



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. 18-0068

ROY ROCK, LLC,

Respondent.

ON BRIEFS:

Joseph G. Gilliland, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Anthony M. Rainone, Esq., Eric Magnelli, Esq.; Brach Eichler LLC, Roseland, NJ
For the Respondent

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

An employee of Roy Rock, LLC, a New Jersey concrete and masonry construction company, was injured when his hand was caught in a machine that bends and cuts reinforcing steel bar, known as "rebar." Following the incident, the Occupational Safety and Health Administration issued Roy Rock a citation alleging a serious violation of a provision of the Concrete and Masonry Construction standard, 29 C.F.R. § 1926.702(j)(1), which requires potentially hazardous energy sources to be locked out and tagged during equipment maintenance or repair.¹ Administrative Law Judge Carol A. Baumerich affirmed the citation.

¹ Roy Rock was initially cited under the Occupational Safety and Health Act's general duty clause, 29 U.S.C. § 654(a)(1). The Secretary later amended the citation and complaint to instead allege a violation of § 1926.702(j)(1).

For the following reasons, we conclude that the Secretary has failed to establish § 1926.702(j)(1)'s applicability here. Accordingly, we reverse the judge's decision and vacate the citation.

BACKGROUND

In October 2017, Roy Rock was performing work at a construction site in Jersey City, New Jersey. G.N., a Roy Rock employee, began working at the site in February 2017, and his principal assignment was to bend and cut rebar using a machine called a Rod Chomper. The bending and cutting mechanisms are on opposite sides of the Rod Chomper, and the machine's engine is turned on/off by an ignition key. To operate either the bending or cutting mechanism, the key must be in the ignition and turned on—the machine cannot be operated when the key is either in the off position or has been removed.

To bend rebar, the operator places a piece between two cylinders on a wheel that is set into the Rod Chomper's tabletop. The operator then steps on a pedal, which causes the wheel to turn and the cylinder at the wheel's edge to rotate around the cylinder at the center, bending the rebar against the cylinders. Different-sized cylinders are removed and replaced by hand to create different angles on, or accommodate larger pieces of, rebar. The Rod Chomper manual states under a "WARNING" header that when changing the machine's cylinders, the operator should "shut off the machine and lock out power." The frequency of cylinder changes varies depending on what is needed for the job—G.N. testified that he could change cylinders four or five times on some days, but not at all on others. Between February and October 2017, G.N. bent and cut rebar on the Rod Chomper at the Jersey City project at least thirty to forty times per day, five days per week, and he never turned off the ignition or removed the key when changing cylinders.

On October 2, 2017, after bending the last pieces of rebar for the day, G.N. began removing a cylinder from the Rod Chomper's tabletop when the machine suddenly started operating, trapping his left hand between the cylinder and the part next to it. G.N.'s ring finger was broken, and his little and middle fingers were cut. It is unclear from the record what caused the machine to start up. According to G.N., his foot was not on the pedal at the time, but the key was in the "on" position and the machine's engine was running because he had to cut the rods he had just bent on the other side of the machine.

DISCUSSION

“To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that . . . the cited standard applies.” *Monroe Drywall Constr., Inc.*, 24 BNA OSHC 1111, 1112 (No. 12-0379, 2012). The provision cited here states as follows:

No employee shall be permitted to perform maintenance or repair activity on equipment (such as compressors, mixers, screens or pumps used for concrete and masonry construction activities) where the inadvertent operation of the equipment could occur and cause injury, unless all potentially hazardous energy sources have been locked out and tagged.

29 C.F.R. § 1926.702(j)(1). There is no dispute that G.N. was not engaged in a “repair activity” at the time of the alleged violation.

The judge found that § 1926.702(j)(1) applied to the cited condition because G.N. was “performing maintenance activities . . . when he removed and disassembled the cylinder from the machine’s wheel, as the machine remained energized.” According to the judge, the term “maintenance” is ambiguous because the standard does not define it. To determine its meaning, she considered the standard’s preamble, as well as the definition of “maintenance” in the general industry lockout/tagout (LOTO) standard. The judge concluded that “OSHA’s stated intent” in the former and “the interpretive guidance found in” the latter “reveals that the Secretary’s interpretation of ‘maintenance’ activities covered by [§1926.702(j)(1)] is reasonable and entitled to deference.” On review, Roy Rock challenges the judge’s conclusion, asserting that G.N. was engaged in construction-related activities on the Rod Chomper, not maintenance activities, and thus the cited provision does not apply.

We agree with Roy Rock. “When determining the meaning of a standard, the Commission first looks to its text and structure,” and “[i]f the wording is unambiguous, the plain language of the standard will govern, even if the Secretary posits a different interpretation.” *JESCO, Inc.*, 24 BNA OSHC 1076, 1078 (No. 10-0265, 2013). Here, the judge and the Secretary incorrectly treat the lack of a regulatory definition as automatically rendering the term “maintenance” ambiguous, but our precedent makes it clear that an undefined term’s meaning can be determined by consulting a contemporaneous dictionary. *See, e.g., Fla. Gas Contractors, Inc.*, No. 14-0948, 2019 WL 995716, at *3 (OSHRC Feb. 21, 2019) (determining term’s meaning by first turning to dictionary in absence of definition in standard); *see also Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (undefined term “carries its ordinary meaning”).

According to *Webster's Third New International Dictionary of the English Language Unabridged* 1362 (1986), maintenance means “the labor of keeping something (as buildings or equipment) in a state of . . . efficiency,” and “care, upkeep.” See *infra* note 3 (cited provision promulgated in 1988). We believe that this term is unambiguous and the question, therefore, is whether G.N. was working on the “care” or “upkeep” of the Rod Chomper when he removed its cylinders without locking out and tagging the machine.² See *S. Pan Servs. Co.*, 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014) (“Under Commission precedent, . . . the focus of the Secretary’s burden of proving that the cited standard applies pertains to the cited conditions.”), *aff’d*, 685 F. App’x 682 (11th Cir. 2017) (unpublished).

At the outset, we find that the judge’s characterization of G.N.’s work—that he “was removing the cylinder to put it away, disassembling the machine, as there were no more rods to bend,” and that “Roy Rock was at the end of the project and the machine was to be moved off site”—is not wholly faithful to the record. G.N. testified that he was removing the cylinder because he had just finished bending the last pieces of rebar for the day, but that the machine was still running because he was about to cut them. And though it is clear that G.N. was done bending rebar for the *day*, it is unclear from the part of the transcript the judge cites that these were the last pieces of rebar to be bent for the project as a whole—the company’s safety director testified only that the project was “almost” at its end and that the crew was “almost” done with installing rebar. Thus, the record does not support the judge’s finding that when G.N. was removing the cylinder, he was disassembling the machine. Rather, G.N. was still working on the machine, about to cut the pieces he had just bent—his removal of the cylinder during his routine work of bending was unrelated to the machine’s “care” or “upkeep” and therefore, not a “maintenance . . . activity” given the plain meaning of that phrase. 29 C.F.R. § 1926.702(j)(1).

Because the meaning of “maintenance” is plain, we also find that the judge’s reliance on the general industry LOTO standard’s definition of the term, as well as the cited provision’s preamble, was improper. See *Blount Int’l, Ltd.*, 15 BNA OSHC 1897, 1902 (No. 89-1394, 1992) (if provision’s wording is unambiguous, plain language will govern); *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1418-19 (No. 89-1206, 1993) (rejecting Secretary’s interpretation of a

² We note that the amended complaint mentions that there was “another employee . . . cutting [rebar] at the other end” of the Rod Chomper at the time of the incident. The record, however, supports the judge’s finding that G.N. was the only one working on the machine at that time.

standard when it strains the plain meaning of the regulatory text). Section 1910.147(a)(1)(i) of the general industry LOTO standard states that it “covers the servicing and maintenance of machines and equipment” under certain conditions, and “[s]ervicing and/or maintenance” is defined as follows:

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.

29 C.F.R. § 1910.147(b) (emphasis in original). The judge found that this definition’s “broad and varied examples of service and maintenance . . . are helpful when determining the ‘maintenance’ activities covered by . . . § 1926.702(j)(1),” and that “disassembling the cylinder from the Rod Chomper is analogous to the activity of ‘setting up’ the machine for further rebar bending.”

But this ignores the language of the general industry LOTO standard, which explicitly “does not cover . . . [c]onstruction . . . employment.” 29 C.F.R. § 1910.147(a)(1)(ii)(A). In addition, the various rulemakings associated with the promulgation of the general industry LOTO standard and the Concrete and Masonry Construction standard occurred at around the same time, so the inclusion of a definition of “maintenance” in the former and the omission of one in the latter could suggest that a different meaning was intended in each.³ *Cf. Lumex Med. Prods, Inc.*, 18 BNA OSHC 2002, 2005 (No. 97-1522, 1999) (“Where the drafter of language uses a particular term in one place but omits that term in another place, it is assumed that the drafter acted intentionally, and the term in question is not to be implied where it is not used.”). More to the point, the general industry LOTO standard was promulgated *after* § 1926.702(j)(1), so the judge plainly erred in consulting a definition that did not exist when the cited provision was

³ An advance notice of proposed rulemaking for the Concrete and Masonry Construction standard was published in February 1982, the notice of proposed rulemaking was published in September 1985, and the final rule was promulgated in June 1988. *See* Concrete and Masonry Construction Safety Standards, 53 Fed. Reg. 22,612 (June 16, 1988) (Final Rule). An advance notice of proposed rulemaking for the general industry LOTO standard was published in June 1980, the notice of proposed rulemaking was published in April 1988, and the final rule was promulgated in September 1989. *See* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,645 (Sept. 1, 1989) (Final Rule).

effectuated.⁴ *See Maitland v. Pelican Beach Props., Inc.*, 892 F.2d 245, 252-53 (3d Cir. 1989) (applying definition of “hotel” from “a 1972 law instead of the contemporaneous 1957 law . . . cannot be classed as harmless error”).⁵

The judge’s resort to, and the Secretary’s continued reliance on, the cited standard’s preamble is also error because the plain meaning of “maintenance” resolves the question before us. *See Manganas Painting Co.*, 21 BNA OSHC 1964, 1980 n.22 (No. 94-0588, 2007) (rejecting interpretation based on “the general industry lead standard’s preamble” because “there is no such limitation contained in the plain wording of the standard cited here”); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) (“[B]ecause the plain language of the regulation unambiguously permits a one-year employment finding without a 365-day requirement, we cannot consult the preamble.”). Even if we were to consider the preamble, reading it to support the Secretary’s assertion that OSHA intended for “maintenance or repair activity” to mean *any task* would be at odds with the actual terms of the standard, which plainly limits coverage to a specific category of activities. 29 C.F.R. § 1926.702(j)(1); *see Concrete and Masonry Construction Safety Standards*, 53 Fed. Reg. 22,612, 22,624 (June 16, 1988) (Final Rule) (noting that “[p]aragraph (j) of the final rule requires the employer to lock out and tag equipment before allowing employees to perform any activities such as maintenance or repairs where unexpected, inadvertent operation could occur and cause injury,” and that “OSHA has revised the proposed requirement to include

⁴ In any event, when the Commission has looked to another standard to interpret broad or ambiguous terms that are undefined in the cited standard, there has been a significant and substantive connection between the standards. *See, e.g., Armour Food Co.*, 14 BNA OSHC 1817, 1825 (No. 86-0247, 1990) (looking to ANSI standard’s definition of “enclosed” to interpret the same term in OSHA’s machine guarding standard, where machine guarding provision was “derived from [the ANSI] Safety Code for Mechanical Power Transmission Apparatus”); *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 2001 (No. 92-1022, 1994) (looking to general industry standard’s definition of “unattended” where alleged violation of construction standard depended on same undefined term in ANSI standard). This is not the case here given that: (1) “maintenance . . . activity” is not broad or ambiguous in the circumstances of this case; (2) the general industry LOTO standard explicitly does not apply to construction employment; and (3) that standard’s definition of “maintenance” was not in effect when the cited provision was promulgated.

⁵ Roy Rock’s principal place of business is in New Jersey, and the events giving rise to the citation occurred there, so review of the Commission’s decision may be sought in the Third Circuit. *See* 29 U.S.C. § 660(a); *see also Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (“Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case.”).

all activities, including maintenance and repair.”).⁶ A standard cannot “be construed to mean what [OSHA] might have intended but did not express” because it “must give employers fair notice of what is required for compliance.” *Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1474 (No. 79-0310, 1982) (Rowland, Chairman, concurring); *see also S.A. Storer & Sons Co. v. Sec’y of Labor*, 360 F.3d 1363, 1371 n.19 (D.C. Cir. 2004) (“The Secretary cannot [put forth] an interpretation [in a preamble] that flouts the [regulatory] exception’s plain language.”); *cf. Free Speech Coal., Inc. v. Attorney Gen. of U.S.*, 677 F.3d 519, 539 (3d Cir. 2012) (“[T]he plain text of the [s]tatutes setting forth their broad scope must trump any conflicting statements contained within the preamble to the regulations . . .”).

In short, given the plain meaning of “maintenance . . . activity,” we conclude that § 1926.702(j)(1) does not apply here and deference to the Secretary’s interpretation of the provision is unwarranted.⁷ *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (noting that “the possibility of deference can arise only if a regulation is genuinely ambiguous,” and that “when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation”); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (“[D]eference is warranted only when the language of the regulation is ambiguous.”); *Unarco Comm. Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993) (“[C]ourts . . . defer to a reasonable interpretation developed by the agency charged with administering the challenged . . . regulation” only “[i]f [an] inquiry into the meaning of the text does not settle the question.”).

⁶ The part of the preamble stating that “OSHA has revised the proposed requirement to include all activities, including maintenance and repair” was in response to a question submitted about the proposed rule, and was meant to clarify that “workers entering mixers to chip out dried concrete” are performing maintenance. 53 Fed. Reg. at 22,624.

⁷ Given our holding, we need not reach the remaining elements of the Secretary’s case. *See Safeway Store No. 914*, 16 BNA OSHC 1504, 1508 (No. 91-0373, 1993) (“A violation . . . is established whenever . . . (1) the standard applies to the cited conditions, (2) the employer’s conduct does not conform to the requirements of the standard, (3) employees are exposed to the cited conditions, and (4) the employer knew or could have known of those conditions.”). We note, however, that G.N.’s testimony that he always worked on the Rod Chomper with the key in the ignition shows “potentially hazardous energy sources [were not] locked out and tagged.” 29 C.F.R. § 1926.702(j)(1). Also, Roy Rock does not dispute exposure (established by G.N.’s injury), and the judge based her finding of constructive knowledge on evidence of Roy Rock’s inadequate safety program.

Accordingly, we vacate Citation 1, Item 1.

SO ORDERED.

/s/

Cynthia L. Attwood
Chairman

/s/

Amanda Wood Laihow
Commissioner

Dated: July 22, 2021



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SECRETARY OF LABOR,

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v.

ROY ROCK, LLC,

Respondent.

OSHRC DOCKET NO. 18-0068

Appearances:

Kate S. O'Scannlain, Solicitor of Labor
Jeffrey S. Rogoff, Regional Solicitor
Marc G. Sheris, Senior Trial Attorney
U.S. Department of Labor, New York, NY
For the Complainant

Eric Magnelli, Esq.
Anthony M. Rainone, Esq.
Brach Eichler, LLC, Roseland, NJ
For the Respondent

Before: Carol A. Baumerich, Administrative Law Judge

DECISION AND ORDER

Roy Rock, LLC (Roy Rock or Respondent) operates a construction company that performs concrete and masonry services, located at 150 N. Park Street, East Orange, New Jersey 07017. (Tr.124; Ex. J-1, No. 1). On October 2, 2017 the hand of a Roy Rock employee was injured when he removed a cylinder from a "Rod Chomper" rebar bending machine at a Roy Rock construction worksite located on Van Vorst Street, in Jersey City, New Jersey (the Project). In response to the employee's worksite injury the Occupational Safety and Health Administration (OSHA) began an inspection of the Jersey City Project worksite on October 3, 2017. (Ex. J-1, No. 2, 14). As a result of OSHA's inspection, the Secretary of Labor (Secretary) issued a one-item serious citation to Roy

Rock. The citation, as amended,¹ alleged a serious violation of the concrete and masonry construction standard regarding the requirements for equipment and tools, lockout/tagout (LOTO) procedures, 29 C.F.R. § 1926.702(j)(1).²

Roy Rock filed a timely notice of contest bringing the matter before the Occupational Safety and Health Review Commission (the Commission).³ A hearing was held in Newark, New Jersey on February 25 and 26, 2019. Both parties filed post hearing briefs and reply briefs.⁴

¹ On July 10, 2018, the Secretary's unopposed first Motion to amend the Citation and Complaint was granted. The amendment set forth the date of the alleged violation as on or about October 2, 2017.

² The Secretary originally cited Roy Rock for a violation of the general duty clause, section (5)(a)(1) of the Occupational Safety and Health Act of 1970, (the OSH Act), 29 U.S.C. § 654(a)(1). Prior to the hearing, Respondent filed a Motion for Summary Judgment contending that the Complaint should be dismissed because the section 5(a)(1) general duty clause violation alleged was improper. Among other arguments, Respondent contended that citing a general duty clause violation was inappropriate if a specific standard applied to the alleged violation. Respondent noted that the Secretary did not cite Respondent for a violation of concrete and masonry construction standard 29 C.F.R. § 1926.702(j)(1) (LOTO procedures), among other standards not cited. (Resp't Br. 17). Respondent specifically contended that it fully complied with standard 29 C.F.R. § 1926.702(j)(1).

Following review and consideration of Respondent's Summary Judgment Motion, the Secretary agreed that concrete and masonry construction standard 29 C.F.R. § 1926.702(j)(1) applied to Respondent's inspected worksite and the violation alleged in the citation. Contrary to Respondent, the Secretary asserted that Respondent had not complied with standard 29 C.F.R. § 1926.702(j)(1) at the inspected Jersey City Project. On November 15, 2018, the Secretary promptly moved to amend the citation and Complaint to allege a violation of the specific concrete and masonry construction standard 29 C.F.R. § 1926.702(j)(1), rather than a violation of the general duty clause. Respondent opposed the Secretary's second Motion to amend. The Secretary's second Motion to amend the Citation and Complaint was granted prehearing. (Tr. 7-8).

³ The Commission is an independent adjudicatory agency and is not part of the Department of Labor or OSHA. 29 U.S.C. § 661. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the OSH Act and has no regulatory functions. 29 U.S.C. § 659(c).

⁴ Affirmative defenses not raised at the hearing are deemed waived and abandoned by Respondent. *Corbesco, Inc. v. Dole*, 926 F.2d 422, 428–29 (5th Cir. 1991). In its Answer, Roy Rock raised several affirmative defenses, including infeasibility, that Respondent did not pursue at the hearing or in its post hearing briefing. I deem these affirmative defenses abandoned. *See Ga.-Pac. Corp.*, 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

The key issues in dispute follow. (1) Did the Secretary meet his burden to prove that Respondent violated concrete and masonry construction standard 29 C.F.R. § 1926.702(j)(1)? (2) Is the rebar bending machine, the Rod Chomper Rotary Machine (the Rod Chomper), equipment covered by the standard, where inadvertent operation of the equipment could occur and cause injury? (3) Was Respondent's employee, the injured employee, engaged in maintenance activities on the Rod Chomper, while the machine remained energized, without first locking out the machine, in violation of the standard? (4) Did Respondent know or with the exercise of reasonable diligence could Respondent have known of the hazardous worksite conditions violative of the standard? (5) Was the Secretary's proposed penalty, at the time the citation was issued and amended, appropriate?

For the reasons discussed, citation 1, item 1, as amended, is affirmed, and a penalty of \$9,760.00 is assessed.

Jurisdiction

Respondent has a principle place of business in East Orange, NJ. (Tr. 124; Ex. J-1, No. 1). At all relevant times, Respondent was engaged in a business affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Occupational Safety and Health Act of 1970, (the OSH Act), 29 U.S.C. §§ 652(3), (5). Respondent is an employer within the meaning of the section 3(5) of the OSH Act. The Commission has jurisdiction over the parties and subject matter of this case. (Tr. 9; Amended Answer ¶¶ II, III.)

Background and Fact Findings⁵

The Company and Worksite

Roy Rock operates as a construction company performing various concrete and masonry services. (Ex. J-1, No. 1). In 2017, Roy Rock was engaged in concrete and masonry work on a construction site located on Van Vorst Street, in Jersey City, New Jersey, where Respondent employed at least sixty-five employees. (Tr. 323; Ex. J-1, No. 2).

Roy Rock's worksite management consisted of a project foreman and safety officer. In October 2017, Roy Rock's Jersey City Project Foreman was Manuel Brito. (Ex. J-1, No. 11).

⁵ The fact findings are based on the credible record evidence, as discussed below, and consideration of the record as a whole. Contrary evidence is not credited.

Brito oversaw all operations at the Project site, including the use of rebar cutting and bending equipment. (Ex. J-1, No. 11). As Project Foreman Brito was responsible for crew safety. (Ex. S-13; Ex. S-17, p. 6). During the same time period, Roy Rock employed Ricardo Quinteros as its Safety Officer. (Tr. 149-51; Ex. J-1, Nos. 5, 13; Ex. R-1). As the Safety Officer, Quinteros's duties included safety orientation training, training on specific safety topics, conducting Toolbox Talks, field safety inspections, insurance walkthroughs, and meetings with foremen. (Tr. 150-53; Ex. S-13; Ex. S-17, pp. 4-5; Ex. R-7).

One of Respondent's employees performing concrete and masonry work at the Jersey City Project was G.N.⁶ (Ex. J-1, No. 3). G.N. began working for Roy Rock in or around September 2016. (Ex. J-1, No. 4). G.N. began working at the Jersey City Project in or about February 2017. On the Jersey City Project, G.N.'s principal assignment was to bend and cut rebar using a Rod Chomper. He also performed other tasks as instructed. (Tr. 48, 60-61, 107; Ex. J-1, Nos. 6, 9, 10). On this Project, G.N. was the only employee assigned to bend rebar on the Rod Chomper. (Tr. 70, 116). G.N.'s co-worker laborer Francisco Munoz's work assignments included cutting rebar on the Rod Chomper. (Tr. 114-15).

The Rod Chomper Rotary Machine

The Rod Chomper machine is used in the concrete and masonry industry to bend and cut reinforcing steel bar, generally referred to as rebar. (Ex. J-1, No. 6). For the Rod Chomper to function, an ignition key to an electric starter is turned. This starts the machine's engine. (Tr. 65-68, 138-39; Ex. J-1, No. 6; S-8). The machine's engine is powered by diesel fuel. (Tr. 65, 137). The Rod Chomper has two separate hydraulic pumps which allow the machine to bend rebar on one end and cut rebar on the other end. (Tr. 114-115, 136, 144, 155, 306-09; Ex. R-4, pp. 2-3).

⁶ In the interest of preventing the unwarranted invasion of personal privacy, the injured employee will be referred to as G.N. or the injured employee.

The machine is activated when a foot pedal is pressed. This energizes and moves the machine's wheel,⁷ resulting in the bending of rebar placed on the wheel.⁸ (Tr. 53- 54, 56-60, 106, 145; Ex. J-1, No. 7; Ex. S-1; Ex. S-7). Depending on the desired angle the rebar is to be bent, metal cylinders,⁹ are positioned on top of the wheel, which bend the rebar as the wheel rotates. (Tr. 56-58, 60, 69, 154, 157-59, 161; Ex. S-1; Ex. S-7). With his hands, the operator often removes and changes the cylinders depending on the size or angle of rebar required. Likewise, with his hands, the operator removes the cylinders when the machine is disassembled. (Tr. 69-70, 98, 106-07, 161; Ex. S-1; Ex. S-7).

As the Rod Chomper's ignition key is the method to power the machine on and off, the ignition key is the means to lock out the power. (Tr. 65-68, 72, 130-31; Ex. J-1, No. 6). The machine's instruction manual describes the procedure for locking out the power and when lock out must be applied. (Tr. 129-34; Ex. S-1). To lock out the Rod Chomper's power, the manual states in pertinent part: "**WARNING:** 1. When changing the knives, wheel or pins, shut off the machine and lock out power." (Tr. 129-130; Ex. S-1, pp. .2, 7). The warning to lock out the power is corroborated by the sworn deposition testimony of Brian Bouwman, Rod Chomper Inc.'s sales manager and Wayne Bouwman, Rod Chomper Inc.'s owner. Ultimately, the only way to lockout the Rod Chomper's power is to turn the key to the off position and remove the key. (Tr. 130-33; Ex. J-2; Ex. S-1, pp. 2, 7; Ex. S-19 5:21-25, 12:16 -25; 13:2-9; Ex. S-20 7:5-14, 17:16-25, 18:1-25; 19:1-4; Ex. R-4, p. 3).

The foot pedal, which operates the energized Rod Chomper, is connected to the machine by a cord which can be moved to allow the operator to stand at various positions around the machine. (Ex. J-1, No. 8; Ex. S-3). If the Rod Chomper remains energized when the operator

⁷ For consistency in this decision, the larger, flat, circular disc, containing holes and numbers, located underneath the cylinders will be called the "wheel." In the record, and in post hearing briefing, this wheel is also called the machine disc or turntable. (Tr. 53-55, 60, 69; Ex. S-1; Ex. S-7).

⁸ The operator does not remove the machine's wheel. (Tr. 69, 161; Ex. S-7).

⁹ For consistency in this decision, the machine parts that the operator removes and changes, depending on the desired rebar angle bend, that are positioned on top of the wheel, will be called "cylinders." In the record, and in post hearing briefing the cylinders are also called pins, discs, bar wheels, shafts, or balls. (Tr. 12, 57-59, 69, 99, 158, 267; Ex. S-1; Ex. S-7; Ex. R-4).

removes, changes, or disassembles cylinders from the machine, and the foot pedal is inadvertently pressed or “stepped on,” by the operator or someone else, the wheel and cylinders could move. (Tr. 72-73, 105-07, 129-33; Ex. S-1, pp. 2, 7; Ex. S-7; Ex. R-1). To prevent the inadvertent operation of the wheel and cylinders, if the foot pedal is inadvertently pressed, the Rod Chomper must be deenergized and locked out by turning off the machine with the ignition key and removing the key.¹⁰ (Tr. 129-33, 301, 317, 319; Ex. S-1, pp. 2, 7).

From February 2017 to October 2017, while working on the Jersey City Project, G.N. used the Rod Chomper in excess of thirty times a day, five days a week. (Tr. 60-61; Ex. J-1, Nos. 10, 12). Daily G.N. changed and removed the Rod Chomper’s cylinders while the machine was energized. (Tr. 68-71). Daily, for several months before G.N.’s injury, Roy Rock’s Project Foreman Brito witnessed G.N. work on the energized Rod Chomper. (Tr. 62-63, 70; Ex. J-1, No. 11; Resp’t Br. 4 ¶ 24; 19).

Throughout G.N.’s tenure at Roy Rock, when changing and removing cylinders on the Rod Chomper, the Rod Chomper’s energy source was never disengaged and locked out and the ignition key was never removed, including on the day G.N. was injured. (Tr. 68-72, 90). G.N. never turned off the Rod Chomper’s power source when removing, changing, or disassembling the cylinders on the machine’s wheel. (Tr. 68-72, 90, 107; Ex. S-7).

The Injury

¹⁰ A warning is posted, in English and Spanish, on the Rod Chomper, next to the ignition, that reads:

! OPERATOR WARNING

THE FOOT SWITCH YOU ARE USING CANNOT PROTECT YOU FROM SERIOUS INJURY.

YOUR HANDS OR FINGERS CAN BE CRUSHED OR CUT OFF IF THE MACHINE YOU ARE OPERATING DOES NOT HAVE A GUARD OR OTHER WAYS TO KEEP YOU AWAY FROM DANGEROUS MOVING MACHINE PARTS.

(Ex. S-8). The potential hazard presented by the foot pedal is highlighted. No information regarding when or how to lock out the machine is stated on the posted warning. *See also* Ex. S-1, p. 18.

On or about October 2, 2017, G.N. was using the Rod Chomper to bend rebar. (Ex. J-1, No. 12). At the end of the workday, G.N. was injured while removing a cylinder from the Rod Chomper, when the machine inadvertently operated causing the cylinder to move “trapping” or catching G.N.’s left hand fingers. Specifically, the Rod Chomper injured three of the G.N.’s fingers, breaking his ring finger and cutting the pinky and middle fingers on his left hand. (Tr. 45-46, 50-51, 98-100, 105-07, 109, 117; Ex. S-7; Ex. R-1, p. 2.; Ex. R-4, p. 2).

G.N. was removing the cylinder to put it away, disassembling the machine, as there were no more rods to bend. (Tr. 105-07, 267, Ex. R-4, pp. 2-3). In fact, Roy Rock was at the end of the project and the machine was to be moved off site. (Tr. 332-33). As G.N. removed the cylinder the machine remained energized, as G.N. still had rods to cut on the machine. (Tr. 71-72, 89, 107). When G.N. was injured he was the only person working on the machine.¹¹ (Tr. 99, 117, 121, 238-39).

At the hearing, G.N. credibly testified that he did not know what happened to cause the machine to move as he removed the cylinder with his hand. G.N. recalled that his foot was not on the foot pedal when the machine activated and moved. G.N. acknowledged that if he had stepped on the foot pedal the machine would have moved.¹² (Tr. 50-51, 99, 105-06, 267, 290; Ex. R-4, p. 3).

¹¹ Great weight is given to the testimony of G.N. and his co-worker Munoz, who were present at the time of G.N.’s injury and had direct knowledge of where they were working at that time.

Laborer Munoz testified that working on the Jersey City Project, on occasion, he cut iron rods on the same Rod Chomper machine used by G.N. to bend rods. Munoz also testified that he was working near G.N. at the time of his injury. (Tr. 115-117; Ex. S-2). During the OSHA on-site inspection, there was an apparent miscommunication / misunderstanding between OSHA Compliance Officer (CO) Idrovo and Munoz and G.N. regarding the exact machine Munoz was working on to cut iron bars at the time of G.N.’s injury. (Tr. 258, 265-67, 279-81, 283, 304; Ex. R-4, pp. 2-4). Therefore, information provided by CO Idrovo that Munoz was working on the Rod Chomper at issue in this case, at the time of G.N.’s injury, is given no weight. (Tr. 258, 265-67, 280-81, 283; Ex. R-4).

¹² G.N. was a credible witness. G.N. took care to answer the questions asked on direct and cross-examination to the best of his recollection, without exaggeration or embellishment. Recalling the experience of his traumatic injury, G.N.’s candid statement that he did not know how the accident happened is understandable and credited. (Tr. 50-51, 99, 105-06).

Following G.N.'s injury, Safety Officer Quinteros interviewed G.N. Quinteros recalled G.N. stating that "he didn't know how [the accident] happened." G.N. "presumed" he pressed the pedal with his foot and that is how the accident happened. (Tr. 238). As a result of the injury, Quinteros prepared an Incident Investigation Report¹³ and contacted OSHA. (Tr. 233-239; Ex. J-1, No. 13; Ex. R-1).

The OSHA Inspection

On October 3, 2017, the day after the injury, OSHA Safety Engineer / Compliance Officer (CO) Idrovo responded to the Jersey City Project worksite to investigate the incident. (Tr. 248-251, 258; Ex. J-1, No. 14). During the investigation, CO Idrovo conducted an on-site inspection, took photographs, gathered documents, interviewed individuals employed by Roy Rock, including the injured employee, and interviewed the machine manufacturer.¹⁴ (Tr. 252-74; Ex. R-4) The investigation disclosed that G.N. was injured when removing cylinders, "balls," from the Rod Chomper while the machine was running. G.N. did not know how the machine activated when he was performing this task. G.N. was unaware how to lock out the machine as recommended by the manufacturer.¹⁵ (Ex. R-4, p. 4).

¹³ Safety Officer Quinteros prepared an Incident Investigation Report concerning G.N.'s worksite injury. (Ex. R-1). Quinteros prepared the report based on his interview of G.N., approximately forty minutes after G.N. suffered a severe injury to his left hand, while G.N. was in the hospital for treatment. This interview took place in the stressful period immediately following G.N.'s injury. Respondent offered this report into evidence, not for the truth of the information asserted in the report, but for Respondent's understanding of what occurred. (Tr. 234). The report was received into evidence as a business record and to show Respondent's understanding. (Tr. 239). Statements in the report attributed to G.N. are hearsay and are so weighted. *See Morrison-Knudsen, Inc.*, 13 BNA OSHC 1121, 1126 (No. 80-345, 1987) (noting the fact that testimony was hearsay when deciding the weight to accord it).

¹⁴ Overall, I find CO Idrovo's hearing testimony credible. I observed his sincere effort to carefully answer the questions he was asked on direct and cross-examination. CO Idrovo's hearing testimony is substantially corroborated by the OSHA Investigation Safety Narrative and the testimony of witnesses with first-hand knowledge of the case facts. (Tr. 248-310; Ex. J-1, No. 14, Ex. R-4). Respondent's assertion that the Secretary's case is derived from the inconsistencies in CO Idrovo's inspection findings and opinions is rejected as meritless. (Resp't Br. at 15-17).

¹⁵ With the investigation concluded, CO Idrovo determined that Roy Rock violated the general duty clause, section 5(a)(1) of the OSH Act. Subsequently, CO Idrovo learned that the original

Roy Rock's Workplace Safety Rules and Safety Training Program

Roy Rock neither had nor enforced any work rules relating to the operation of the Rod Chomper or the removal of its cylinders. (Tr. 166, 199). Roy Rock's Safety Officer Quinteros specifically testified that there were no rules relating to the rebar bending machine. (Tr. 163, 166, 173, 199, 204). Roy Rock employees G.N and Munoz testified that they were not aware of any work rules related to lock out of the Rod Chomper.¹⁶ (Tr. 71-75, 87, 119-120).

When G.N. worked on the Jersey City Project, there were no work rules in Roy Rock's Safety Orientation, Rebar Bender Machine Safety Training, Safety Plan, Safety Reports,¹⁷ or Safety Toolbox Talks that specifically related to locking out the Rod Chomper's power. (Tr. 78, 166-67, 104, 175-176, 210; Ex. S-9; Ex. S-11; Ex. S-13; Ex. S-17; Ex. R-7) The lack of work rules related to Rod Chomper lock out is corroborated by Roy Rock's failure to enforce or discipline employees for not locking out the Rod Chomper when changing and removing cylinders on the energized machine.¹⁸ (Tr. 75-76).

citation had been amended to allege a violation of 29 CFR § 1926.702(j)(1). (Tr. 275-276). See Note 2 above.

Respondent incorrectly places great weight on the deposition statements of CO Idrovo regarding the appropriate legal theory for the Secretary to advocate in this case. Likewise, Respondent incorrectly places great weight on CO Idrovo's statements regarding whether Roy Rock violated any OSHA general industry or construction standard regarding training or LOTO. (Tr. 230-32, 286-98, 302; Resp't Br. 9-10, ¶¶ 53, 54.) Respondent's narrow focus on the compliance officer's statements is misplaced. The Secretary and the Commission are not bound by the legal conclusions of the OSHA compliance officer. See *Kasper Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1128 (D.C. Cir. 2001) ("the Commission is not bound by the representations or interpretations of Compliance Officers"); *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (the Secretary is not bound by the "narrow construction of citations issued by his inspectors," compliance officers who are not legal professionals).

¹⁶ Laborer Munoz recalled receiving general information regarding use of the Rod Chomper, during talks and speeches, including to use the goggles and a mask at all times, to pay attention where the rod is going, and to make sure the chips don't fall on anybody. (Tr. 119). See note 20.

¹⁷ The worksite Safety Reports, in Part 6: Concrete and Masonry Construction, include no Rod Chomper rebar bending machine lock out rule or requirement. (Tr. 210; Ex. S-17, p. 37; Ex. R-7, pp. 6, 23, 32).

¹⁸ No work rules specific to the Rod Chomper or Rod Chomper lock out were offered into evidence. The record reveals that Respondent had general rules regarding machine

The record reveals that although Roy Rock had a generalized safety program, it was lacking regarding the Rod Chomper. (Tr. 77-78, 85, 210, 222; Ex. S-9; Ex. S-11; Ex. S-13; Ex. S-17; Ex. R-7). Roy Rock did provide generalized training on the Rod Chomper pertaining to eye and hand protection. (Tr. 79-80, 119). *See* note 20.

The record reveals that G.N. was never properly trained on safe Rod Chomper use, including locking out the power when changing, removing, or disassembling the machine's cylinders. (Tr. 71-75, 78, 81-83, 85, 270-71; Ex. S-9). Although Roy Rock's Project Foreman Brito daily observed G.N. use the Rod Chomper to bend rebar, neither Brito nor any other Roy Rock supervisor ever informed G.N. how to properly lockout the machine when changing or removing cylinders, including the need to turn off the machine's power. (Tr. 71-73, 75, 164-65; Ex. J-1, No. 11; Ex. 17, p. 6).

More specifically, the credible record evidence reveals that Roy Rock's Rod Chomper training did not include a discussion regarding how and when to properly turnoff and lockout the Rod Chomper's power. (Tr.71-81, 87-88, 119-20, 164-66, 175-76; 222; Ex. S-9). Roy Rock employees G.N. and Munoz had specific corroborating recollections that the topic of lockout was not included in the training.¹⁹ (Tr. 71-81, 87-89, 119-120). Roy Rock's February 6, 2017 Rebar

guarding and equipment operation. After the OSHA inspection, Safety Officer Quinteros submitted to OSHA AAD Flynn two generic work rules to support Respondent's employee misconduct defense, as follows:

Machine Operations

- Avoid leaving an unattended machine running unless it is fully guarded and intended to operate continuously in a safe mode.
- Do not operate equipment for which you have not been trained and authorized. If you have questions about the safe operation of a machine, contact your Foreman or the office immediately.

(Tr. 166-67, 173, 199-202, 204, 320-21; Ex. S-15, p. 3; Ex. S-16; Ex. S-17).

¹⁹ At the hearing, Safety Officer Quinteros testified that he was "pretty sure" Rod Chomper training included the topic of locking out the machine. (Tr. 165, 176; Ex. S-9). Quinteros's memory was uncertain and his testimony was hesitant regarding the inclusion of this specific topic in the Rod Chomper training. Quinteros's uncertain testimony regarding Rod Chomper training is not

Bender Machine Safety Training outline does not include the topic of machine lock out or power shut off when changing cylinders.²⁰ (Ex. S-9). OSHA Assistant Area Director (AAD) Flynn testified that during the OSHA inspection, he and safety officer Quinteros discussed lock out of the Rod Chomper, including removal of the ignition key. During their discussion, Quinteros was uncertain the Rod Chomper had a key, until AAD Flynn showed Quinteros an inspection photo of the Rod Chomper's ignition key.²¹ (Tr. 316-17, 325; Ex. S-3; Ex. S-8). Safety officer Quinteros's lack of knowledge on the basic functionality of the Rod Chomper is strong evidence that he did not provide lock out training regarding the Rod Chomper.

Further support for the finding that Roy Rock's Rod Chomper training did not include a discussion regarding how and when to lockout the machine's power is found in Roy Rock's safety documents.²² Before G.N.'s injury, Roy Rock did not create any safety documents pertaining to

credited. G.N. and Munoz's specific recollection that they did not receive Rod Chomper lock out training is credited. (Tr. 71-81, 87-89, 119-120).

Further, Respondent's contention that G.N. was instructed to turn off the power to the Rod Chomper when changing cylinder "as a matter of caution," is rejected as not supported by credited testimony. (Resp't Br. 15; Resp't Reply Br. 3).

²⁰ The Roy Rock Rebar Bender Machine Safety Training form, dated February 6, 2017, lists the following summary of topics covered during the training.

1. Read and Understand the Instruction Manual.
2. Wear Safety Goggles, Gloves and Protective Footwear.
3. Be Careful About Hand Placement.
4. Warm up Machine for a Few Minutes in Cold Weather.
5. Hold the Bar Parallel to the Bender before Bending.
6. Operate the Foot Pedal Carefully.
7. Operate the Rebar Bender Only If You are Fit to Do So.

Safety Officer Quinteros, G.N., laborer Munoz and six others signed the February 6, 2017 form. (Ex. S-9).

²¹ Safety Officer Quinteros was present throughout the hearing as Respondent's representative. (Tr. 6-7, 315, 332). Quinteros did not rebut OSHA AAD Flynn's testimony regarding this discussion.

²² After G.N.'s injury, Rod Chomper Sales Manager Brian Bouwman visited Roy Rock's worksite on January 29, 2018 to explain how the Rod Chomper machine operates. His statements lasted

turnoff and lock out of the Rod Chomper's power when changing or removing cylinders.²³ (Tr. 220, 222; Ex. S-9; Ex. S-11; Ex., S-13; Ex. S-17; Ex. R-7).

Roy Rock never verified its employees' competence or knowledge regarding proper lockout procedures and safe use of the Rod Chomper.²⁴ (Tr. 87-89, 120). G.N.'s primary language is Spanish. (Tr. 44-45). G.N. cannot read documents written in English.²⁵ G.N. was never told to review and comprehend the Rod Chomper's instruction manual. (Tr. 83, 86-87; Ex. S-1). An instruction to review the Rod Chomper's instruction manual would have provided no insight to Roy Rock's Spanish speaking employees, including G.N. and Munoz.²⁶ (Tr. 44-45, 111). The Rod Chomper instruction manual is exclusively written in English. (Tr. 80, 82, 128, 133-134, 220; Ex. S-1).

about three or four minutes. He would not characterize his statements regarding how the machine operates as a "training session." The Roy Rock document entitled "Rebar Bender Machine Safety Training," dated January 29, 2017, is incorrectly dated; a typographical error. The correct date is 2018. No Rod Chomper representative visited Roy Rock's worksite in 2017. (Tr. 212-13; Ex. J-2; Ex. S-10; Ex. S-19, pp.7:11-25; 8:1-15; 10:21-25;11:1-24; 13:18-25;14:1-4.).

²³ Only after G.N.'s injury did Roy Rock include lock out of the Rod Chomper's power in its training document outline. (Tr. 222). In addition to the "summary of topics" listed on the Roy Rock Rebar Bender Machine Safety Training form, dated February 6, 2017, the Roy Rock Rebar Bender Machine Safety Training form dated January 29, 20[18], includes two additional topics:

8. Shut the machine off and lock it out when changing shafts as the manual requires.

9. General information about the maintenance of the equipment.

(Compare Ex. S-9 with Ex. S-10).

²⁴ Absent Roy Rock's verification of an employee's knowledge regarding operation of the Rod Chomper, G.N.'s prior experience working with the Rod Chomper machine, at a different employer, does not establish G.N.'s knowledge of Rod Chomper lock out procedures. (Tr. 81, 97-98, 241).

²⁵ The instruction on the 2017 Rebar Bender Machine Safety Training document, to "Read and Understand the Instruction Manual," written in English, was meaningless and unhelpful to G.N. (Ex. S-1; Ex. S-9). See note 20.

²⁶ G.N. and Munoz testified at the hearing with a Spanish language interpreter. (Tr. 43-44, 111).

Discussion

In order to establish a violation of a safety standard under the OSH Act, in this case standard 29 C.F.R. § 1926.702(j)(1), the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the violative condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.702(j)(1).²⁷ This item alleges that, on or about October 2, 2017, Roy Rock employees were permitted to perform maintenance and repair activity on the Rod Chomper machine, without locking out the machine's power, when the inadvertent operation of the Rod Chomper could occur and cause injury. This failure to lock out the machine's power resulted in Roy Rock's employees being exposed to potentially hazardous energy and a high severity injury. This failure did cause serious physical harm to G.N.

1. Applicability and Violation

The parties agree that Respondent was performing concrete and masonry services on the Jersey City Project construction site. (Ex. J-1, Nos. 1, 2, 3). Therefore, the Subpart Q – Concrete

²⁷ Citation 1, Item 1, alleges that, in violation of 29 C.F.R. § 1926.702(j)(1):

Employees were permitted to perform maintenance or repair activity on equipment used for concrete and masonry construction activities where the inadvertent operation of the equipment could occur and cause injury, and potentially hazardous energy sources had not been locked out and tagged.

Specifically,

Location: Van Vorst St., Jersey City, NJ. An employee's fingers were injured when he was taking off a bar wheel from the Rod Chomper machine (Serial No. 3828, Model CBRPTDlID), at the rebar bending side of machine, while another employee was cutting at the other end of the machine. The machine's power was not shut off or locked out; on or about 10/2/2017.

Amended Complaint, ¶ V.

and Masonry Construction standards were applicable to Respondent's Project worksite.²⁸ Subpart Q standard 29 C.F.R. § 1926.702 sets forth the requirements for equipment and tools used by construction employees working on concrete and masonry construction worksites. Specifically, Subpart Q, standard 29 C.F.R. § 1926.702(j)(1) concerns the lockout / tagout procedures required as follows:

No employee shall be permitted to perform maintenance or repair activity on equipment (such as compressors, mixers, screens or pumps used for concrete and masonry construction activities) where the inadvertent operation of the equipment could occur and cause injury, unless all potentially hazardous energy sources have been locked out and tagged.

The Secretary contends that standard 29 C.F.R. § 1926.702(j)(1) is applicable to Respondent's Jersey City Project worksite. The Rod Chomper is equipment covered by the standard, as inadvertent operation can occur. Respondent violated this standard when G.N., on the day he was injured, removed a cylinder from the Rod Chomper's wheel, while the machine remained energized, without locking out the Rod Chomper's potentially hazardous energy sources. Removing and disassembling the cylinder from the machine's wheel, G.N. engaged in maintenance activity covered by the standard. The Secretary contends that the Rod Chomper's hazardous energy sources are locked out by turning the ignition key to the off position, removing the key from the ignition, and securing the key. (Sec'y Br. 2, 7, 10, 15, 28; Sec'y Reply Br. 1-6).

Respondent contends that standard 29 C.F.R. § 1926.702(j)(1) is not applicable to the Jersey City Project worksite. (Resp't Br. 12-15; Resp't Reply Br. 1-5). First, Respondent contends that the Rod Chomper rebar bending machine is not equipment as identified in the standard because it cannot be inadvertently operated. (Resp't Br. 12-14; Resp't Reply Br. 3-5). Second, Respondent contends that the cited standard is not applicable to the hazard cited in this case because G.N. was not maintaining or repairing the Rod Chomper when he was injured. (Resp't Br. 6, 14-15; Resp't

²⁸ Standard 29 C.F.R. § 1926.700(a) states:

Scope and application.

This subpart sets forth requirements to protect all construction employees from the hazards associated with concrete and masonry construction operations performed in workplaces covered under 29 C.F.R. Part 1926. In addition to the requirements in Subpart Q, other relevant provisions in Parts 1910 and 1926 apply to concrete and masonry construction operations.

Reply Br. 1-3). Respondent contends that OSHA’s construction industry standards do not require lock out of the Rod Chomper, or removal of the ignition key, when an employee changes cylinders, during normal construction operations. (Resp’t Br. 3, ¶ 21; 8, ¶ 50; 14-15; Resp’t Reply Br. 3-4; Tr. 163, 220).

Regulatory Interpretation.

Respondent disputes the applicability of standard 29 C.F.R. § 1926.702(j)(1) to the Rod Chomper used on Roy Rock’s Jersey City Project and to the work performed by Respondent employee G.N. on the day he was injured.²⁹ Therefore, the meaning of standard 29 C.F.R. §1926.702(j)(1) must be determined.

When interpreting a standard, the first consideration is the plain text of the standard. “If the meaning of the [regulatory] language is ‘sufficiently clear,’ the inquiry ends there.” *Davey Tree Expert*, 25 BNA OSHC 1933, 1934, 1937 (No. 11-2556, 2016), quoting *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006), *aff’d in relevant part*, 541 F.3d 193 (3d Cir. 2008). The regulatory language is considered ambiguous where the meaning is “not free from doubt.” *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 150-51 (1991). Where the regulatory language is ambiguous, the Secretary’s interpretation of its own regulations is “entitled to substantial deference” where the interpretation is “consistent with the regulatory language and is otherwise *reasonable*.” *Id.* at 150, 156, 158 (emphasis in original). When considering the reasonableness of the Secretary’s interpretation, the Commission may consult the regulation’s preamble, the promulgation of interpretive rules, and agency enforcement guidelines. *Id.* at 157.

“Where the language of the standard itself is not explicit on the matter in issue,” the Commission will look to the standard’s legislative history. *Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2091 (No. 96-0126, 2000). The preamble to the standard provides the “most authoritative evidence of the meaning of the standard.” *Id.*; *Am. Sterilizer Co.*, 15 BNA OSHC 1476, 1478 (No. 86-1179, 1992)

²⁹ Standard 29 C.F.R. § 1926.702(j)(1) requires that potentially hazardous energy sources be locked out and tagged. Lock out is a necessary predicate to tagging. There is no dispute that the Rod Chomper was not tagged. Therefore, the focus of the decision analysis is on the standard’s applicability to the operation of the Rod Chomper on Respondent’s Project worksite and the requirement for machine lock out.

When interpreting terms that are disputed, the Commission looks to “the provisions of the whole law, and to its object and policy.” *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1077 (No. 90-2148, 1995). The Commission applies the rule of statutory construction that “each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” *Morrison-Knudsen Co. / Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1108 (No. 88-572, 1993) (citation omitted). See *Davey Tree*, 25 BNA OSHC at 1934. See generally, *Gen. Motors, Delco Chassis Div.*, 17 BNA OSHC 1217, 1220 (No. 91-2973, 1995) (consolidated) (effect must be given to every clause and word in defining a standard’s application), *aff’d*, 89 F.3d 313 (6th Cir. 1996).

The Rod Chomper is equipment covered by the standard, where the inadvertent operation of the equipment could occur and cause injury.

The parties disagree regarding whether the Rod Chomper rebar bending machine is equipment that can be inadvertently operated as identified in the standard. The Secretary contends that by the “plain terms” of standard 29 C.F.R. § 1926.702(j)(1), the Rod Chomper is equipment covered by the standard. The energized Rod Chomper will inadvertently operate if someone unintentionally or accidentally presses, or steps on, the foot pedal causing the wheel to rotate. (Sec’y Br. 10-11).

Respondent contends that the Rod Chomper is not equipment as identified in the standard, because it cannot be inadvertently operated.³⁰ (Resp’t Br. at 12-14). Respondent’s contention is rejected.

³⁰ Respondent has misplaced reliance on an administrative law judge decision, regarding a non-precedential, unreviewed, LOTO citation item. *O’Brien Concrete Pumping, Inc.*, No. 98-0471, 1999 WL 40880 (O.S.H.R.C.A.L.J., Jan. 29, 1999) (alleged violation of 29 C.F.R §1926.702(j)(1)). (Resp’t Br. 14). The alleged LOTO violation adjudicated in the administrative law judge decision is non-precedential as it was not directed for review before the Commission. *O’Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2059 n.2 (No. 98-0471, 2000). See *Dick Corp.*, 7 BNA OSHC 1951, 1951 n.1 (No. 16193, 1979) (Sections of an administrative law judge’s decision regarding unreviewed citation items are accorded the significance of an unreviewed judge’s decision.); *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (An unreviewed administrative law judge decision is not binding precedent for the Commission.).

Further, Respondent mistakenly tries to analogize the Rod Chomper with an auger in *O’Brien*. The Rod Chomper is operated by a foot pedal, which can be unintentionally stepped on causing the inadvertent operation of the machine. (Tr. 50-51, 54-56, 145; Ex. J-1, No. 7, Ex. S-7). In

The plain text of the standard supports the Secretary's interpretation that the Rod Chomper is equipment where the "inadvertent operation" could occur and cause injury, unless all potentially hazardous energy sources have been locked out. The Secretary notes that the word "inadvertent" means unintentional, noting Webster's New Basic Dictionary, Office edition, 2007. (Sec'y Reply Br. at 4).

The Final Rule preamble to standard 29 C.F.R. § 1926.702(j)(1) further supports the Secretary's interpretation that the Rod Chomper is equipment covered by the standard. A review of the Preamble reveals OSHA's intended purpose was for the standard to apply to any piece of equipment which could expose an employee to the hazard of inadvertent operation and cause injury. Concrete and Masonry Construction Safety Standards, 53 Fed Reg. 22612, 22624 (June 16, 1988) (to be codified at 29 C.F.R. pt. 1926) (Concrete and Masonry Construction Final Rule preamble). Once the ignition key has been turned, the Rod Chomper is operated by a foot pedal, which if unintentionally pressed or "stepped on" can cause the machine to inadvertently operate and result in severe injury. (Tr. 50-51, 54-56, 145; Ex. J-1, No. 7; Ex. S-7). As such, the Rod Chomper is exactly the type of equipment envisioned by the cited standard.

Respondent contends that because G.N. was the only employee operating the Rod Chomper at the time of his injury, the equipment LOTO standard does not apply to the violation alleged. Relying on one phrase in the Concrete and Masonry Construction Final Rule preamble, Respondent contends that the standard is applicable only when an employee may inadvertently cause the machine to operate when another employee is engaged in machine maintenance or repair.³¹ (Resp't Br. 5, 9, 12-13, 16; Resp't Reply Br. 3). Respondent's contention is rejected.

The Secretary contends that Respondent's reading of the standard is too narrow. The intent of the cited standard was to require any piece of equipment that could be inadvertently activated and cause injury, to be locked out and tagged before maintenance or repair work is performed, regardless of the number of employees involved. The Secretary notes that if the equipment can be

contrast, the record in *O'Brien* disclosed that the auger could not be inadvertently activated without specific intent. *O'Brien*, 1999 WL 40880, at *2, *4.

³¹ The Concrete and Masonry Construction Final Rule preamble states in pertinent part, "The intent of this requirement is to prevent employee injury due to operation of equipment by persons who may be unaware that an employee is maintaining or repairing the equipment." 53 Fed Reg. at 22624.

operated inadvertently by the employee performing the maintenance or repair activity, the hazard exists, and the standard applies. (Sec’y Reply Br. 4-5) *Cf.* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, 36647 (Sept. 1, 1989) (to be codified at 29. C.F.R. pt. 1910) (“Inadvertent activation can occur due to an error on the part of the employee who is conducting the maintenance or servicing activity, or by any other person.”) The Secretary’s interpretation is reasonable, especially as G.N.’s unintentional actions appear to have caused the inadvertent operation of the Rod Chomper in this case.

Further, Respondent cites Roy Rock mechanic Roberto Morgado’s testimony that it is not possible for “stored energy” to inadvertently cause the Rod Chomper’s wheel to rotate. (Resp’t Br. 13-14; Tr. 136). Mechanic Morgado testified that the Rod Chomper’s engine cannot start unless the ignition key is turned to the on position and the foot pedal is pressed. (Tr. 130-31, 145). Here, the Secretary is not claiming that the Rod Chomper was inadvertently activated by stored energy, rather the Secretary claims that the Rod Chomper could be inadvertently operated by someone unintentionally pressing or stepping on the foot pedal while the machine is energized. (Sec’y Reply Br. 3). Mechanic Morgado’s testimony, supports the Secretary’s contention that the Rod Chomper could be inadvertently operated.

It is undisputed that pressing the foot pedal, even inadvertently, will cause the energized machine to operate and the wheel to rotate. Here, it appears G.N. inadvertently stepped on the foot pedal while removing the Rod Chomper’s cylinder, causing injury to his hand. (Tr. 50-51, 106, 145; Sec’y Reply Br. 4-5; Resp’t Br. 2, 5, 6). Regardless of his injury, throughout his tenure on Roy Rock’s Jersey City Project, daily G.N. was exposed to hazardous energy and the inadvertent operation of the Rod Chomper, as the Rod Chomper was never deenergized or locked out when he changed, removed, or disassembled cylinders on the machine’s wheel. (Tr. 71-72, 90, 107, 166).

The Secretary’s interpretation that the Rod Chomper is equipment covered by standard 29 C.F.R. § 1926.702(j)(1) is reasonable and entitled to deference. *See CF&I*, 499 U.S. at 150-51.

Respondent’s employee G.N., the injured employee, was engaged in maintenance activities on the Rod Chomper while the machine remained energized, without first locking out the machine.

The parties disagree regarding whether G.N., on the day he was injured, was performing maintenance activity on the Rod Chomper when he removed a cylinder from the machine’s wheel,

disassembling the machine, while the machine remained energized.³² The Rod Chomper inadvertently operated injuring G.N.'s hand as he removed the cylinder. The Secretary contends that G.N. was engaged in a maintenance activity covered by the standard. (Sec'y Br. 11-12)

Respondent contends that the cited standard is not applicable to the hazard cited because G.N. was neither maintaining³³ nor repairing the Rod Chomper when he was injured, rather G.N. was removing a cylinder, a task routinely performed when bending rebar. (Resp't Br. 6, 14-15; Resp't Reply Br. 2). Respondent contends that the injured employee was "engaging in construction related activities" which do not fall under the scope of maintenance or repair.³⁴ (Resp't Br. 14). Respondent contentions are rejected.

Under the cited standard, an employee shall not be "permitted to perform maintenance or repair activity on equipment," where inadvertent operation of the equipment could occur and cause injury, unless potential hazardous energy sources have been locked out and tagged. 29 C.F.R. § 1926.702(j)(1). Maintenance is not defined in the Subpart Q – Concrete and Masonry Construction standard. *See* 29 C.F.R. §§ 1926.700; 1926.32. Therefore, the plain text of the

³² Neither party claims that G.N. engaged in Rod Chomper repair activities.

³³ Respondent contends that G.N. was not performing or authorized to perform maintenance on the Rod Chomper; rather it was the responsibility of mechanic Morgado to maintain and repair the Rod Chomper. (Tr. 123-124, 135, 160-161). (Resp't Br. 6 ¶¶ 34, 35; 14; Resp't Reply Br. 2). Respondent's contention is rejected. The maintenance activity covered by the standard is determined by the work activity the employee performs, not by the employee's job title or by the employer's designation of work tasks as "maintenance."

³⁴ Respondent cites to an OSHA interpretation letter to bolster its argument that the injured employee was not performing maintenance. (Resp't Br. 14; Resp't Reply Br. 1). The purpose of the cited interpretation letter was to provide insight into the difference between construction and maintenance when determining the applicability of the Part 1926 construction standards or the Part 1910 general industry standards. <https://www.osha.gov/laws-regs/standardinterpretations/1994-08-11-3>. Here the parties agree that Respondent was performing concrete and masonry services on a construction site. (Ex. J-1, No. 1-3). Therefore, there is no dispute that the Subpart Q – Concrete and Masonry Construction standards were applicable to Respondent's Jersey City Project construction site. Furthermore, the cited LOTO standard contemplates the performance of equipment maintenance in the course of Part 1926 construction work and prohibits performing maintenance, on equipment where inadvertent operation could occur and cause injury, unless all hazardous energy has been locked out and tagged. *See* 29 C.F.R. § 1926.702(j)(1).

standard regarding the “maintenance” activities subject to the lock out requirement is “not free from doubt.” *CF&I*, 499 U.S. at 150-51.

The Final Rule preamble to 29 C.F.R. § 1926.702(j)(1) supports the Secretary’s interpretation that G.N. was engaged in maintenance activity on the Rod Chomper when he removed the cylinder from the wheel, disassembling the machine, on the day he was injured. The Preamble discloses a broad reading of the activities constituting “maintenance or repair.”³⁵ The Preamble states, in pertinent part, that the intent of the cited standard is to require employers “to lock out and tag equipment before allowing employees to perform any activities such as maintenance or repairs where unexpected, inadvertent operation could occur and cause injury.” Concrete and Masonry Construction Final Rule preamble, 53 Fed Reg. at 22624.

In addition to the guidance regarding the broad reading of maintenance activities found in the Concrete and Masonry Construction Final Rule preamble, the Secretary finds interpretative guidance in the general industry Control of Hazardous Energy Sources (Lockout/Tagout) (LOTO) standard 29 C.F.R. § 1910.147.³⁶ Maintenance is defined in the general industry LOTO standard 29 C.F.R. § 1910.147(b) as follows:

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. (emphasis added).

The broad and varied examples of service and maintenance “workplace activities,” stated in the general industry LOTO standard, are helpful when determining the “maintenance” activities covered by 29 C.F.R. § 1926.702(j)(1) the concrete and masonry construction LOTO standard for

³⁵ The broad reading of “maintenance and repair activities” covered by the standard is further elucidated in the Preamble where OSHA responds to a specific question raised concerning whether the cited standard applies to workers entering concrete mixers to remove concrete. OSHA elaborates the intent of the standard is “to protect employees who enter mixers (or any other equipment) for any reason from the inadvertent activation of equipment. To further clarify OSHA’s intent, OSHA has revised the proposed requirement to include all activities, including maintenance and repair.” Concrete and Masonry Construction Final Rule preamble, 53 Fed Reg. at 22624.

³⁶ The Secretary does not contend that the general industry Control of Hazardous Energy Sources (Lockout/Tagout) standard is directly applicable to Respondent’s concrete and masonry construction worksite. 29 C.F.R. § 1910.147(a)(1)(i). (Sec’y Br. 12).

equipment subject to inadvertent operation. The Secretary contends that the activities of adjusting and modifying machines and making adjustments or tool changes are maintenance activities applicable to operation of the Rod Chomper at Roy Rock's Jersey City Project worksite. (Sec'y Br. 12).

The Secretary contends that the operator's workplace activities disassembling the Rod Chomper, by removing or changing parts, cylinders, are maintenance activities requiring lock out of the machine's hazardous energy. These activities involve adjustment and modification of the machine and tool changes, directly exposing the operator to hazardous energy and moving machine parts, should the Rod Chomper inadvertently operate. In other words, these activities place the operator's body, including the operator's hands, in the hazardous area of the machine's moving parts, the cylinders and wheel. "[A]ctivities requiring machine or equipment shutoff and *disassembly*, such as *changing a machine tool* or cutting blade, usually take place *outside of the normal production process* and require energy isolating device LOTO in accordance with §1910.147." *The Control of Hazardous Energy-Enforcement Policy and Inspection Procedures*, Directive No. CPL 02-00-147 (Feb. 11, 2008), Chapter 3, Section IV, pp. 3-25; 3-26 (emphasis added). (*LOTO Directive* No. CPL 02-00-147) (Sec'y Br. 12-13).

The Secretary contends that the operator's activity disassembling the cylinder from the Rod Chomper is analogous to the activity of "setting up" the machine for further rebar bending. Equipment set-up activities do not occur during the normal production process. *See LOTO Directive* No. CPL 02-00-147, Chapter 3, Section IV, p. 3-26. G.N.'s removal and disassembly of the cylinder from the Rod Chomper's wheel are activities outside the scope of normal production operations, bending and cutting rebar, on the Rod Chomper.³⁷ (Sec'y Br. 12-14, 25-26; Sec'y Reply Br. at 6).

³⁷ In post hearing briefing, Respondent does not contend that the general industry LOTO standard, minor servicing exception, was applicable to Roy Rock's Jersey City Project and G.N.'s operation of the Rod Chomper, when changing, removing, or disassembling cylinders from the machine's wheel. 29 C.F.R. § 1910.147(a)(2)(ii).

The Secretary persuasively argues that G.N.'s work activities at issue in this case, removing and disassembling cylinders from the machine's wheel, are maintenance activities outside normal production operations. Therefore, lock out protection is required. These Rod Chomper operator work activities would not meet the criteria for the minor serving exception in the general industry LOTO standard 29 C.F.R. § 1910.147(a)(2)(ii). (Sec'y Br. 25-26; Sec'y Reply Br. 6).

The Secretary states that, on the day he was injured, G.N. was performing maintenance activities, covered by standard 29 C.F.R. § 1926.702(j)(1), on the Rod Chomper when he removed and disassembled the cylinder from the machine's wheel, as the machine remained energized. OSHA's stated intent in the Concrete and Masonry Construction Final Rule preamble and the interpretive guidance found in the general industry LOTO standard and in the *LOTO Directive* reveals that the Secretary's interpretation of "maintenance" activities covered by the standard is reasonable and entitled to deference. *See CF&I*, 499 U.S. at 150-51.

Concrete and Masonry Construction standard 29 C.F.R. § 1926.702(j)(1), requiring the lock out and tag out of equipment where inadvertent operation can occur and cause injury, was applicable to G.N.'s maintenance activities on the Rod Chomper at Roy Rock's Jersey City Project worksite, on the day he was injured. On Roy Rock's Project, G.N. operated the Rod Chomper, changing and removing cylinders daily. G.N. never locked out or deenergized the Rod Chomper when he changed and removed cylinders on the machine, including on the day he was injured. Therefore, the Rod Chomper's hazardous energy could be inadvertently activated by G.N. or another employee unintentionally pressing the machine's foot control.

Respondent violated the standard by not ensuring that the Rod Chomper was locked out when G.N. removed and disassembled the cylinder from the machine's wheel, on the day he was injured. The inadvertent operation of the Rod Chomper coupled with G.N.'s resulting injury while performing maintenance activities is the exact scenario contemplated and sought to be prevented by standard 29 C.F.R. § 1926.702(j)(1)

2. Exposure

To establish exposure, the Secretary "must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). *See Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

In this case "access" to the hazard is established as the evidence shows that it is reasonably predictable that an employee engaged in the maintenance activities of removing and disassembling cylinders on the energized Rod Chomper, without first locking out the power sources, will be exposed to the hazard of "inadvertent operation," in violation of standard 29 C.F.R.

§ 1926.702(j)(1). *Cf., Gen. Motors Corp., (GM)*, 22 BNA OSHC 1019, 1029-30 (No. 91-2843E, 2007) (consolidated) (discussing the general industry LOTO standard 29 C.F.R. § 1910.147, the Commission held “access” to the hazard is established “where the evidence shows it is reasonably predictable that an employee engaged in serving or maintenance will be exposed to the hazard of unexpected energization.”).

G.N. was routinely exposed to the inadvertent operation of the Rod Chomper and hazardous energy as the Rod Chomper was never powered off and locked out when he performed maintenance, removing and changing cylinders, on the machine’s wheel. In fact, both parties stipulated that G.N. used the Rod Chomper thirty to forty times a day, five days a week for over eight months. G.N. testified that the machine was never turned off when he removed and changed cylinders. G.N. was never told to power down or lock out the machine when performing cylinder changes. (Tr. 71-72; Ex. J-1, No. 10).

It is undisputed that the Rod Chomper injured three of G.N.’s fingers, breaking his ring finger and cutting the pinky and middle fingers on his left hand. (Tr. 50-51, 109; Ex. R-1). G.N.’s actual exposure, in having his fingers injured, also establishes exposure. *See S & G Packaging Co., LLC (S&G)*, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (injuries establish actual exposure to the violative condition).

3. Knowledge

Respondent’s knowledge of the serious violation may be established by showing that the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k); *Nat’l Eng’g & Contracting Co. v. OSHRC*, 928 F.2d 762, 767 (6th Cir. 1991). An employer’s awareness of the violation may be shown through actual or constructive knowledge of the hazardous condition. The actual or constructive knowledge of a supervisor may be imputed to the employer. *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000); *A.P. O’Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369. 1991).

Respondent argues that OSHA and the Secretary’s Counsel did not know standard 29 C.F.R. § 1926.702(j)(1) applied to Respondent’s Jersey City Project; therefore, it was not possible for Roy Rock to know this standard applied to the Rod Chomper on Respondent’s Project worksite. (Resp’t Br. 10, ¶ 54; 17). *See* note 2 above. Respondent’s argument is rejected.

Knowledge is directed to the physical conditions that constitute a violation. The Secretary need not show that an employer understood or acknowledged that the physical conditions were hazardous. *S&G* 19 BNA OSHC at 1506; *Phoenix Roofing, Inc.*, 17 BNA OSHC, 1079, 1080 (No. 90-2148, 1995) *aff'd* 79 F.3d 1146 (5th Cir. 1996). “The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard, rather it is established if the record shows that the employer knew or should have known of the conditions constituting a violation.” *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199 (No. 90-2304, 1993), *aff'd* 26 F.3d 573 (5th Cir. 1994).

In order to establish constructive knowledge, an employer must fail to exercise reasonable diligence in discovering the hazardous condition. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Whether an employer was reasonably diligent rests on a variety of factors, “including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.” *Id.* at 1407; *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

The Secretary contends that Roy Rock failed to exercise reasonable diligence to discover and prevent the Rod Chomper lockout violation and therefore had constructive knowledge of the violative condition. Respondent failed to establish work rules or train employees regarding the lockout procedures required. (Sec’y Br. 2, 16-24; Sec’y Reply Br. 7-9).

In support of Respondent’s employee misconduct affirmative defense, Respondent claims that it met the reasonable diligence factors through Roy Rock’s safety trainings, “Safety Toolbox Talks,” and general safety rules. (Resp’t Br. 18-19). Respondent’s claim is rejected.

The credible record evidence reveals that Respondent had constructive knowledge of the hazardous condition of G.N. removing, changing, and disassembling cylinders on the energized Rod Chomper, without locking out the machine’s energy sources. *See Roy Rock’s Workplace Safety Rules and Safety Training Program*, in the Background and Fact Finding Section, above.

Respondent’s lack of work rules regarding Rod Chomper lock out illustrates its failure to exercise reasonable diligence. While Respondent had general worksite safety rules, they were inadequate regarding operation of the Rod Chomper. There were no work rules requiring lockout of the Rod Chomper when changing and removing cylinders. (Tr. 71-75, 87, 119-20, 163, 166, 173, 199, 204). This is understandable as it is Respondent’s position that lockout of the Rod

Chomper when the operator removes or changes cylinders is not required. (Tr. 163, 220; Resp't Br. 3, ¶ 21; 8, ¶ 50; 14-15; Resp't Reply Br. 3, 4).

Similarly, Respondent's failure to train employees regarding required lock out procedures during Rod Chomper cylinder changes and removal discloses Respondent's failure to exercise reasonable diligence. "[T]he adequacy of a company's safety program, broadly construed, is the key to determining whether an OSHA violation was reasonably foreseeable and preventable." *Pa. Power & Light Co. v. OSHRC, (PP&L)*, 737 F.2d 350, 358 (3d Cir. 1984). Roy Rock's general worksite safety training was markedly inadequate regarding safe operation of the Rod Chomper and the need to protect employees from hazardous energy, should the machine inadvertently operate, when the operator engaged in maintenance, removing and changing cylinders on the machine's wheel. Respondent had no training regarding the need to deenergize and lock out the Rod Chomper when the operator removed and changed cylinders. (Tr. 71-81, 87-88, 119-20, 164-66, 175-76, 222; Ex. S-9). Without a Rod Chomper lock out rule or lock out training, it was reasonably foreseeable that G.N. would engage in Rod Chomper maintenance, removing and changing cylinders, without first shutting off the power and locking out the machine. The hazardous condition G.N. encountered was preventable.

Respondent's lack of Rod Chomper lock out training, illustrates Respondent's failure to anticipate the hazards presented by the possible inadvertent operation of the Rod Chomper, when the operator removed and changed cylinders. This is further evidence of Respondent's lack of reasonable diligence.

Also, the absence of Respondent reasonable diligence is shown by Roy Rock's failure to adequately supervisor employees operating the Rod Chomper on the Project worksite. G.N. daily removed and changed cylinders on the Rod Chomper without shutting off the power and locking out the machine, by turning the ignition key to the off position and removing the key. G.N. never deenergized the Rob Chomper before changing cylinders. (Tr. 68-72, 90). Respondent emphasizes Project Foreman Brito's consistent observation of the construction site workforce, including his daily observation of G.N.'s operation of the Rod Chomper to bend rebar. (Ex. J-1, No. 11; Resp't Br. 4, ¶ 24; 19; Resp't Reply Br. 6). Despite this daily observation, neither Foreman Brito nor any other Roy Rock supervisor instructed G.N. how to properly lockout the machine when changing cylinders, including the need to turn off the machine's power. (Tr. 71-73, 75, 164-65; Ex. J-1, No. 11). *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 589 (D.C. Cir. 1985) (*Simplex*)

(finding employer had constructive knowledge of safety violation based on physical conditions and work practices that were “readily apparent” and that “indisputably should have been known to management”).

Respondent lacked measures to prevent the occurrence of Rod Chomper lock out violations. This further illustrates Respondent’s failure to exercise reasonable diligence. As Respondent had no work rules regarding Rod Chomper lock out, it is not surprising that G.N. was never disciplined for performing maintenance activity, changing and removing cylinders on the wheel, without first deenergizing and locking out the Rod Chomper. (Tr. 75-76). *See CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195 (No. 90-329, 1993) (Employer’s lack of safety enforcement program established constructive knowledge.).

Respondent’s failure to exercise reasonable diligence establishes Respondent’s constructive knowledge of the hazardous condition at the Jersey City Project worksite presented by the injured employee removing, changing, and disassembling cylinders on the machine’s wheel, without first deenergizing and locking out the Rod Chomper’s power sources.³⁸

³⁸ The Secretary also contends that Respondent had actual knowledge of the hazardous condition as the hazard was in plain view of the Roy Rock’s supervisors, including Project Foreman Brito. (Sec’y Br. 2, 17, 23-24). In opposition, Respondent contends there is no record testimony that Project Foreman Brito observed G.N. change a cylinder. (Resp’t Reply Br. 6). Respondent’s contention is persuasive.

G.N. testified that Foreman Brito routinely observed him working; however, G.N. did not know whether Foreman Brito observed him perform a cylinder change. (Tr. 62-63, 70). The record reveals that G.N.’s principal task was to bend rebar on the Rod Chomper, an operation that required the machine to be energized. (Tr. 48, 60-61, 107; Ex. J-1, Nos. 6, 9, 10). Foreman Brito’s observation of G.N. working on the energized Rod Chomper, without additional specific evidence of the tasks observed, does not establish actual knowledge of the lockout violation. (Ex. J-1, No. 11). The record does not support a finding that Roy Rock had actual knowledge of the physical conditions constituting the violation of G.N. removing and disassembling the cylinder on the energized machine that was not locked out.

Further, cases cited by the Secretary support the constructive knowledge finding. *Simplex*, 766 F.2d at 589 (constructive knowledge established); *Kokosing Constr., Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996) (constructive knowledge found where unguarded rebars were in a conspicuous location in the presence of company crews); *Hamilton Fixture*, 16 BNA OSHC 1073, 1087 (No. 88-1720, 1993)(constructive knowledge established).

4. *Unpreventable Employee Misconduct*

Respondent raises the affirmative defense of unpreventable employee misconduct in its answers and Post Hearing Brief. (Resp't Br. 18-19; Resp't Reply Br. 5-6; Respondent Answers). The burden is on the Respondent to prove the elements of this affirmative defense. To establish the affirmative defense of unpreventable employee misconduct, in cases that do not involve supervisor misconduct, the employer must prove that it "[1] has established work rules designed to prevent the violation [; (2)] has adequately communicated these rules to its employees [; (3)] has taken steps to discover violations and [; (4)] has effectively enforced the rules when violations have been discovered." *Western World, Inc. v. Sec'y of Labor*, 604 F. App'x 188, 191 (3d Cir. 2015) (unpublished), quoting *PP&L*, 737 F.2d at 358 (emphasis omitted) (quoting *Marson Corp.*, 10 BNA OSHC 1660 (No. 78-3491, 1982). See *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1455, (No. 93-2971, 1995) *aff'd*, 106 F.3d 401 (6th Cir. 1997) (unpublished); *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1994).

The factors illustrating Respondent's constructive knowledge of the worksite hazardous condition also show that Respondent's unpreventable employee misconduct defense fails. *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (the factors for evaluating constructive knowledge are the same factors for evaluating the unpreventable employee misconduct defense), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished).

Respondent presented no evidence at the hearing to establish employee misconduct. In Respondent's post hearing briefing, G.N.'s alleged misconduct is never stated. In fact, Respondent contends that there was no lock out requirement applicable to the Rod Chomper on Respondent's Jersey City Project. (Resp't Reply Br. 6). Respondent admits that G.N.'s work practice of changing and removing cylinders on the Rod Chomper, while the machine remained energized, never turning the machine off before performing these tasks, did not violate a work rule. G.N.'s work practice on the day he was injured was consistent with his work practice for the many months he worked on the Jersey City Project. The record does not reveal any misconduct by G.N.

Respondent's unpreventable employee misconduct defense fails. Respondent failed to meet its proof burden regarding this affirmative defense.

5. *Characterization*

The Secretary characterizes the violation of 29 C.F.R. § 1926.702(j)(1) as serious. A serious violation is committed where both a substantial probability of death or serious physical harm could have resulted from the hazardous condition and the employer knew, or with the exercise of reasonable diligence could have known of the condition. The OSH Act, section 17(k), 29 U.S.C. § 666(k); *Nat'l Eng'g & Contracting Co. v. OSHRC*, 928 F.2d 762, 767 (6th Cir. 1991). Here, the citation item is properly characterized as serious. OSHA AAD Flynn testified to the high severity associated with this violative condition because of the strong potential for amputation. (Tr. 322, 327). The serious violation characterization is further supported by the serious physical harm G.N. experienced. (Tr. 51, 109). The citation is affirmed as serious.

6. *Penalty*

Under section 17(j) of the OSH Act, the Commission has the authority to assess civil penalties for the violation of citations. 29 U.S.C. § 666(j). In assessing penalties, the Commission is instructed to give due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of previous violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). A violation's gravity is determined by weighing the number of employees exposed, the duration of their hazard exposure, preventative measures taken against injury, and the possibility that an injury would occur. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

OSHA AAD Flynn testified how the proposed penalty for the citation item was calculated. (Tr. 322-324, 327). The gravity of the violation was assessed as high severity because of the high likelihood of an amputation and the actual serious physical harm suffered by Respondent's injured employee. (Tr. 50-51, 109, 322, 327). The high probability of an injury was exacerbated by the injured employee's repeated exposure to the violative condition for months before the accident as stipulated by the parties and supported by testimony. (Tr. 69-70; J-1, No. 10). The injured employee worked on the Rod Chomper machine daily, changing and removing cylinders

frequently, while never deenergizing and locking out the machine before engaging in this maintenance activity. The high gravity assessment is accurate.

There was no reduction for good faith because of the severe nature of the violation and Respondent's lack of lock out tag out rules specific to the Rod Chomper. Additionally, regarding Respondent's history of prior violations, there was a ten percent penalty increase because of a high-gravity violation issued against Respondent in the last five years. (Tr. 323-24).

Further, the proposed penalty calculation included a thirty percent penalty reduction for size. At the time of OSHA's investigation, the OSHA compliance officer reported that Respondent employed sixty-five employees. (Tr. 323). The Secretary contends that the penalty should not be reduced by thirty percent because safety officer Quinteros testified that Roy Rock employed significantly more than sixty-five employees, at the time of the OSHA investigation. (Tr. 333-34; Sec'y Br. 3, 31-32; Sec'y Reply Br. 10). At the hearing, Safety officer Quinteros testified that Respondent had at most 250 employees when G.N. was injured. (Tr. 334). When questioned regarding Respondent's total employee complement in October 2017, a year and a half prior to the hearing, safety officer Quinteros's testimony was hesitant and uncertain.³⁹ The Secretary presented no additional evidence supporting a penalty increase other than the uncertain testimony of Respondent's safety officer Quinteros and the non-specific, general "understanding" of OSHA AAD Flynn. (Tr. 323, 327-29, 332-34). Therefore, on this record, the Secretary's post hearing argument has failed to persuade that the originally proposed thirty percent penalty reduction for employer size should be changed. *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

For serious citation 1, item 1 the Secretary proposed, after adjustments, a \$9,760 penalty. Upon due consideration of section 17(j) of the OSH Act, with regard given to the enumerated penalty calculation factors, the undersigned judge finds the Secretary's original penalty proposed appropriate. The penalty of \$9,760 is affirmed for citation 1, item 1.

In Summary

(1) The Secretary met his burden to prove that Respondent violated concrete and masonry construction standard 29 C.F.R. § 1926.702(j)(1). (2) The rebar bending machine, the Rod

³⁹ Observing Quinteros testify, he appeared unprepared for this inquiry. It appeared his recollection on this topic had not been refreshed prior to the hearing.

Chomper, is equipment covered by the standard, where inadvertent operation of the equipment could occur and cause injury. (3) Respondent's employee, the injured employee, was engaged in maintenance activities on the Rod Chomper, while the machine remained energized, without first locking out the machine, in violation of the standard. (4) With the exercise of reasonable diligence, Respondent could have known of the hazardous worksite conditions violative of the standard. (5) The Secretary's proposed penalty, at the time the citation was issued and amended, is appropriate.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1926.702(j)(1), is AFFIRMED as Serious and a penalty of \$9,760 is ASSESSED.

SO ORDERED.

/s/ Carol A. Baumerich
Carol A. Baumerich
Judge, OSHRC

Dated: July 27, 2020
Washington, D.C.