 1122-23, 1483-84, 1524, 1779-80) The record is replete with instances wherein employees were exposed to the unexpected movement of the machine while engaged in the activities described above.

In response to this evidence, Respondent asserts that the tasks were accomplished during normal production operations and were minor, routine, repetitive and integral to the production process. Respondent's arguments are not persuasive. The massive amount of evidence presented by the Secretary clearly established that Respondent's employees were exposed to the precise hazards that the standard was intended to eliminate. Moreover, the work activities were accomplished when the machine was not producing anything. Thus, the work activities were not

performed during normal production operations and therefore exempt from the standard as alleged by the Respondent.

Although this item is alleged to be a “willful” violation, the Secretary has failed to establish that Respondent intentionally disregarded or was plainly indifferent to the LOTO standard as it applied to the module machine. Furthermore, Respondent did not have a “heightened awareness” of its obligations to comply with the LOTO requirements for the module as a result of the “Des Moines” citation. The facts do support a finding of a serious violation within the meaning of the Act and, for the reasons stated *supra* at pg. 41 this item was tried as an alleged serious violation by the implied consent of the parties. Accordingly, this item is amended pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to reflect a serious violation of the cited standard and the citation as amended, is affirmed.

**Item 7 Failure To Issue Equipment**

Item 7 of the Citation reads as follows:

29 CFR 1910.147(c)(5)(i): Locks, tags, chains, wedges, key blocks, adapter pins, self locking fasteners, or other hardware were not provided by the employer for isolating, securing, or blocking of machines or equipment from energy sources:

At the plant[,] the employer did not provide the necessary protective materials and hardware such as locks, tags, chains, etc., for attachment to energy isolating devices in the following operations:

- a) Employees setting up tire assembly machines.
- b) Employees setting up bead forming machines.
- c) Employees setting up curing presses and cleaning doper machines.
- d) Employees unjamming mills and extruders.
- e) Employees unjamming mixers and feed belts.
- f) Employees installing parts and unjamming modules machines.

The Secretary alleges that Respondent failed to provide employees with the necessary equipment to implement the LOTO procedures required to be instituted pursuant to section 147(c)(4)(i) for items 1-6 *supra*.<sup>19</sup> Respondent does not dispute this point. In fact, Respondent asserts, in essence, that there was no need to provide the materials to employees because it believed,

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<sup>19</sup>The Secretary declined to issue this citation on an instance by instance basis. There is no explanation as to why this was cited as a single item rather than on a machine type basis (items 1 - 6) or on an individual employee basis similar to the “failure to train” violations. See *Hartford Roofing infra*.

in good faith, that LOTO procedures were not required for the activities listed above. Thus, to provide the materials to employees would only constitute an unnecessary act. As discussed above, however, the Secretary has demonstrated, by a preponderance of the evidence, that LOTO procedures including providing the necessary equipment to employees were required for the activities described. Moreover, the failure to institute the procedures and provide the required materials exposed employees to a substantial probability that death or serious physical harm could result.

Respondent argues vigorously that this violation, if supported by the evidence, was not willful in nature for the reasons set forth at pg. 22 *supra* (Willful Discussion). However, based upon the “Des Moines” citation, Respondent had a heightened awareness of the need to institute LOTO procedures for the tire assembly machines (item 7(a)), the curing presses (item 7(c)) and the banbury (item 7(e)). Accordingly, the failures to provide necessary protective materials and equipment to employees engaged in the aforesaid work activities are affirmed as willful violations.

The Secretary has established, however, that the work activities performed by Respondent’s employees as described in items 7(b), &(d) and 7(e) of the citation exposed those employees to serious physical harm or death. Moreover, this item was tried as a serious violation within the meaning of the Act with the implied consent of the parties. *Supra* pg. 41. Accordingly, items 7(b), 7(d), 7(f) and the dooper machine (item 7(c)) of the citation and complaint are amended pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to allege serious violations of the Act and the citation and complaint, as amended, are affirmed.

**Items 8(a) Failure to Inspect and 8(b) Failure to Certify Inspection**

Items 8(a) and 8(b) of the Citation read as follows:

(a) 29 CFR 1910.147(c)(6)(i): The employer did not conduct an annual or more frequent inspection of the energy control procedure to ensure that the procedure and requirements of this standard were followed:

At the plant[,] periodic inspections were not performed at least annually in order to verify and to ensure that the energy control program was being properly utilized in the following operations:

- a) Employees setting up the tire assembly machine.
- b) Employees setting up bead forming machines.

- c) Employees setting up curing presses and cleaning doper machines.
- d) Employees unjamming mills and extruders.
- e) Employees unjamming mixers and feed belts.
- f) Employees installing parts and unjamming modules machines.

(b) 29 CFR 1910.147(c)(6)(ii): The employer had not certified that periodic inspections of the energy control procedures had been performed.

At the plant[,] the employer failed to certify that the periodic inspections were performed at least annually in order to verify and to ensure that the energy control program was being properly utilized in the following operations:

- a) Employees setting up the tire assembly machines.
- b) Employees setting up bead forming machines.
- c) Employees setting up curing presses and cleaning doper machines.
- d) Employees unjamming mills and extruders.
- e) Employees unjamming mixers and feed belts.
- f) Employees installing parts and unjamming modules machines.

As previously stated, Respondent acknowledges that it did not institute LOTO procedures for the machines and work activities listed above. Thus, Complainant has cited Respondent for failing to conduct periodic inspections of a non-existent energy control procedure as well as its failure to certify that the inspections were performed.

There is evidence in the record that Respondent's safety managers, Mr. McCowan and Ms. Mattocks, at various times reviewed the existing procedures regarding the applicability of the LOTO standard to the work activities performed by Dayton Tire employees. Mr. McCowan first became safety and plant manager in 1972 and served in that capacity until 1990. (Tr. 4411) He is familiar with the operations of each machine relevant to this matter and authored the safe operating procedure for each machine. (Tr. 4426) He reviewed each type of machine and the work activities relevant to this litigation during early 1990 shortly after the LOTO standard had been promulgated and concluded that the standard was not applicable to those work activities because, in his view, all of the activities were performed during normal production and exempt from the standard. (Tr. 4414, 4458) He also conducted safety "walk throughs and reviews" of each department on a monthly basis. (Tr. 4446) In addition, Mr. McCowan's successor, Ms. Mattocks, relied upon Mr. McCowan's determination that all service and maintenance functions were performed by Ogden

Allied personnel and Dayton employees were engaged solely in production work. However, upon being alerted by Industrial Hygienist Kearney that LOTO procedures may be applicable to some work activities performed by Dayton employees, Ms. Mattocks contacted production supervisors and foremen to determine whether any job functions performed by Dayton employees had changed since McCowan's evaluation. After receiving a negative response, Ms. Mattocks concluded that Ms. Kearney's observations were incorrect. All of this leads to the conclusion that safety procedures were being reviewed regularly by Mr. McCowan and Ms. Mattocks. Those reviews confirmed the initial, but erroneous, conclusion that the LOTO standard was not applicable to the work performed by Dayton employees. The Secretary apparently takes the position that the required inspections, if conducted properly, should have revealed the need to apply LOTO procedures to the work activities in question. To the extent that the inspections failed to reveal that requirement, in the context of this case, the citation is affirmed. Moreover, the failure of the inspections to reveal the need for the application of the LOTO standard exposed employees to a substantial probability that death or serious physical harm could result. Thus, the evidence supports a serious violation of the standard.

The record does not, however, support a finding that Respondent willfully violated the standard as alleged. It is clear that Respondent's safety personnel were regularly and routinely inspecting and reviewing safety procedures and practices in the Oklahoma City plant. The requirements of the LOTO standard were reviewed and evaluated by Mr. McCowan and Ms. Mattocks. Although their efforts were not entirely effective or complete, it cannot be said that their actions justify a finding of willful conduct for this violation notwithstanding the fact that the same violation was cited at the Des Moines location. *See Williams Enterprises, Inc.*, 1986-87 CCH OSHD ¶ 27, 893; *Secretary of Labor v. General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064 (1991); *Secretary of Labor v. Keco Industries, Inc.*, 13 BNA OSHC 1161 (1987).

With respect to the failure to certify the results of inspections it is undisputed that Respondent failed to comply with the provisions of that standard. There is no evidence, however, that Respondent's failure to comply with the standard exposed employees to serious physical harm or death. Accordingly, this subitem is affirmed as an other than serious violation. For the reasons stated above, there is no basis for concluding that the violation was willful as alleged.

### Citation I, 92 items

29 C.F.R. 1910.147(c)(7)(i): The employer failed to train each authorized employee with respect to all training elements listed under Item (A) of this section specifically training in the recognition of applicable hazardous energy sources the type and magnitude of energy available in the workplace, and/or the methods and means necessary for isolation control.

The Secretary alleges that Respondent failed to train 92 employees<sup>20</sup> engaged, as part of their work activities, in the service and maintenance of the machines and equipment discussed *supra* (Items 1-6 of the complaint) at the “authorized” level. *See* footnote 9 *supra*. Respondent agrees that the employees listed in the complaint were not provided with training at the authorized level. Moreover, Respondent conceded that each named employee was assigned to work in one of the job classifications listed in items 1 through 6 of the complaint.<sup>21</sup> *See* Joint Stipulations *supra*. Accordingly, in light of the findings above (items 1 through 6), each of the listed employees should have been trained at the authorized level prior to engaging in those work activities. Thus, the aforesaid failure to train violations are affirmed.

Respondent vigorously disagrees with Complainant’s characterization of the violations as willful. Respondent argues that it believed in good faith that it had complied with the LOTO standard. Moreover, each employee listed in the complaint had received training at the “affected” level. *See* footnote 8 *supra*. Thus, according to Respondent, there was no failure to train; at most there was a failure to provide the proper level of training. In effect, Respondent argues that it made a good faith effort to comply even though its efforts were not entirely effective or complete. *See*

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<sup>20</sup>The failure to train violations are set forth at items 9 through 106 of the original complaint. Complainant added one additional failure to train violation (item 108) and deleted the violations set forth at items 13, 18, 31, 49, 84, 88 and 89.

<sup>21</sup>Respondent argues that seventeen of the training violations should be vacated on the ground that the employees named in those items failed to testify. The stipulations establish, however, that all of the named employees were employed in work activities which exposed employees to the hazards described above. *Secretary of Labor v. Phoenix Roofing*, 17 BNA OSHC 1076 (1995); *Secretary of Labor v. Dover Elevator*, 16 BNA OSHC 1281 (1993). Moreover, it is not necessary to obtain the testimony of the exposed employee to establish exposure. *See Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 66 S. Ct. 1187 (1946); *Reich v. Southern Maryland Hospital, Inc.*, 43 F.3rd 949 (1995).

*Williams Enterprise, Inc.*, 13 BNA OSHC 1249, 1257 (1987); *Secretary of Labor v. Woolsten Construction Co.*, 15 BNA OSHC 1114, 1119 (1991), *aff'd*, 15 BNA OSHC 1634 (D.C. Cir. 1992).

Although Respondent provided “affected level” training to its employees, the issue is whether Respondent intentionally disregarded or was plainly indifferent to its responsibility to provide employee training at the authorized level. Respondent has recited a number of grounds in support of its good faith defense. *See* pg. 27-31 *supra*. No convincing defense has been offered, however, for Respondent’s disregard for the Des Moines citation (Exh. C-92), and the notice to Respondent via that citation that work activities at the Oklahoma City facility may be subject to LOTO requirements. As demonstrated above, an analysis of those machines and work activities, items 1 (TAMS), 3 (curing press) and 5 (Banbury) of the complaint, should have alerted Respondent of the hazards to which its employees were exposed and the need to provide training at the authorized level for those employees. Based upon the record evidence, it is concluded that Respondent willfully violated the training standard for twenty-one TAM size changers (Items 9, 10, 11, 27-30, 32-34, 37-40, 45, and 51-56), ten curing press mold, bladder and PCI ring changers (Items 22, 36, 44, 57-63), and two Banbury operators (Items 26 and 50). *See Willful Discussion supra* at pgs. 31-34. For the reasons stated *supra* at pg. 41, the remaining training violations are affirmed as serious violations.

**Item 107 Fatal Injury on M6 85 TAM**

Item 107 of the Citation reads as follows:

29 CFR 1910.147(d): No orderly application of energy control as required by this paragraph was utilized on the M6 85 Inline tire assembly machine during setup operations on October 19, 1993, which resulted in the unexpected cycling of the machine, fatally injuring an employee.

As to this item, the Respondent cites 29 CFR 1910.147(d) which reads, in relevant part, as follows:

The established procedures for the application of energy control (the lockout or tagout procedures) shall cover the following elements and actions and should be done in the following sequence:

Following the above language are six numbered subparagraphs listing the actions that must be taken during a lockout or tagout procedure. The citation fails to give any notice of which subsection is being cited or whether some or all of the subsections are cited. In his posthearing memorandum, Complainant states without equivocation that Item 107 of the citation cites Respondent for failing to comply with section 1910.147(d)(2). (Complainant's Memorandum at pg. 76) The citation clearly does not cite Respondent for violating 1910.147(d)(2) nor has Complainant at any time sought to amend the citation to reflect that alleged violation. On the other hand, Respondent has not objected to the citation as written nor raised the language of the citation as an issue. The evidence elicited regarding this item relates to the fatal accident sustained by one of Respondent's employees while engaged in the setup of the M-6 TAM machine. (Tr. 2661-62, 2779-82, 2798, 2814-16, 3248-49) Based upon the record, it is concluded that the parties tried the issue of whether Respondent violated section 1910(d)(2) by consent. Accordingly, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, citation item 107 is amended to allege a violation of section 1910.147(d)(2). *National Realty and Construction Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973); *John and Ray Carlstrom*, 6 BNA OSHC 2101 (1978); *Rodney E. Fossett*, 7 BNA OSHC 1915 (1979).

Section 1910.147(d)(2) reads as follows:

(2) *Machine or equipment shutdown.*

The 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.

This item alleges that Respondent failed to shutdown the machine using established procedures for the machine and to insure an orderly shutdown of the machine. The citation implies that LOTO procedures for the machine were in existence for the M-6 machine and Respondent failed to follow those established procedures. The record clearly establishes, however, that Respondent had no LOTO procedures for any of the TAM machines at the time of the inspection. Thus, the violation is Respondent's failure to have established LOTO procedures in the first instance. Respondent has been cited for that violation and that citation has been affirmed. *Supra* pg. 21. Since Respondent failed to establish LOTO procedures in accordance with 1910.147(c)(4) for the M-6 TAM machine, this item is further amended pursuant to Rule 15(b) of the Federal Rules of Civil

Procedure to reflect a violation of that standard and incorporated as an additional violation under item 1 of the citation. For the reasons stated *supra* at 41, this item, as amended, is affirmed as a willful violation.

**Instance By Instance Citation (Egregious)**

The citation initiating this action was issued to Respondent, in large part, pursuant to Complainant's so called "egregious policy." The Department's Deputy Director for the Directorate of Compliance Programs, Mr. H. Barrien Zettler, testified on behalf of Complainant to explain the basis for the egregious policy and its application in this case. According to Zettler, the Department normally groups instances of the same or similar violations as one violation with a single proposed penalty. See *Secretary of Labor v. Caterpillar, Inc.*, 15 BNA OSHC 2153, 2170 (1993). Under the egregious policy, each violation is cited separately and a separate penalty is proposed for each item. Thus, as in this case, rather than citing Respondent for one violation of the training standard (29 CFR 1910.147(c)(7)(i)); ninety-two separate violations representing Respondent's failure to train ninety-two employees at the authorized level were alleged with a separate penalty for each violation. The genesis of the egregious policy occurred during 1986 when the Department concluded that the penalties OSHA had been proposing were "ineffectual"; that is, the penalties "were not having the effect that the statute intended those penalties to have."<sup>22</sup> (Tr. 5341) According to Zettler, "the purpose of the penalties is to persuade the violating employer to correct the violations" and "persuade the rest of industry...they cannot with impunity violate the standards." *Id.* Zettler further testified that "the Agency believed that it needed to find a way to increase penalties for employers who needed to be persuaded in a more effective manner, and industries that needed to be persuaded in a more effective manner that they could not with impunity violate the standards." (Tr. 5342) Although the instance by instance program initially focused on record keeping violations, the scope of the program soon expanded into safety and health matters such as ergonomics, construction, the chemical industry and other areas where large numbers of fatalities and injuries were occurring. The

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<sup>22</sup>During 1986 the maximum penalty for serious and other than serious violations was \$1,000 and \$10,000 for willful violations. The penalty limits were raised seven fold by the time the instance citation was issued with a minimum, mandatory penalty of \$5,000 for each willful violation. See *Omnibus Budget Reconciliation Act of 1990*, Pub. L. No. 101-508, § 3101 (1990).

Agency “tried to focus on those areas which we believed employers were neglecting, were determining not to try - not to come into compliance.” (Tr. 5346) In 1990, the Agency issued CPL 2.80 (Exh. C-112), Complainant’s policy statement for issuing instance by instance citations. The criteria which must be met before an instance by instance citation may be issued pursuant to that instruction are (1) that the alleged violation must be classified as “willful” and (2) at least one of the following elements must be present:

- (a) The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
- (b) The violations resulted in persistently high rates of worker injuries or illnesses.
- (c) The employer has an extensive history of prior violations of the Act.
- (d) The employer has intentionally disregarded its safety and health responsibilities.
- (e) The employer’s conduct taken as a whole amounts to clear bad faith in the performance of his/her duties under the Act.
- (f) The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

No statutory or judicial authority has been cited as a basis for this criteria nor is there any indication as to the weight to be accorded each element. Moreover, it is unclear which elements were present in this case which convinced Mr. Zettler that this matter should be treated as an “egregious” case. Mr. Zettler continually emphasized the point, however, that it is necessary, in his opinion, to assess high penalties under the egregious policy in order to achieve compliance with the Act. Specifically, the Agency has designated the LOTO standard as one of four standards for which the egregious policy will be applied in order to achieve compliance with those standards. (Tr. 5352) Moreover, “an important part of the egregious program is not simply the size of the penalty, but the wide spread...public notice of that penalty.”<sup>23</sup> (Tr. 5355)

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<sup>23</sup>In this case the Secretary of Labor traveled to Oklahoma City and personally served the citation upon Respondent and thereafter conducted a press conference in that city along with other high ranking Labor Department officials to announce the issuance of the citation. The following day the Secretary sought a preliminary injunction (continued...)

Unlike routine citations issued by local Area Directors, “egregious” cases are reviewed by Mr. Zettler and his staff at the national office to determine whether the case satisfies the criteria to be issued as egregious. Upon being satisfied that the case merits an egregious designation, Mr. Zettler formulates recommendations to be presented to the Assistant Secretary or the Deputy Assistant Secretary of Labor for final approval. (Tr. 5366) Although Mr. Zettler did not personally review the investigation file in this case, he was briefed by his staff and concluded that the case should be issued as egregious with the maximum penalty of \$70,000 per violation. Mr. Zettler did not consider the penalty factors set forth at section 17(j) of the Act<sup>24</sup> when he proposed the penalties for the alleged violations, even though he knew that the gravity factor was not the same for each violation. (Tr. 5436-38, 5449-50) The stated purpose for issuing the citation in this manner was to “send a message”<sup>25</sup> to Respondent and the tire manufacturing industry by proposing a penalty of such magnitude that compliance with the LOTO standard would be enhanced. (*See generally* testimony of H. Berrien Zettler Tr. 5334-5500; Complainant’s Posthearing Brief at pg. 104 *et seq.*) Moreover, the Secretary takes the position that assessing penalties falls within his “prosecutorial discretion” to which the Commission must defer (Complainant’s Reply Brief at pg. 23-24) notwithstanding the plain language of section 17(j) of the Act granting penalty assessing authority solely to the Commission. *Secretary of Labor v. Hern Iron Works, Inc.*, 16 BNA OSHC 1619 (1994).

Respondent vigorously argues that the Secretary’s manipulation of the statute and the LOTO standard to arrive at one of the largest penalties in the history of the Act was arbitrary and capricious and a violation of the due process notice requirement. (Respondent’s Post-Trial Brief at pg. 20 citing

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<sup>23</sup>(...continued)

against Respondent in Federal District Court pursuant to Section 13 of the Act. The preliminary injunction was denied on the ground that the Secretary had failed to establish that Respondent’s employees were in imminent danger due to the alleged noncompliance with the LOTO standard. *Reich v. Dayton Tire, A Division of Bridgestone/Firestone, Inc.*, 855 F. Supp. 276 (W.D. Oklahoma 1994). The Secretary did not appeal the decision.

<sup>24</sup>Section 17(j) of the Act states:

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to 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.

<sup>25</sup>The Secretary’s authority to send such messages, according to Mr. Zettler, falls within the “public purpose” of the statute. (Tr. 5400-01)

*Kolender v. Johnson*, 461 U.S. 352, 357-58 (1982)) Respondent argues that Complainant's written "egregious" policy is nothing more than a vehicle to enforce the "personal predilections" of government personnel. *Id.* Respondent points to the fact that the primary decision maker in this case, Mr. Zettler, does not worry about government compliance with CPL 2.80, Complainant's egregious policy, when issuing citations. (Tr. 5459-60) Thus, Complainant's "egregious" policy is no policy at all and provides no notice to employers as to the criteria that must be met before a citation will be issued. (Respondent's Brief at pg. 20) Moreover, according to Respondent, the arbitrary application of the egregious policy "is out of all proportion to any culpability Dayton may have had regarding the LOTO standard and any legitimate interest that the Secretary may have in deterring future LOTO violations." (Respondent's Brief at pg. 22) Respondent also cites *Diamond Roofing, Inc. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976), that "an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *Id.* at 649 (emphasis added).

As the Supreme Court has made clear, the statutory scheme enacted by Congress "contemplates that the rights created by the [OSH] Act are to be protected by the Secretary." *Cullahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 6 (1985). Exclusive rulemaking and broad prosecutorial authority are vested in the Secretary. *See* sections 6(b), 8(a) and 10 of the Act. Moreover, instance by instance citing of individual violations falls within the prosecutorial discretion of the Secretary. *Secretary of Labor v. Caterpillar, Inc.*, 15 BNA OSHC 2153 (1993). Indeed, a finding of "willful" is not necessary to affirm instance by instance violations. *Caterpillar supra*; *J.A. Jones*, 15 BNA OSHC 2201 (1993). The Commission has held that the test to be applied for determining the appropriateness of instance by instance citing is whether the cited standard prohibits individual acts or a single course of conduct. *Caterpillar supra* (citing *Blockburger v. United States*, 234 U.S. 299 (1934)). In *Secretary of Labor v. Sanders Lead Co.*, 17 OSHC BNA 1197 (1995), the Review Commission held that multiple citing of the same standard was appropriate in that case because the cited standard required evaluation and action "under certain unique circumstances peculiar to each employee." *Id.* at 1203 (emphasis added). The Review Commission rejected instance by instance citing of a roofing standard however, where the employer's failure to comply

with the standard was a single violation which exposed six employees to the hazard. *Secretary of Labor v. Hartford Roofing Co.*, 17 OSHC BNA 1361 (1995). The Commission held that “where a single practice, method, or condition affects multiple employees there can be only one violation of the standard. *Id* at 1365. *See also Secretary of Labor v. Arcadian Corp.*, 17 OSHC BNA 1345 (1995).

Armed with his broad prosecutorial powers, the Secretary possessed wide discretion in citing Respondent in this case for the violations disclosed during his investigation. At the low end of the spectrum, the Secretary could have cited Respondent for one violation of the general LOTO standard set forth at 29 CFR 1910.147(c)(1)<sup>26</sup> for its failure to establish an energy control program for the machines listed in items 1 - 6 of the citation; failure to train the 92 employees listed in the citation as well as the required inspections set forth at item 8 of the citation. A single penalty, assuming willfulness, in the amount of \$70,000 could have been proposed and a second citation alleging a violation of 29 CFR 1910.147(c)(5)(i) (Item 7, failure to provide locks, tags, etc.) with a \$70,000 proposed penalty would cover all of the violations alleged in the citation issued by the Secretary. At the other end of the spectrum, the Secretary possessed discretion to cite Respondent for violating 29 CFR 1910.147(c)(4)(1) for each individual machine described in items 1 - 6 of the citation. Thus, an individual citation could have been issued for each of the 58 TAM machines (item 1), 5 beadwinding machines (item 2), 180 curing presses and 7 doper machines (item 3), 4 tubers (item 4), 3 banburys (item 5) and 21 module machines (item 6) for a total of 278 separate violations. *See Hartford Roofing supra*. Assuming a willful allegation for each machine, the maximum proposed penalty would be \$19,460,000. Similarly, individual citations for 29 CFR 1910.147(c)(5)(i) (item 7) and 29 CFR 1910.147(c)(6)(i) (item 8) could have been issued for each of the 278 machines with a maximum proposed penalty of \$38,920,000. Finally, as cited in this case, failure to train each employee could be cited separately for an additional maximum penalty of \$6,440,000. Thus, the

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<sup>26</sup>29 CFR 1910.147(c)(1) provides:

(c) *General* -(1) *Energy control program*. The employer shall establish a program consisting of energy control procedures, employee training and periodic inspections to ensure that before any employees performs any servicing or maintenance on a machine or equipment where the unexpected energizing, start up or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source, and rendered inoperative.

proposed penalty range available to the Secretary in the exercise of his prosecutorial discretion is a low of \$140,000 or less to a high of \$64,820,000.

The Secretary, of course, did not exercise his full discretionary powers in this case. (Tr. 5576-80) Items 1 - 6 allege that Respondent failed to institute energy control procedures for each type of machine even though two distinctly different machine types are included in item 3 (curing presses and doper machines). (Tr. 5401) Respondent's failure to train employees at the authorized level is cited on an instance by instance basis; however, its failure to provide locks, tags, etc. to each employee are combined into one item (item 7) and the failure to conduct annual inspections for each machine and certify those inspections are similarly combined into one item (item 8(a) and 8(b)). There appears to be no logical or rational basis for citing Respondent in the manner set forth in the citation and Complainant has been unable to give a rational explanation for the methodology utilized by the Secretary when drafting the citation other than to "send a message" to Respondent and others in the tire manufacturing industry. (Tr. 5482, 5572-81) Complainant freely acknowledges, however, that the egregious policy was utilized in this matter for the sole purpose of raising the proposed penalty to achieve that end.

Respondent vigorously objects that the proposed penalty is grossly excessive and finds little solace in the fact that the Secretary did not fully exercise his prosecutorial discretion by applying the egregious policy to its full extent in this case. (Tr. 5603) Respondent cites *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and *Pacific Mutual Life Ins. Co. v. Haslip*, 11 S. Ct. 1032, 498 U.S. 1306 (1991), for the proposition that the government cannot impose a grossly excessive penalty simply because that penalty will deter others. (Respondent's Reply Brief at pg. 15) In a later case, *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), the Supreme Court, in finding that a two million dollar award was grossly excessive and therefore exceeded constitutional limits, stated: "[e]lementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.* at 1598. The case involved the award of damages assessed by a jury against an automobile manufacturer for failing to disclose to the purchaser of a new automobile that it had been repainted prior to the original sale. In his concurring opinion Justice Breyer stated:

Requiring the application of law rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.

*Id.* at 1605.

Justice Breyer concluded that the standards applied by the state were vague and open ended to the point where they risked arbitrary results. *See also Seaboard Air Line Railway v. A.L. Seegers*, 28 S. Ct. 28, 30 (1907).

It is well established that the Secretary may cite individual violations of the same standard on an instance by instance basis and it is concluded that the citation issued in this case satisfies the requirements for issuing instance by instance violations. *Hoffman Construction*, 6 BNA OSHC 1274, 1977-78 CCH OSHD ¶ 22,489; *Caterpillar, Inc. supra*; *Hartford Roofing supra*; *Sanders Lead supra*. However, authority to assess a penalty for those violations lies solely within the discretion of the Review Commission. Section 17(j) of the Act; *Hern Iron Work, supra*. As stated by the Review Commission:

The key question for penalty purposes is not how many errors or omissions there were, but what penalty is appropriate. Thus, although the Secretary may cite separate omissions to record injuries as separate violations, he may not exact a total penalty that is inappropriate in light of the four factors listed in section 17(j) of the Act; the gravity of the violations, the employer's good faith, its size, and its history of violations.

*Caterpillar supra* at 2173.

The penalties proposed by the Secretary in this case bear no relationship to the factors set forth at section 17(j) of the Act. (Tr. 5450) On that basis alone, the penalty recommendation of the Secretary must be rejected. Furthermore, the egregious policy was applied arbitrarily in this case to propose a high penalty in order to effectuate the "public policy" of the Act without any assurance of "uniform general treatment of similarly situated persons." *BMW v. Gore supra*.<sup>27</sup> Since the

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<sup>27</sup>Pursuant to the principles applied by the Secretary in this case, any employer having six different machines subject to the LOTO standard and employing less than 100 employees who are authorized employees within the meaning of the standard is subject to a \$7,000,000 proposed penalty if the Secretary concludes that the elements  
(continued...)

egregious policy was applied by the Secretary for the sole purpose of influencing the assessment of a penalty, the application of that policy may be disregarded by the Review Commission when assessing a penalty in this case. In other words, that which the Secretary considered for purposes of proposing a penalty may be reviewed and accepted, modified or rejected by the Review Commission for purposes of assessing a penalty pursuant to section 17(j) of the Act. *Caterpillar supra*. See penalty section *infra*.

### **Penalty**

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: the size of the employer's business, gravity of the violation, good faith and prior history of violations. In *Secretary of Labor v. J.A. Jones Construction Company*, 15 BNA OSHC 2201 (1993), the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p. 40,033(No. 88-2681, 1992); *Astra Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070(No. 78-6247), 1982). The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶25,738 p. 32, 107 (No. 76-2644, 1981).

As previously discussed, the Secretary did not apply the penalty factors set forth at section 17(j) of the Act as a basis for proposing penalties for the violations alleged. Accordingly, the penalties proposed by the Secretary must be disregarded for purposes of assessing penalties pursuant to section 17(j) of the Act. See *Brennan v. OSHRC (Interstate Glass Co.)* 487, F.2d 438 (8th Cir. 1973); *Colorado Fuel & Iron Steel Corp.*, 2 BNA OSHC 1295 (1974).

The Secretary established by a preponderance of the evidence that Respondent violated 29 C.F.R. 1910.147(c)(4)(i) (failure to establish and use a hazardous energy control procedure) for seven distinct types of machines (items 1-6 of the citation). The evidence establishes that

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<sup>27</sup>(...continued)  
contained in CPL 2.80 have been met.

Respondent willfully violated that standard for the tire assembly machines (item 1); the curing presses (item 3(a)) and the Banbury mixers and feed belts (item 5). Because Respondent had a “heightened awareness” of these violations or the likelihood of their existence, each violation shall be considered separately for purposes of establishing a penalty.

First, with respect to the tire assembly machines, the record supports a finding of a high gravity factor for all of the second stage TAM machines and, in particular, the M-6 TAM machine. There is a high probability of severe injury from the unexpected energization of these machines including death. This fact has been dramatically demonstrated by the tragic death of a size changer for the M-6 machine. The violation extended to each of the 58 second stage TAM machines at Respondent’s location. Accordingly, the maximum penalty of \$70,000 is assessed based upon the high gravity factor. No reduction in the penalty is warranted because of good faith or history in view of the willful nature of the violation.<sup>28</sup>

With respect to the curing presses, (item 3) the record similarly supports the conclusion that a high gravity factor exists as a result of the unexpected energization of the machines. Such movement by this massive machine would likely result in severe physical harm to the exposed employee. Moreover, the probability of injury and the extent of the violation are likewise high. Accordingly, in view of the willful nature of the violation, a penalty in the amount of \$70,000 is assessed. No reduction of that penalty is justified on the basis of good faith or history<sup>29</sup> in view of Respondent’s “heightened awareness” of the violation.

Although a willful violation has been established relating to the Banbury mixers and feed belts (item 5) the gravity factor for that violation is less than that which was established for the TAMS and the curing presses. Although there is evidence that employees could sustain a severe laceration and possible broken bones as a result of the unexpected energization of these machine parts, there is no evidence that death is likely to occur. Thus, the severity of injury is not as great

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<sup>28</sup>Respondent is a large corporation employing thousands of people at multiple manufacturing locations. Accordingly, Respondent’s size has not been considered as a reduction factor in assessing a penalty for any of the alleged violations *see: Desarrollos Metropolitanos, Inc., v. OSHRC*, 551 F.2d 874 (1st Cir. 1977).

<sup>29</sup>There is no evidence in the record that the Oklahoma City location had received any OSHA citations prior to the instant citation.

as for the TAMS and curing presses. Nevertheless, a significantly high gravity factor was established by the Secretary based upon the severity of a resulting injury, the probability of injury and the extent of the violation. Accordingly, a penalty in the amount of \$50,000 is assessed for the violation. As with the other willful violations, *supra*, no reduction in the penalty is justified based upon Respondent's good faith and history of previous violations.

The other violations of 29 CFR 1910.147(c)(4)(i) relate to the bead winding machines (item 2), the doper machines (item 3), the tuber mills, extruders and the Dayton Loader (item 4) and the module machines (item 6). All of these items have been found to be serious violations within the meaning of the Act. With respect to the bead winding machine, the evidence establishes that changing the wire reels and the chuck could result in lacerations and possible finger bone fractures. There is no history, however, of any injuries to employees while changing wire reels or the bead winding chuck. Based upon the evidence it is concluded that the gravity factor for this violation is moderate. Of the five bead winding machines, two are automated. However, since the employees are clearly not engaged in production work when changing wire reels and chucks, no credit is given for good faith. Based upon the foregoing, a penalty in the amount of \$5,000 is assessed for this violation.

Although the doper machines were combined with the curing presses by the Secretary (item 3), the machines are completely different and pose different hazards to employees. Unlike the curing presses, the hazards to which employees cleaning the doper machines are exposed are relatively minor. There is evidence that the unexpected energization of the doper machine could expose an employee to bruises, minor lacerations, and, possible broken bones to the hands. The probability of an employee sustaining those injuries, however, is slight. Furthermore, there is no history of any employee being injured while cleaning the doper machine. Accordingly, it is concluded that the gravity of this violation is low and a penalty in the amount of \$3,000 is assessed.

With respect to the tread tuber and Dayton Loader (item 4) the evidence supports the conclusion that employees were exposed to serious physical harm in the event that the machines became unexpectedly energized while the employees were removing jammed rubber from the mills, extruders, the Dayton Loader and conveyor belts. Based upon the record, it is concluded that a moderate gravity factor must be applied in assessing a penalty for this violation. Only two tuber

operators were listed as exposed employees to hazards (items 19 and 108 of the citation). There is no evidence as to the total number of exposed employees nor is there any evidence of the duration of employee exposure. Although there is evidence of multiple “misses”; involving a high potential for employee injury as a result of unexpected energization, there is no evidence on the record of any actual injuries. Accordingly, a penalty in the amount of \$5,000 is assessed for this serious violation.

Item 6 of the citation (module machines) has been affirmed as a serious violation of the Act. Complainant lists forty-six employees exposed to the hazards presented by this violation and called a large number of those employees to testify at the hearing in this matter. Based upon that testimony, it is concluded that a high gravity factor must be applied in assessing a penalty. Many employees have been exposed to severe lacerations and possible broken bones for long periods of time with few or no precautions being taken to protect employees from potential injuries resulting from unexpected energization of these machines. For the foregoing, reasons, a penalty in the amount of \$7,000 is assessed for this violation.

Item 7 of the citation alleges that Respondent failed to provide appropriate locks, tags, etc, to employees operating the machines listed in items 1 - 6 of the citation. The violation has been affirmed as willful for three of the seven machines listed (items 7(a) TAM machines, item 7(c) curing presses and item 7(e) banbury). The other alleged violations have been affirmed as serious violations. Although the Secretary has not articulated a rational basis for combining these particular violations into one item of the citation with a single proposed penalty, other than the exercise of his broad prosecutorial discretion, there is nothing in the record which supports a separate penalty for each willful violation. Nevertheless, an analysis of each willful violation in relation to the penalty factor is necessary in order to assess a penalty.

With respect to the TAM machines, the Secretary has presented convincing evidence that a high gravity factor should be assessed for this violation. In addition to its failure to establish a lockout procedure for these machines, Respondent’s failure to provide appropriate lockout devices to exposed employees could have resulted in serious physical harm and, in one instance, did result in the death of an employee. The severity of the resulting injury due to this violation mandates the maximum penalty.

Similarly, with respect to the curing presses, these massive machines exposed the mold/bladder changers, PCI changers, to severe physical harm or death. Accordingly, great weight is given to the severity of injury factor when assessing a penalty for this violation.

Item 7(e), the banbury, has also been affirmed as a willful violation. The gravity factor, however, is not as high for this violation see *supra* pg. 84-85. Specifically, the severity of a resulting injury is not as great as the TAM or curing presses. Nevertheless, the gravity factor for the three machines is high. Accordingly, a penalty in the amount of \$70,000 is assessed for items 7(a), 7(c) (curing press) and 7(e) of the citation.

The remaining sub-items of item 7 have been affirmed as serious violations. As previously discussed, the high penalty gravity factor for the module machine alone warrants a maximum penalty. Accordingly, a penalty in the amount of \$7,000 is assessed for items 7(b), 7(c) (doper machines), 7(d) and 7(f).

Items 8(a) and 8(b) have been affirmed as a serious and other than serious violations, respectively. While it is true that Respondent's employees, Mr. McCowan and Ms. Mattocks, reviewed safety procedures within the plant on a regular basis, it is clear that those reviews failed to achieve the intended purpose of the cited standard; that is, to uncover work activities which exposed employees to injury as a result of unexpected energization of machines. In that respect, the inadequate inspections (reviews) exposed employees to serious physical harm or death (citation items 1 - 6 *supra*). Although the failure to certify that periodic inspections had been conducted has been affirmed as an other than serious violation, the overall effect of these violations in combination exposed employees to a high gravity factor. Accordingly, a penalty in the amount of \$7,000 is assessed for item 8(a) and (b) of the citation.

The remaining 92 items cited by the Secretary involve Respondent's failure to train 92 employees at the "authorized" level. The Secretary proposed a maximum penalty of \$70,000 for each violation for a total proposed penalty of \$6,440,000. For the reasons stated *supra* at pg. 74, it is concluded that the Secretary has established that thirty-three (33) of the failure to train violations were "willful." The remaining fifty-nine (59) failure to train violations have been affirmed as "serious" violations.

The penalty proposed by the Secretary for the failure to train violations constitutes a major issue in this case. The primary violation committed by Respondent was its decision that LOTO procedures need not be instituted for the work activities listed in items 1 - 6 of the citation. Those violations represent an application of the Secretary's "egregious" policy as a result of Respondent's failure to develop, document and utilize procedures for the control of potentially hazardous energy ( 29 CFR 1910.147(c)(4)(i)). The Secretary concluded that Respondent willfully violated that standard and proposed the maximum penalty of \$420,000, pursuant to the egregious policy, for the violations (Items 1 - 6 of the citation). As a consequence of its conclusion that LOTO procedures were not required for the work activities listed in the citation, Respondent, based upon that conclusion, failed to provide to each employee engaged in the activities described in items 1 - 6 of the citation, the locks, tags, chains and other equipment necessary to perform the LOTO procedure. The Secretary properly cited Respondent for failing to comply with that standard (29 CFR 1910.147(c)(5)(i)). However, rather than citing Respondent for the failure to provide the necessary equipment to each employee, the Secretary combined the violations into one item and proposed a penalty of \$70,000.

Also as a consequence of its conclusion that LOTO procedures were not required for the work activities listed in items 1 - 6 of the citation, Respondent declined to train employees engaged in those activities at the "authorized level." Rather than citing Respondent for one violation of this standard (29 CFR 1910.147(c)(7)(i)) consistent with the manner in which the Respondent was cited for its failure to provide necessary LOTO equipment to each employee, the Secretary issued separate violations as to each employee and proposed the startling penalty of \$6,640,000. Thus, the principle violation (failure to institute LOTO procedures) has a proposed penalty of \$420,000, a secondary violation resulting from the initial violation (failure to provide LOTO equipment to each employee) had a proposed penalty of \$70,000 and another secondary violation (training) had a proposed penalty over 15 times higher than that proposed for the principle violation. The Secretary has provided no rational explanation for his decision to cite only one instance of one secondary violation and 92 instances of another secondary violation. Moreover, there is no evidence that, having instituted LOTO procedures, Respondent would decline to provide the necessary equipment and training to employees particularly since there is no evidence of a history of prior "failure to train" violations at

the Oklahoma City location. It appears that the Secretary has the cart before the horse; the primary violation has a comparatively modest proposed penalty and a secondary violation has a proposed penalty far in excess of that proposed for the principle violations due primarily to the application of the Secretary's egregious policy for that violation. Under these circumstances, it is not clear what "message" is being sent to Respondent nor is there any indication that the egregious program as applied in this case, in the words of Justice Breyer, represents "the application of law rather than a decision maker's caprice ...." *BMW supra* at pg. 1605.

The Secretary, as previously discussed, has the authority to issue instance by instance citations for Respondent's failure to train each employee and this Commission must defer to that decision even though the Secretary has not articulated a rational basis for instituting that policy as applied in this case. Thus, I am constrained to assess a penalty as to each willful failure to train of at least \$5,000 per violation (see footnote 24). The application of the statutory penalty factors for the "failure to train" violations would, under ordinary circumstances, result in a penalty equivalent to that assessed for Respondent's failure to provide necessary LOTO equipment to each employee (Item 7 *supra* at pg. 87). Thus, although a penalty in the amount of \$70,000 would be appropriate for Respondent's willful failure to train employees at the authorized level, I am forced to assess a penalty in the amount of \$5,000 for each willful violation (33) for a total penalty of \$165,000.

The remaining fifty-nine (59) "failure to train" violations have been affirmed as serious violations. As previously stated, the Commission has held that "[t]he key question for penalty purposes is not how many errors or omissions there were, but what penalty is appropriate" *Caterpillar supra* at 2173. Thus, the penalty must be based upon the penalty factors set forth at section 17(j) of the Act. Based upon those factors, it is concluded that the overall gravity factor for the failure to train employees is moderate to high. A large number of employees are affected by the violation and, in many instances, serious physical harm or death could result from the violation. Although there is no history of previous violations, it is concluded that a penalty in the amount of \$1,000 is appropriate for each violation for a total penalty of \$59,000.

### Findings of Fact and Conclusions of Law

All findings of fact relevant and necessary to a determination of the contested issues have been made above Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

### Order

- (a) Willful Citation Item No. 1 alleging a violation of 29 CFR 1910.147(c)(4)(i) **is affirmed** and a penalty in the amount of **\$70,000** is assessed.
- (b) Willful Citation Item No. 2 alleging a violation of 29 CFR 1910.147(c)(4)(i) **is affirmed** as a serious violation and a penalty in the amount of **\$5,000** is assessed.
- (c) Willful Citation Item No. 3(a) (curing press) alleging a violation of 29 CFR 1910.147(c)(4)(i) **is affirmed** and a penalty in the amount of **\$70,000** is assessed.
- (d) Willful Citation Item 3(b) (doper machine) alleging a violation of 29 CFR 1910.147(c)(4)(i) **is affirmed** as a serious violation and a penalty in the amount of **\$3,000** is assessed.
- (e) Willful Citation Item No. 4 alleging a violation of 29 CFR 1910.147(c)(4)(i) **is affirmed** as a serious violation and a penalty in the amount of **\$5,000** is assessed.
- (f) Willful Citation Item No. 5 alleging a violation of 29 CFR 1910.147(c)(4)(i) **is affirmed** and a penalty in the amount of **\$50,000** is assessed.
- (g) Willful Citation Item No. 6 alleging a violation of 29 CFR 1910.147(c)(4)(i) **is affirmed** as a serious violation and a penalty in the amount of **\$7,000** is assessed.
- (h) Willful Citation Items 7(a), 7(c) (curing press) and 7(e) alleging a violation of 29 CFR 1910.147(c)(5)(i) **are affirmed** and a penalty in the amount of **\$70,000** is assessed.
- (i) Willful Citation Items 7(b), 7(c) (doper machine), 7(d) and 7(f) alleging a violation of 29 CFR 1910.147(c)(5)(i) **are affirmed** as serious violations and a penalty in the amount of **\$7,000** is assessed.
- (j) Willful Citation Item No. 8(a) alleging a violation of 29 CFR 1910.147(c)(6)(i) **is affirmed** as a serious violation and Item No. 8(b) alleging a violation of 29 CFR 1910.147(c)(6)(i) **is affirmed** as a non-serious violation with a total penalty in the amount of **\$7,000** assessed for both violations.

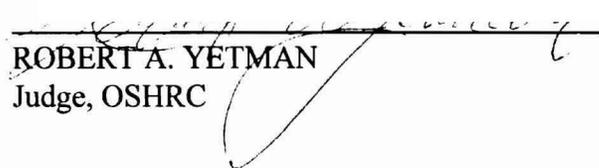
(k) Willful Citation Items 9,10,11,27-30, 32-34, 37-40, 45, 51-56, 22, 36, 44, 57-63, 26, and 50 (33 violations) alleging violations of 29 CFR 1910.147(c)(7)(i) **are affirmed** as willful violations with a penalty of **\$5,000** assessed for each violation (total penalty \$165,000).

(l) Willful Citation Items 12, 14-17, 20, 21, 23-25, 35, 41-43, 46-48, 64-83, 85-98, 100-106 (59 violations) **are affirmed** as serious violations and a penalty of **\$1,000** is assessed for each of the violations.

(m) Willful Citation Items 13, 18, 31, 49,84, 88 and 99 were withdrawn by the Secretary.

(n) The total penalty for all violations is **\$518,000**.

/s/

  
ROBERT A. YETMAN  
Judge, OSHRC

Dated: **FEBRUARY 21, 1997**  
Boston, MA\_\_