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. Home Rubber Company, LP, Respondent.	OSHRC Docket No. 17-0138

APPEARANCES:

Terrance Duncan, Esquire
U.S. Department of Labor
New York, New York
For the Secretary

Randall Schauer, Esquire
Fox Rothschild, LLP
Exton, Pennsylvania
For the Respondent

BEFORE: Carol A. Baumerich
Administrative Law Judge

DECISION AND ORDER

On October 27, 2016, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty to Home Rubber Company, LP (Home Rubber or Respondent). Home Rubber filed a timely notice of contest bringing this matter before the Occupational Safety and Health Review Commission (the Commission), pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

OSHA opened an investigation at Home Rubber's facility in response to a May 6, 2016 accident that seriously injured an employee. As a result, OSHA cited Home Rubber for thirty violations with a total proposed penalty of $180,592. Of the cited violations, two were classified as willful, twenty-three as serious, and five as other-than-serious.

Home Rubber was cited for violations of the noise exposure, housekeeping, chemical storage, fire extinguisher, lockout-tagout, machine guarding, powered industrial truck, electrical, bloodborne pathogen, accident reporting, training, recordkeeping and hazard communications standards. In particular, the Secretary alleges that Home Rubber exposed its mill operators to amputation and other injuries, because the ingoing nip points on its rubber mills were not guarded, and willfully ignored requirements to protect its mill operators from hearing loss.

A two-day hearing was held in Trenton, New Jersey on April 9-10, 2018. Five witnesses provided testimony: OSHA Compliance Officer (CO) Marie Lord, Steven Anderson (analytical chemist for OSHA), Richard Balka (owner and president of Home Rubber), James Bole (plant manager for Home Rubber), and William Howard (Secretary's expert). Both parties filed post-hearing briefs, including reply briefs.

Respondent asserted three primary arguments. First, Respondent argues that guarding the ingoing nip points on its mills was infeasible and the Secretary did not prove guarding was feasible. (R. Br. 23-28). As discussed below, the burden for the affirmative defense of infeasibility rests with Respondent.

Secondly, Respondent argues the lack of attention to safety training and oversight was due to turnover and vacancies in the safety and compliance manager's position since 2006. (R. Br. 1). As discussed below, the argument is rejected.

Finally, Respondent asserts the willful and serious citations should be reclassified to other-than-serious if they are affirmed. The classification for each citation item is discussed below.

Key Issues

The key issues to resolve are:

1. Did Home Rubber willfully violate the requirements to provide audiometric testing for its employees operating Mill Three?
2. Was it infeasible to guard the ingoing nip points on the Chrome Mill, Kobe Mill, Mill Three, and Mill One?

3. Are the willful and serious violations properly classified?

4. Did the Secretary prove his prima facie case for all thirty alleged violations?

For the reasons discussed below, the citation items are affirmed and a total penalty of $180,592 is assessed.

JURISDICTION

Based upon the record, I find that at all relevant times Respondent was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. I also find that the Commission has jurisdiction over the parties and subject matter in this case. (Tr. 9-11).

FACTS

The accident

Home Rubber is a small specialty rubber manufacturer with 36 employees that has been in business since 1881. (Tr. 342, 344). Home Rubber manufactures specialty rubber products, including hoses, belts, tubes, gaskets, lathe-cut, and sheet rubber to its customers' specifications. (Tr. 341-42).

Just before noon on Friday, May 6, 2016, employee J.L.[1] was processing rubber on the Chrome Mill when his left hand was pulled into the ingoing nip point at the mill's rollers.[2] (Tr. 426-27; Ex. P-5). J.L. immediately pulled the machine's brake cord to reverse the roller and free his hand. (Tr. 28; Ex. P-5). The maintenance manager, R.B., took Employee J.L. to the factory's lab area, where R.B. applied pressure to the wound. (Tr. 427). Emergency services were notified, and the employee was taken to the hospital by ambulance. (Tr. 427).

After J.L. was taken to the hospital, the maintenance manager, R.B., and maintenance employee, V.D., cleaned up the blood from the accident. (Tr. 334-35, 427-28). Richard Balka, company owner, was nearby and made sure the area was cleaned with bleach. (Tr. 428). The maintenance manager made sure the cleaning debris was sealed in a trash bag. (Tr. 428).

Mr. Balka went to the hospital later that afternoon and stayed until J.L. was taken to surgery. (Tr. 428-29). On Sunday, Mr. Balka learned that four of J.L.'s fingers were so

[1] In the interest of privacy, the injured employee will be referred to as J.L. The maintenance manager will be referred to as R.B. The maintenance employee will be referred to as V.D.

[2] Company owner, Richard Balka was upstairs, in his office, when the accident occurred. (Tr. 426-27).

damaged they had been surgically amputated. (Tr. 429; Ex. P-17, p. 3). OSHA was notified of the hospitalization on Monday, May 9, 2016. (Tr. 102).

Home Rubber's product

Home Rubber's specialty products were manufactured on four of Home Rubber's mills: Mill One, Mill Three, the Chrome Mill, and the Kobe Warm-up Mill. (Ex. P-17, p. 3). Five employees operated these mills. (Tr. 344-45).

Most of Home Rubber's mills were in the main mill room, which was about 150 feet long by 88 feet across. (Tr. 371). The frequency of a mill's use was related to the customer order being processed. (Tr. 343-44). For example, Mill Three was used to produce most of the rubber compounds using carbon black. (Tr. 370, 376). Mill One was used to produce compounds without carbon black. (Tr. 371). A mill could be used continuously for weeks and then not used for a few weeks. (Tr. 344).

Each mill had two large rollers that rotated toward each other to create an ingoing nip point. (Tr. 410, 412). The roller on a mill was about 20 inches in diameter. (Tr. 410, 423). The two rollers moved at slightly different speeds to create friction. (Tr. 410). The friction created heat which broke down the ingredients to create a rubber compound. (Tr. 411). A typical batch of rubber compound used about 145 pounds of natural rubber and took about 20-25 minutes to mix. (Tr. 415).

Company ownership and management

In 1996, Richard Balka purchased Home Rubber along with two partners, Steve Kelly and Norman Zigler. (Tr. 345). Mr. Kelly was responsible for sales, Mr. Balka was responsible for production, and Mr. Zigler was responsible for safety, compliance, and human resources. (Tr. 346). In 2006, Mr. Balka purchased Mr. Zigler's share of the company and became the sole owner. (Tr. 346). Mr. Kelly had left the business sometime before 2006. (Tr. 346).

When Mr. Zigler left the company in 2006, Donald Slowicki took over safety and compliance duties. (Tr. 346). Mr. Slowicki had been a Home Rubber employee since 1997. (Tr. 347). Upon Mr. Slowicki's death in 2012, his assistant, Michael Strasser, took over the safety and compliance duties. (Tr. 347). Mr. Strasser was the safety and compliance manager for about 14 months. (Tr. 347).

Home Rubber did not have a safety and compliance manager for some time after Mr. Strasser left. (Tr. 346). Tim Fisher was eventually hired as the safety and compliance manager

and worked for Home Rubber for about two years; he was responsible for compliance with OSHA standards at the time of the May 2016 inspection. (Tr. 347, 353). Mr. Fisher reported directly to Mr. Balka. (Tr. 348).

Jim Bole was Home Rubber's plant manager. (Tr. 347-48). The maintenance manager for Home Rubber was R.B. (Tr. 28).

The 2016 OSHA inspection

In response to the May 6 accident, CO Marie Lord opened an investigation of Home Rubber. She visited Home Rubber's facility on May 16, 2016[3] and on June 2, 2016. (Tr. 23, 43). The CO observed and photographed conditions throughout the facility. The CO observed electrical cords, a chemical storage area, forklifts, and various machines. She recorded video of employees working at the mills. (Tr. 196-207). The CO interviewed employees and management. (Ex. P-4). Mr. Balka provided records of safety policies, training records and other documents that were stored in Mr. Zigler's old office. (Tr. 351, 353, 426).

While near the Chrome Mill, CO Lord found that she had to shout when speaking to Mr. Balka, who was an arm's length away. (Tr. 37). In her experience, this generally indicated a noise level over 85 decibels (dBA). (Tr. 37). She noticed the operator of the Chrome Mill wearing music-type headphones and was not using earplugs. (Tr. 38). She noted that Home Rubber did not require its employees to use hearing protection in the Chrome Mill room; Mill Three was the only area that required the use of hearing protection. (Tr. 38)

On her June 2 visit, CO Lord conducted audiometric testing for the operators of the Chrome Mill and Mill Three. (Tr. 96; Ex. 29, p. 1). The employee operating the Chrome Mill wore a dosimeter for 406 minutes that day. (Tr. 95-96; Ex. P-29, pp. 1, 6). The employee operating Mill Three wore a dosimeter for 480 minutes. (Tr. 95-96; Ex. P-29, pp. 1, 8). The results showed that Mill Three operator had an exposure level at 91.8 dBA and that the Chrome Mill operator had an exposure level at 89.5 dBA. (Tr. 98-99; Ex. P-29, p. 3).

The CO observed significant dust accumulation on both her May 16 and June 2 visit to Home Rubber's factory. (Tr. 30, 33, 36; Exs. P-6, P-7). She could see dust buildup on the walls, floors, machines, plastic curtains, and machine canopies. (Tr. 33-34, 36). The chemical safety data sheets provided by Mr. Balka showed some of the chemicals used in the rubber compounds

[3] References in this decision to May 16 mean May 16, 2016 and to June 2 mean June 2, 2016.

were either explosive or combustible in nature. (Tr. 35). The CO collected a dust sample and sent to it to OSHA's Salt Lake Technical Center (SLTC) to test for combustibility and explosibility. (Tr. 27, 221-22). The results of the SLTC's testing showed the dust had explosive properties. (Tr. 28-29, 243; Ex. P-39).

Home Rubber's 1999 noise audit

In 1999, safety and compliance manager Zigler asked the state of New Jersey to conduct a voluntary noise audit. Three areas were tested for excessive noise levels. The results showed a noise level at Mill Three that required an operator to use hearing protection.[4] (Tr. 40-41, 349; Ex. P-30, p. 12). The state's testing report explicitly stated that OSHA's requirements at 29 CFR § 1910.95 (occupational noise exposure) must be followed and the report stated that annual and baseline audiograms were required for Mill Three operators and must be documented. *Id*. Further, the report stated that a copy of OSHA's noise standards was provided to Home Rubber during the audit. (Ex. P-30, p. 13). For a few years after the 1999 audit, Home Rubber provided audiograms and hearing protection for any employee that worked at Mill Three. (Tr. 349). The Chrome Mill was added to the production floor in 2007 so it was not evaluated during the audit. (Tr. 342-43, 354-55).

ANALYSIS

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

THE CITATIONS

Applicability — All citation items

Home Rubber used chemicals, forklifts, mill machines, and electrical equipment in its rubber production. Home Rubber was cited for safety violations related to housekeeping, noise, injury reporting, electrical, forklifts, compressed air settings, bloodborne pathogens (exposure control), and hazard communications. I find the standards cited are applicable to Home Rubber and this element of the Secretary's case is proved.

[4] The Chrome Mill was not at the factory in 1999; it was added in 2007. (Tr. 342-43, 354-55)

Knowledge — All citation items

To establish his prima facie case, the Secretary must prove the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Revoli Constr. Co*., 19 BNA OSHC 1682, 1684 (No. 00-0315, 2001). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc.,* 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (*Phoenix*). It is not necessary to show that the employer knew or understood the condition was hazardous. *Id*.

Reasonable diligence for constructive knowledge includes the "'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence"' of hazards. *Pub Utils. Maint., Inc. v. Sec'y*, 417 F. Appx 58, 63 (2d Cir. 2011) (unpublished) (*PUMI*) (citing *North Landing Line Constr. Co.,* 19 BNA OSHC 1465, 1472 (No. 96-721, 2001) (*NLLC*)).

Knowledge is imputed to the employer "through its supervisory employee." *American Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (*AEDC*) (citations omitted). The formal title of an employee is not controlling. *Id*. The Commission has imputed the knowledge of crew leaders and foremen. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000) (citations omitted); *see generally*, *Penn. Power & Light Co.*, 737 F.2d 350, 357-58 (3d Cir. 1984) (crew leader is a supervisory employee). An employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel. See *Hamilton Fixture*, 16 BNA OSHC 1073, 1091 (No. 88-1720, 1993) (*Hamilton*).

Knowledge particular to each citation item is discussed below. For most of the citation items, the violative condition was in plain view. According to Mr. Balka, managers were in the production area "all the time every day." (Tr. 345). Plant manager, Mr. Bole, stated that he routinely travelled through the various departments. (Tr. 330). Mr. Bole and the maintenance manager told the CO they routinely inspected the facility for safety hazards. (Tr. 35-36). Generally, knowledge is proved because management employees were routinely in the production area for conditions that were in plain view or because Home Rubber had a written policy that mirrored OSHA's requirement.

Citation Classification – All citation items

The citations at issue were classified as willful, serious, or other-than-serious. Respondent asserts that many of the willful and serious citation items should be classified as

other-than-serious because there was a low risk of harm and Home Rubber had promptly abated the violations. (R. Br. 3, 7, 17-22, 29-35, 37).

A willful violation is "one committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Burkes Mech., Inc.,* 21 BNA OSHC 2136, 2140 (No. 04-0475, 2007) (quoted cases omitted) (*Burkes*).

The Act states that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Sec. 17(k) of the Act; 29 U.S.C. § 666(k). A serious classification is established upon determining that "a serious injury is the likely result should an accident occur." *Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000).

The Act does not define other-than-serious; however, the Commission has stated that an other-than-serious violation "is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." *Crescent Wharf & Warehouse Co*., 1 BNA OSHC 1219, 1222 (No. 1, 1973) (*Crescent*).[5] As discussed below, I find the citations were properly classified as issued and have not downgraded the items cited as serious and willful.

THE NOISE EXPOSURE VIOLATIONS

The analysis of the four citation items related to violations of the hearing protection standard (willful citation items 2.1a and 2.1b and serious citations items 1.2 and 1.3) follows.

Willful Citations - Citation 2, Item 1a & Citation 2, Item 1b

Citation 2, Item 1a alleged a violation of 29 C.F.R. § 1910.95(g)(5)(i).

[5] By contrast, a *de minimis* violation, "is one in which there is technical non-compliance with a standard but the departure from the standard bears such a negligible relationship to employee safety and health as to render inappropriate the assessment of a penalty or the entry of an abatement or order." *Keco Indus., Inc.,* 11 BNA OSHC 1832, 1834 (No. 81-1976, 1984); *see also, Otis Elevator Co.*, 17 BNA OSHC 1167, 1168 (No. 90-2046, 1995) (a *de minimis* violation is one where the deviation from the cited standard increases the risk of injury so slightly that the relationship of the violation to safety and health was not direct or immediate).

(g) *Audiometric testing program*. . ..
(5) *Baseline audiogram*. (i) Within 6 months of an employee's first exposure at or above the action level, the employer shall establish a valid baseline audiogram against which subsequent audiograms can be compared.

Citation 2, Item 1b alleged a violation of 29 C.F.R. § 1910.95(g)(6).

(g) *Audiometric testing program*. . ..
(6) *Annual audiogram*. At least annually after obtaining the baseline audiogram, the employer shall obtain a new audiogram for each employee exposed at or above an 8-hour time-weighted average of 85 decibels.

The Secretary alleges that mill operators exposed to noise above the action level[6] had not received baseline audiograms within 6 months of the employee's first exposure. The Secretary further alleges that mill operators exposed to noise above the action level had not received annual audiograms. (S. Br. 4-5). Respondent contends that, at most, it was unintentionally negligent in not providing the required audiometric testing for its employees. (R. Br. 13).

For the following reasons, I find that the Secretary established violations of 29 C.F.R. § 1910.95(g)(5)(i) and 29 C.F.R. § 1910.95(g)(6).

The standard applied and employees were exposed.

The June 2 audiometric monitoring showed employees who worked at the Chrome Mill and Mill Three were exposed to noise above the action level of 85 dBA. (Tr. 96; Ex. P-29, p. 3). Home Rubber was required to provide baseline and annual audiograms for employees working on the Chrome Mill and Mill Three. The cited standards apply.

The five employees that operated the two mills at Home Rubber were required to have baseline and annual audiograms. Employees were exposed to the cited hazard.

The terms of the standard were violated.

Respondent offered evidence of a few audiograms provided to mill operators in 2000 and 2002. (Tr. 100-01, 353; Ex. P-30, pp. 6-10). The safety and compliance manager initially responsible for obtaining the employees' audiograms, Mr. Zigler, had left Home Rubber in 2006. (Tr. 96, 101). The CO determined that only one of the five mill operators, the injured employee, had received a baseline audiogram. (Tr. 96-97, 100-01; Ex. P-30, pp. 3, 6-10). Neither of the

[6] As defined in the Appendix to the cited standard, the action level is "[a]n 8–hour time-weighted average of 85 decibels measured on the A-scale, slow response, or equivalently, a dose of fifty percent." 29 C.F.R. § 1910.95, App. I.

two employees monitored on June 2 had received a baseline or annual audiogram. (Tr. 97, 101). One had worked for Home Rubber for about one year and the other had worked for Home Rubber for eleven years. (Ex. P-29, p. 3). Respondent does not dispute baseline and annual audiograms had not been provided to the operators of Mill Three and the Chrome Mill. (R. Br. 13).

I find Respondent did not provide baseline or annual audiograms and thus violated the cited standards.

Home Rubber had knowledge of the hazard.

The Secretary must prove "the employer knew or, with the exercise of reasonable diligence could have known of the hazardous condition." *PSP Monotech Ind.,* 22 BNA OSHC 1303, 1305 (No. 06-1201, 2008) (*PSP*) (citations omitted). Knowledge is directed to the physical conditions that constitute the violation and does not require the employer to know or understand the condition was hazardous. *Phoenix*, 17 BNA OSHC at 1079-1080.

Home Rubber's documents demonstrate knowledge that audiometric testing was necessary. Knowledge is also demonstrated through Home Rubber's records of audiometric testing it conducted in 2000-2002. (Tr. 97, 100-01; Ex. P-30, p. 11).

The 1999 noise audit results showed that employees operating Mill Three were exposed to noise levels above the action level. (Ex. P-30, p. 12). OSHA's requirements for audiograms were provided to Respondent during the 1999 audit. (Ex. P-30, p.12). Mr. Zigler, the safety and compliance manager, received the audit report. The report remained available to company president, Mr. Balka, after Mr. Zigler's departure. (Tr. 353-54). Home Rubber's written Hearing Protection Policy was developed after the 1999 audit. (Tr. 346, 349-50, 353; Ex. P-30, pp. 6-10). The Policy stated that employees working on Mill Three would be provided baseline and annual audiometric tests. (Tr. 96, 350-52; Ex. P-30, p. 11).

Mr. Zigler's actual knowledge of the requirement for audiograms is imputed to Respondent. *See Caterpillar*, *Inc.,* 17 BNA OSHC 1731, 1732 (No. 93-373, 1996), *aff'd,* 122 F.3d 437 (7th Cir. 1997) (corporate knowledge is imputed from current and past agents). Further, Mr. Balka oversaw production and had been the owner of Home Rubber since 1996. (Tr. 340, 346). Mr. Balka knew that after the 1999 noise audit Mill Three operators were required to use ear protection. (Tr. 352-53). Mr. Balka admitted that it was likely he had reviewed the Hearing Protection Policy document when it was issued. (Tr. 351-52). Mr. Bole,

plant manager, knew that a noise protection plan had been developed in the past. (Tr. 330). Both Mr. Bole and Mr. Balka told the CO that the testing had stopped when a previous manager left the company many years before. (Tr. 96). Respondent had actual knowledge audiometric testing was required for the operators of Mill Three.

Further, Respondent had constructive knowledge that audiograms were needed for the operators of the Chrome Mill. The hazardous condition was readily apparent because the Chrome Mill was so loud that it was necessary to shout when having a conversation near the machine. *See Hamilton*, 16 BNA OSHC at 1091. (An employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel). Yet, Mr. Balka took no action to determine if audiograms were needed to protect the Chrome Mill's operators from hearing loss. (Tr. 355). *See PUMI*, 417 F. App'x at 63 (citing *NLLC,* 19 BNA OSHC at 1472) (constructive knowledge where employer did not make reasonably diligent actions to inspect, anticipate, or prevent hazardous condition).

I find Respondent had knowledge that audiometric testing was required for operators of Mill Three and the Chrome Mill.

Willful Classification

Respondent asserts a willful classification is not merited because it was merely unintentionally negligent.[7] (R. Br. 13).

A willful violation is "one committed 'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Burkes,* 21 BNA OSHC at 2140; *see also, Bianchi Trison Corp. v. Sec'y,* 409 F.3d 196, 208 (3d Cir. 2005) ("Although the [OSH] Act does not define the term willful, courts have unanimously held that a willful violation of the [OSH] Act constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the [OSH] Act's requirements.").

"The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were

[7] Respondent relies on *Great Lakes Packaging Corp.*, 1998 WL 558896, at *5-6 (No. 97-2030, 1998) (ALJ) (finding two violations were other-than-serious) to support its argument that the noise citations should be classified as other-than-serious. This reliance is inapt. The cited case was not the final order of the Commission and has no persuasive nor precedential value. On review, the Commission reversed the ALJ's other-than-serious classification and determined one of the citations was willful. *Great Lakes Packaging Corp*, 18 BNA OSHC 2138, 2143-44 (No. 97-2030, 2000).

informed of the standard, it would not care." *Burkes,* 21 BNA OSHC at 2140 (citations omitted). "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1569 (No. 94-1979, 2009)

Five employees operated the mills at Respondent's facility. (Tr. 344-45). Respondent's written Hearing Protection Policy required it to conduct baseline and annual audiograms for operators working at Mill Three. (Ex. P-30, p. 11). The Policy also required the operators of Mill Three to use hearing protection. (Tr. 96, 350-52; Ex. P-30, p. 11). Records show no audiograms had been conducted since 2002.[8] (Ex. P-30, pp. 6-10). The CO was prompted to conduct a noise study because she had to shout to have a conversation in the production area. (Tr. 37). Both Mr. Bole and Mr. Balka knew Home Rubber had noise protection requirements. (Tr. 330, 335-54). Mr. Bole and Mr. Balka were in the rubber production area daily and could hear the noise at Mill Three. (Tr. 330, 334, 393). Despite this daily reminder, neither took action to ensure employees were receiving baseline and annual audiograms. Further, when the Chrome Mill was added to the facility in 2007 there was no attempt to determine if the noise levels were above the action level. (Tr. 355). Home Rubber knew of the requirements of the standard and chose to disregard the requirements.

Further, Mr. Balka had a heightened awareness of the need for audiograms. Home Rubber's Hearing Protection Policy was developed after the state of New Jersey conducted a noise audit of the facility and determined that Mill Three operators were exposed to noise levels that required baseline and annual audiograms to comply with OSHA standards. As the owner of Home Rubber, Mr. Balka was aware Mr. Zigler, who had initially implemented the hearing program, had left the company in 2006 and thus his safety and compliance duties would need to be assigned to someone else. Mr. Balka also knew there had been significant turn-over in the safety and compliance position since then.

Respondent's assertion, that the violation was not willful because it was simply negligent and had no bad intent, is rejected. The Secretary is not required to prove a bad motive to support

[8] Audiograms conducted in 2000 and 2002 for four employees were submitted for the record. (Tr. 97, 100-01; Ex. P-30, pp. 6-10). One was a baseline audiogram dated October 4, 2000 for one employee. The others were follow-up audiograms for three employees dated March 29, 2002. *Id.* No other audiogram records were presented.

a willful classification. *See Kaspar Wire Works, Inc. v. Sec'y*, 268 F.3d 1123, 1129 (D.C. Cir. 2001) (an employer's action may be willful without showing evil intent or bad motive); *see generally, Hartford Roofing Co*., 17 BNA OSHC 1361, 1363-64 (No. 92-3855, 1995) (violation was not willful where employer had implemented significant safety measures).

I find Respondent willfully violated the cited standard. Respondent learned from a 1999 audit that it needed a hearing protection program. Respondent developed a Hearing Protection Policy, with requirements for the operators of Mill Three that mirrored OSHA standards. Home Rubber ignored the requirements for baseline and annual audiograms set forth in its Hearing Protection Policy. Documents show no audiograms were conducted after 2002. As owner of the company Mr. Balka knew the person responsible for implementing the policy left the company in 2006, yet he made no effort to ensure the policy was followed thereafter. There is no evidence of an attempt to provide the required baseline and annual audiograms for employees that operated Mill Three. Respondent did not implement its hearing policy.

Further, Respondent made no effort to determine if the Chrome Mill's operators were exposed to excessive noise. To have a conversation near the Chrome Mill, the CO had to shout. (Tr. 37). Despite the noise level, and the existing hearing policy, Respondent took no action to provide audiograms to the operators of the Chrome Mill. (Tr. 342-43).

Despite the apparent noise level of the Chrome Mill, the documented noise exposure at Mill Three, and the requirements of its own hearing policy, Home Rubber did not provide audiograms for its mill operators. Respondent did not simply forget some of the required audiograms; it provided no audiograms to employees for at least ten years. Home Rubber knew of the requirements for audiograms and made no effort to comply.

I find the willful classification is supported for Citation 2, Items 1a and 1b.

Penalty

The maximum penalty for a willful violation is $124,709.[9] 28 USC § 666(a), 29 C.F.R. § 1903.15(d)(1) (2016). Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the

[9] OSHA established new penalties effective August 1, 2016 for violations occurring after November 2, 2015, pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015 and was assessed after August 1, 2016 and on or before January 13, 2017, thus the statutory maximum of $124,709 and statutory minimum of $8,908 applied.

violation, the employer's good faith, and the employer's prior history of violations. *Compass Envt'l, 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 accorded greater weight. *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary proposed a combined penalty of $74,825 for Citation 2, Items 1a and 1b. The penalty was based on a greater gravity due to the risk of hearing loss from operating mills for a full shift, several times a week. (Tr. 38). The size adjustment of 40% reduced the penalty to $74,825. (Ex. P-29, p. 2; Ex. P-2). I find the penalty adjustments are appropriate for these violations. I affirm the willful classification for both items and assess a combined penalty of $74,825.

Citation 1, Item 2 – Alleged serious violation of 29 C.F.R. § 1910.95(d)(1)

> (d) *Monitoring*. (1) When information indicates that any employee's exposure may equal or exceed an 8-hour time-weighted average of 85 decibels, the employer shall develop and implement a monitoring program.

The Secretary alleges that Respondent did not implement a noise monitoring program for employees who were exposed to noise at an 8-hour time weighted average above 85 dBA (action level) at the Chrome Mill. (S. Br. 16). Respondent asserts the Chrome Mill was added in 2007 so it was not at the facility during the 1999 noise audit. (Tr. 342-43). Further, Respondent asserts that Mr. Balka thought the Chrome Mill would have a lesser noise level because it was smaller than Mill Three. (Tr. 355; R. Br. 12).

For the following reasons, I find that the Secretary established a violation of 29 C.F.R. §1910.95(d)(1).

The standard applied, employees were exposed to the hazard, and the standard was violated.

As discussed above, June 6 audiometric monitoring demonstrated the operator of the Chrome Mill was exposed to noise above 85 dBA. Thus, a monitoring program for operators of the Chrome Mill was required. The standard applied.

The employees operating the Chrome Mill were exposed to cited hazard. Home Rubber violated the cited standard because it did not have a noise monitoring program for the operators of the Chrome Mill. Employees were exposed and the standard was violated.

Home Rubber had knowledge of the hazard.

Mr. Balka knew the 1999 noise audit revealed that operators of Mill Three needed hearing protection. Respondent's safety and compliance manager at the time, Mr. Zigler, received this report and his knowledge is imputed to Home Rubber. A copy of the report was in Mr. Zigler's files and available to the company president, Mr. Balka, after Mr. Zigler's departure. (Tr. 353-54). Mr. Balka also knew the Chrome Mill had not been evaluated for noise above the action level when it was added in 2007. (Tr. 342-43). Mr. Bole knew there were no hearing protection requirements for operators of the Chrome Mill. (Tr. 331-32). The loudness of the Chrome Mill was apparent because the OSHA CO had to shout to have a conversation, alerting her to the possibility the noise was above the action level. (Tr. 37). Mr. Balka and Mr. Bole were routinely in the production area so the condition was readily apparent to them. (Tr. 330, 344, 393). *See Hamilton*, 16 BNA OSHC at 1091 (an employer has constructive knowledge of conditions that are apparent to its supervisory personnel).

Home Rubber did not exercise reasonable diligence to develop and implement a noise monitoring program for the Chrome Mill. *See NLLC,* 19 BNA OSHC at 1472 (Reasonable diligence for constructive knowledge includes, among other factors, the "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence" of hazards.)

I find Home Rubber had constructive knowledge that there was no noise monitoring program for the Chrome Mill.

Serious Classification and Penalty

Under §17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k); *see Pete Miller*, 19 BNA OSHC at 1258 (Commission precedent requires a finding that "a serious injury is the likely result should an accident occur.")

The citation was classified as serious because exposure to excessive noise levels can result in hearing loss. (Tr. 38). I agree that not implementing a monitoring plan can result in hearing damage and thus the violation is serious.[10] *See generally, Crescent,* 1 BNA OSHC at 1222 (an other-than-serious violation does not result in serious physical harm or death).

[10] The record evidence fully supports the serious classification pled regarding Citation 1, Item 2. In his discretion, Complainant, the Secretary of Labor, has not pled, in the alternative, a willful classification

The maximum penalty for a serious violation is $12,471.[11] 28 U.S.C. § 666(b), 29 C.F.R. § 1903.15(d)(3) (2016). The penalty was based on a greater gravity due to the risk of hearing loss from operating a mill for a full shift, several times a week. (Tr. 38). The size adjustment of 30% reduced the penalty to $8,730. (Tr. 42). I find the penalty adjustments are appropriate for this violation. I affirm the serious classification and establish a penalty of $8,730.

Citation 1, Item 3 – Alleged serious violation of 29 C.F.R. § 1910.95(k)(1)

> (k) *Training program*. (1) The employer shall train each employee who is exposed to noise at or above an 8-hour time weighted average of 85 decibels in accordance with the requirements of this section. The employer shall institute a training program and ensure employee participation in the program.

The Secretary alleges that, Respondent did not institute or ensure employee participation in a training program for operators of the Chrome Mill and Mill Three. (S. Br. 17). Respondent contends it was not cited for this condition during a prior OSHA inspection and any violation should be other-than-serious. (R. Br. 16).

The lack of prior citation is not a defense to a violation of the cited standard. *S&G Packaging Co., LLC*, 19 BNA OSHC 1503, 1507 n.12 (No. 98-1107, 2001) (*S&G*) ("It is well established, however, that the Secretary's failure to cite a condition does not amount to a determination that the condition does not constitute a violation.").

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.95(k)(1).

The standard applied, employees were exposed to the hazard, and the standard was violated.

As discussed above, June 6 audiometric monitoring demonstrated that the operators of the Chrome Mill and Mill Three were exposed to noise above 85 dBA. Any employee that operated these mills must be trained. The standard applied.

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regarding Citation 1, Item 2. Accordingly, analysis of whether Respondent's violation of 29 C.F.R. §1910.95(d)(1) also supports a willful classification is not necessary.

[11] OSHA established new penalties effective August 1, 2016 for violations occurring after November 2, 2015, pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015 and was assessed after August 1, 2016 and on or before January 13, 2017, thus the statutory maximum of $12,471 applied. *Id.*

Employee training had not been conducted in many years; neither Mr. Balka, Mr. Bole, nor Mr. Fisher[12] had ever provided training to employees. (Tr. 45-47). Five employees were mill operators and exposed to these noise levels. (Tr. 345). Employees were exposed and the standard was violated.

Home Rubber had knowledge of the hazard.

The report from the 1999 noise audit stated that Respondent "shall institute a training program for all employees exposed to noise at or above the 8-hr TWA of 85 decibels and shall ensure employee participation in such program." (Ex. P-30, p. 13). The safety and compliance manager at the time, Mr. Zigler, received this report and his knowledge is imputed to Home Rubber. A copy of the report was in Mr. Zigler's files and available to the company president, Mr. Balka, after Mr. Zigler's departure. (Tr. 353-54). Home Rubber's own Hearing Protection Policy, which stated that "[e]ach employee working on the #3 Mill will annually receive hearing training," shows knowledge of the requirement to train the mill operators. (Ex. P-30, p. 11). *See Phoenix*, 17 BNA OSHC at 1079-1080 (employer knowledge is directed to the hazardous condition, not whether the employer knew the condition was hazardous). Further, the CO had to shout to have a conversation near the Chrome Mill, alerting her to the possibility the noise was above the action level. (Tr. 37). Mr. Balka and Mr. Bole were routinely in the production area so the condition was readily apparent to them. (Tr. 330, 344, 393).

Mr. Balka knew the position for the safety and compliance manager had significant turnover since 2006 and with reasonable diligence could have known that no training had been provided for employees in many years. The exercise of reasonable diligence for constructive knowledge includes, among other factors, the "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence" of hazards. *NLLC,* 19 BNA OSHC at 1472. Neither Mr. Balka nor the management staff made any efforts to implement the required training.

I find Home Rubber had constructive knowledge of its lack of training for mill operators.

Serious Classification and Penalty

Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. 29 U.S.C. § 666(k). I

[12] Mr. Fisher was the safety and compliance manager at the time of the OSHA inspection.

find that a lack of training can lead to failure to use and improper use of hearing protection and result in permanent hearing damage; thus, the violation is serious.[13]

The maximum penalty for a serious violation is $12,471. 28 U.S.C. § 666(b), 29 C.F.R. § 1903.15(d)(3) (2016). The penalty was based on a greater gravity due to the risk of hearing loss from operating mills for a full shift, several times a week. (Tr. 38). The size adjustment of 30% reduced the maximum penalty to $8,730. (Tr. 47). I find these penalty adjustments are appropriate for this violation. I affirm the serious classification and establish a penalty of $8,730.

THE REMAINING SERIOUS CITATIONS

Citation 1, Item 1a – Alleged serious violation of 29 C.F.R. § 1910.22(a)(1) and Citation 1, Item 1b – Alleged serious violation of 29 C.F.R. § 1910.22(a)(2)

(a) *Housekeeping.*[14]

> (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.
>
> (2) The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practicable.

The Secretary alleges that, in the Mill Three area, dust was accumulated in a quantity greater than five percent on the mill, wall ledges, walls, pipes, lights, electrical equipment (item 1a) and the floor (item 1b). (S. Br. 13-14). Respondent asserts the factory was not unusually dusty or dirty and the Secretary failed to show it could cause serious injury. (R. Br. 14-15).

For the following reasons, I find that the Secretary established a violation of the cited standards, 29 C.F.R. § 1910.22(a)(1) and (a)(2).

The standard applied and employees were exposed.

Dust was produced as a part of Home Rubber's production operation. (Tr. 436-37). The Mill Three area was separated from the rest of the production areas to prevent migration of

[13] Respondent asserted the citation should be other-than-serious because of immediate abatement. Abatement records show this condition was abated December 6, 2016, which was 6 months after the inspection and several weeks after the citation was issued in October 2016. (Ex. R-1, p. 2)

[14] 29 C.F.R. § 1910.22(a) was amended effective January 16, 2017. Final Rule, Walking-Working Surfaces and Personal Protective Equipment, 81 Fed. Reg. 82494, 82521 (Nov. 18, 2016) (to be codified at 29 C.F.R. pt. 1910). Here, the cited condition occurred on May 16, 2016, prior to the amendment.

carbon black dust. (Tr. 370-71). The standard applied. Employees worked in the Mill Three area; thus, exposure is established.

The terms of the standard were violated.

The Secretary is not required to prove a hazard is serious to prove a violation of the cited standard; severity of the hazard is relevant to the citation's classification. *See generally, Kaspar Electroplating Corp*., 16 BNA OSHC 1517, 1523 (No. 90-2866, 1993); *see also, Pyramid Masonry Contractors,* 16 BNA OSHC 1461, 1464 (No. 91-0600, 1993) (when standard presumes a hazard exists, Secretary need only show the standard's requirements were not met). The standard requires the Mill Three area be kept in a clean condition. The Secretary has demonstrated that the Mill Three area was not kept in a clean condition.

Mill Three was separated from the rest of the facility to prevent the carbon black, used on Mill Three, from migrating to the other mills. (Tr. 370-71). A curtain of black, vertical, plastic strips separated the Mill Three area from the rest of the facility. (Tr. 142; Ex. P-6, p. 3). The strips allowed a mill operator to walk in and out of the area while preventing the carbon black from migrating outside the Mill Three area. (Tr. 370-71). The CO observed dust accumulations more than 1/32-inch thick on five percent of the surfaces of the room and floor, including the canopy above the mill, the mill equipment, wall ledges, pipes, walls, and the curtain of black plastic strips in the Mill Three area. [15] (Tr. 28-29, 460; Ex. P-6, pp. 1, 5-6; Ex. R-23).

A visible layer of dust can be seen on the mill equipment in photographs taken by the CO on May 16. (Ex. P-6, pp. 5-6). Photographs of an employee operating Mill Three show a build-up of dust on the walls, floor and canopy of the ventilation system, as well as the mill. (Tr. 32-33, 36-37; Ex. P-6, p. 6; Ex. P-7, p. 9). The photographs also show the build-up of dust on the plastic curtain that separated the Mill Three area from the rest of the production area, on the walls around the Mill Three doorway, and on the floor. (Tr. 202-03; Ex. P-6; Ex. P-40, #P1040631).

[15] The CO estimated the Mill Three area was approximately 30 by 30 feet based on information she received from Mr. Balka during the investigation. (Tr. 460). Respondent did not rebut the CO's estimate of the size of the Mill Three area.

The material safety data sheets show that some of the chemicals used for Respondent's rubber products had combustible or flammable properties.[16] (Tr. 31, 35, 145-47). Because the safety data sheets indicated some of the chemicals used were flammable or combustible, the CO collected dust[17] from the surfaces and floor in the Mill Three area for testing.[18] (Tr. 145-46). The testing showed the dust had explosive properties. (Tr. 224; Ex. P-39, pp. 51, 56).

Respondent had no cleaning schedule to prevent excess dust accumulation. The plant manager, Mr. Bole, told the CO the rollers on the mills were cleaned with each product change, but the room was not routinely cleaned. (Tr. 30, 35). R.B., the maintenance manager, told the CO that he assumed the room was cleaned routinely, but did not know how. (Tr. 35). Home Rubber provided no evidence of a housekeeping schedule to minimize dust accumulation. In his testimony, Mr. Balka admitted there was dust build-up and that Home Rubber could have done more to keep the Mill Three area clean.[19] (Tr. 436-37).

I find Home Rubber did not keep the Mill Three area clean, thus the standard was violated.

Home Rubber had knowledge of the hazard.

The Secretary must prove "the employer knew or, with the exercise of reasonable diligence could have known of the hazardous condition." *PSP,* 22 BNA OSHC at 1305. Knowledge is directed to the physical conditions that constitutes the violation and does not require the employer to know or understand the condition was hazardous. *Phoenix*, 17 BNA OSHC at 1079-1080.

A hazardous condition that is "readily apparent" because of its location in a conspicuous, area will support a finding of constructive knowledge, especially where employees are working

[16] The material safety data sheets for the following chemicals were entered into the record: naptha, toluene, carbon black, limestone, zinc oxide, titanium dioxide, Satintone W, silicon dioxide, Sundex, Calsol, Sunpar 2280, specialty magnesium oxide, Dixie Clay, Industrene R, sulfur, and dicumyl peroxide. (Ex. P-34, pp. 5, 24, 32, 40, 45, 55, 67, 75, 87, 100, 109, 120, 127, 132, 141, 150).

[17] In her testimony, the CO referred to a "directive that we follow for combustible and explosive dust." (Tr. 141). Here the cited condition was not a combustible dust allegation but an allegation for excessive amount of dust on the floor and surfaces in the Mill Three area.

[18]The OSHA analytical chemist that conducted the laboratory tests for the dust sample testified about the methods used and the results. (Tr. 221, 223).

[19] Home Rubber argued that the accumulated amount of dust was less than five percent. (Tr. 381). However, this argument was based on the size of the entire mill production room, not the much smaller Mill Three area at issue here. (Tr. 371, 382). This argument is meritless because the Secretary only alleges excess dust accumulation in the Mill Three area.

in the area where the hazard is located. *See KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1267-68 (No. 06-1416, 2008) (signage was in plain view establishing constructive knowledge); *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996) (presence of crews in the area warrant a finding of constructive knowledge); *A. L. Baumgartner Constr., Inc.,* 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994) (constructive knowledge where a condition is "readily apparent to anyone who looked").

As shown in the photographs, the dust accumulation was visible on the walls, floor, the ventilation hood's canopy, and on the equipment. (Tr. 32-33; Ex. P-6). Home Rubber's managers were in the production area "all the time every day." (Tr. 345). The plant manager routinely travelled through the various departments. (Tr. 330). These managers would have seen and known of the excessive dust accumulation. *See Hamilton*, 16 BNA OSHC at 1091 (an employer has constructive knowledge of conditions that are apparent to its supervisory personnel). Further, Mr. Balka knew of the dust accumulation. He acknowledged that he wore "it home every day" and that more could be done to clean the area. (Tr. 436-37). Knowledge is established.

Serious Classification & Penalty

As discussed below, electrical boxes and exposed electrical conduits in the Mill Three area had openings where the dust accumulated. (Tr. 88, 90). There was a significant amount of dust in the Mill Three area. (Tr. 86). The Secretary asserts that a fire in the Mill Three area could be exacerbated by the accumulated explosive dust causing third-degree burns, smoke inhalation, and death from a fire-related explosion. (Tr. 29).

Respondent asserts the violation should be classified as other-than-serious because the chance of injury was remote. (R. Br. 15). However, the likelihood of injury is not the basis for a serious classification. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. 29 U.S.C. § 666(k). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1824 (No. 88-2572, 1992). I find that if an accident occurred that serious injury would be the likely result.

Items 1a and 1b were combined for the penalty. The penalty was based on a moderate gravity due to a lesser probability rating. (Exs. P-6, P-7). The size adjustment of 30% reduced the penalty to $6,236. *Id*. I find the penalty adjustments are appropriate for this violation.

I affirm the serious classification and combined penalty of $6,236 for Citation 1, Items 1a and 1b.

Citation 1, Item 4 – Alleged serious violation of 29 C.F.R. § 1910.106(e)(6)(ii)

> (e) *Industrial plants* . . . (6) *Sources of ignition*. . . (ii) *Grounding*. Category 1 or 2 flammable liquids, or Category 3 flammable liquids with a flashpoint below 100°F (37.8°C), shall not be dispensed into containers unless the nozzle and container are electrically interconnected. Where the metallic floorplate on which the container stands while filling is electrically connected to the fill stem or where the fill stem is bonded to the container during filling operations by means of a bond wire, the provisions of this section shall be deemed to have been complied with.

The Secretary alleges the pump's nozzle was not electrically interconnected to the transfer container when Category 2 flammable liquids were transferred from 55-gallon drums. (S. Br. 18). Respondent asserts this condition was not identified as a violation during a 2012 OSHA inspection and there had never been an incident when transferring chemicals. (Tr. 385-86). Respondent's assertions are rejected.

The lack of a prior citation or injury is not a defense to a violation of the cited standard. *S&G*, 19 BNA OSHC at 1507 n.12 ("It is well established, however, that the Secretary's failure to cite a condition does not amount to a determination that the condition does not constitute a violation."); *Peacock Eng'g, Inc*., 26 BNA OSHC 1588, 1590 (No. 11-2780, 2017) (*Peacock*) (finding absence of prior injury not dispositive since goal of the Act is to prevent the first accident).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.106(e)(6)(ii).

The standard applied and employees were exposed.

Toluene and naphtha, which are Class II flammable liquids, were transferred from fifty-five-gallon drums into dispensing cans for use in the mill room and hose room. (Tr. 48; Ex. P-10, p. 2; Ex. P-40, #P1040671). The standards applied.

R.B. and V.D. transferred the chemicals from the drums a couple of times a day. (Tr. 49; Ex. P-10, p. 2). Employee exposure is established.

The terms of the standard were violated.

Fifty-five-gallon drums of toluene and naptha were stored on the exterior wall of the compounding area in a cage-like area. (Tr. 385-86). The chemicals were transferred from 55-gallon drums into smaller dispensing containers. (Ex. P-10, p. 2). A grounding wire connected a drum to the metal fencing behind the drum. (Tr. 50, 190). The nozzle on the drum's pump was not electrically connected to the transfer container as required by the standard. (Ex. P-10, p. 2). The cited standard was violated.

Home Rubber had knowledge of the hazard.

The material safety data sheets (MSDS) provided by Mr. Balka described the chemicals as flammable and stated that a bonding wire was required to avoid buildup of static electricity. (Tr. 49). The MSDS were posted on the fence behind the drums. (Tr. 48). Mr. Bole, plant manager, knew these chemicals were transferred from their drums daily and R.B. knew there was no bonding wire that connected the nozzle to the dispensing container. (Tr. 49). *See Phoenix*, 17 BNA OSHC at 1079-1080 (employer knowledge is directed to the hazardous condition, not whether the employer knew the condition was hazardous).

Because the posted MSDS stated that a bonding wire was required to avoid static electricity buildup, the managers at Home Rubber could have known of the requirement with reasonable diligence. Further, the managers knew the chemicals were transferred daily without a bonding wire for electrical interconnection. Knowledge is established.

Serious Classification and Penalty

The hazard was serious because of the risk of fire from a buildup of static electricity when transferring flammable liquids. (Tr. 48). The $3,742 penalty was based on a lesser gravity and a 30% reduction for employer size. (Tr. 49-50; Ex. P-10). I find the penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $3,742 for Citation 1, Item 4.

Citation 1, Item 5 – Alleged serious violation of 29 C.F.R. § 1910.147(c)(6)(i)

> (c) *General* . . . (6) *Periodic inspection*.
> (i) The employer shall conduct a *periodic inspection of the energy control procedure at least annually* to ensure that the procedure and the requirements of this standard are being followed.

> (A) The periodic inspection shall be performed by an authorized employee other than the ones(s) utilizing the energy control procedure being inspected.
> (B) The periodic inspection shall be conducted to correct any deviations or inadequacies identified.
> (C) Where lockout is used for energy control, the periodic inspection shall include a review, between the inspector and each authorized employee, of that employee's responsibilities under the energy control procedure being inspected.
> (D) Where tagout is used for energy control, the periodic inspection shall include a review, between the inspector and each authorized and affected employee, of that employee's responsibilities under the energy control procedure being inspected, and the elements set forth in paragraph (c)(7)(ii) of this section.

(emphasis added.)

The Secretary alleges that Respondent did not conduct annual inspections of energy control (lockout-tagout) procedures for the Mill department equipment serviced and maintained by employees. (S. Br. 19). Respondent asserts the Secretary did not prove that its energy control procedures were deficient. (R. Br. 17).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.147(c)(6)(i).

The standard applied.

The energy control (lockout-tagout) standard applies to the "servicing and maintenance of machines and equipment in which the *unexpected* energization or start up of machines or equipment" could injure an employee. 29 C.F.R. § 1910.147(a)(1)(i) (emphasis in original); *see Dayton Tire, Bridgestone/Firestone*, 23 BNA OSHC 1247, 1250 (No. 94-1374, 2010), *aff'd in relevant part,* 671 F.3d 1249 (D.C. Cir. 2012). Maintenance department employees were constantly servicing the various equipment at Home Rubber, so lockout was a regular activity. (Tr. 52). The standard applied.

Employees were exposed to the hazard.

Maintenance employees, R.B. and V.D., repaired and serviced equipment in the Mill room. (Tr. 388, 443; Ex. P-11, p. 2). These maintenance employees used the energy control procedures and were exposed to the hazard.

The terms of the standard were violated.

Home Rubber had general and specific written energy control (lockout-tagout) procedures for its equipment. (Tr. 51, 387-88; Ex. P-13, p. 4). The lockout-tagout procedure stated that the procedure "must be followed throughout the facility. . . [i]f anyone has any

questions concerning the written procedures . . . . contact the Plant Manager immediately." (Ex. P-13, p. 4). The equipment with specific procedures included, Mixing Mill #1, Mixing Mill #2, Mixing Mill #3, Stock Calendar, Friction Calendar, High Pressure Boiler, Hose Room Vulcanizer, Mill #4, Extruder #1, Extruder #2, and Light Work Room Vulcanizers. (Ex. P-13, pp. 4-31).

The standard requires an authorized employee, who does not utilize the lockout procedures, to inspect Home Rubber's energy control procedures at least annually. The plant manager and the two maintenance employees were the authorized employees. (Ex. P-13, p. 5). As users of the lockout procedure the maintenance employees could not inspect the procedures. Thus, as plant manager, Mr. Bole was required to conduct the inspection.

Mr. Bole stated that he had sometimes conducted a periodic inspection of the program but did not specify how often he had done so. (Tr. 333-34). Respondent presented no evidence that it conducted an annual inspection of its lockout-tagout program. Instead, Respondent argues it wasn't necessary to conduct an annual inspection because there were no deficiencies in the procedure. (R. Br. 17). Respondent's argument is rejected. The standard requires an employer to conduct an inspection of its program, at least annually, to confirm its procedures are followed.

The requirements of the cited standard were violated.

Home Rubber had knowledge of the hazard.

Home Rubber had a written general lockout procedure and written procedures for specific equipment, such as the stock calendar machine. (Ex. P-13, pp. 5-31). Home Rubber's internal lockout procedure stated that "all authorized employees will be required to demonstrate at least annually that they have the skill to perform a general lockout/tag out procedure." (Ex. P-13, p. 5).

Mr. Balka knew that maintenance employees serviced machines and used the lockout-tagout procedure. (Tr. 443-44). Mr. Balka knew that he had not conducted an annual inspection of the energy control program or observed employees implementing the procedure. (Tr. 443-44). Home Rubber's written procedures were stored in the office of a prior safety and compliance manager, Mr. Zigler, and were available to Mr. Balka. (Tr. 351, 353, 426). Mr. Bole conducted lockout procedure inspections from time to time, but not annually. (Tr. 333). Mr. Balka made no effort to ensure annual inspections were conducted. (Tr. 443-44).

Home Rubber's management did not make a reasonably diligent effort to ensure the lockout-tagout process was inspected at least annually. *See NLLC*, 19 BNA OSHC at 1472 (Reasonable diligence for constructive knowledge includes, among other factors, the "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence" of hazards.)

With reasonable diligence Mr. Balka could have known that annual inspections of the energy control program had not been conducted. Knowledge is established.

Serious Classification and Penalty

The citation was characterized as serious due to possible injuries that can result from an inadequate energy control (lockout-tagout) policy, including amputation and fractures. (Tr. 52). The gravity was rated as moderate because multiple machines were covered by the procedures. (Tr. 51-52). The gravity-based penalty was reduced by 30% to $6,236 for employer size. I find these penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $6,236 for Citation 1, Item 5.

Citation 1, Item 6 – Alleged serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(B)

> (7) *Training and communication*.
> (i) The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. The training shall include the following:
> (A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control.
> (B) *Each affected employee* shall be instructed in the purpose and use of the energy control procedure.
> (C) All other employees whose work operations are or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out.

(emphasis added).

The Secretary alleges that Respondent did not provide training to affected employees that used equipment in the Mill department, including but not limited to, the calendar equipment. (S. Br. 22). Respondent simply asserts the mill operators were not trained because they were not affected employees. (R. Br. 18-19).

For the following reasons, I find the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.147(c)(7)(i)(B).

The standard applied.

Home Rubber had an energy control (lockout-tagout) program in place for several machines, including Mixing Mill #1, Mixing Mill #2, Mixing Mill #3, Stock Calendar, Friction Calendar, High Pressure Boiler, Hose Room Vulcanizer, Mill #4, Extruder #1, Extruder #2, and Light Work Room Vulcanizers. (Tr. 51, 387-88; Ex. P-13, pp. 4-31). The standard applied.

The terms of the standard were violated.

An affected employee is defined as "[a]n employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed." 29 C.F.R. § 1910.147.

The standard requires training for both authorized employees and affected employees. Home Rubber only provided training to authorized employees. (Tr. 54-55; Ex. P-12, p. 3). The mill operators used the machines serviced under the lockout-tagout program; thus, a mill operator's job "requires him/her to work in areas in which servicing or maintenance is being performed." (Ex. P-13, 4). The mill operators were affected employees and must be trained on the purpose and use of the lockout-tagout procedures.

Home Rubber did not train its mill operators, who were affected employees, on the lockout-tagout program. The standard was violated.

Employees were exposed to the hazard.

A calendar machine was locked out and tagged out to remove a gear for repair during the last week of May 2016. (Tr. 56-57). The mill operators were affected employees and exposed to the hazard of lack of training about the purpose and use of lockout-tagout procedures. Employee exposure is established.

Home Rubber had knowledge of the hazard.

Home Rubber's lockout-tagout procedure stated that operators were affected employees and that "all new employees, whether authorized or affected, must be trained."[20] (Ex. P-13, p. 5). Mr. Bole and Mr. Balka knew the mill operators were not trained on the company's lockout-

[20] Home Rubber's lockout-tagout procedures also uses the term "impacted employees" for its machine operators. (Ex. P-13, p. 5, 14).

tagout procedures. (Tr. 52, 54; Ex. P-12, p. 3). *See Phoenix*, 17 BNA OSHC at 1079-1080. Because Home Rubber's own policy required the training of affected employees and management knew the affected employees worked on those machines where servicing occurred, knowledge is established.

Serious Classification and Penalty

The citation was characterized as serious due to possible injuries that can result from a lack of training on energy control procedures, including amputation and fractures. (Tr. 54). The gravity was rated as moderate due to the multiple machines serviced. (Ex. P-12). The gravity-based penalty was reduced by 30% to $6,236 for employer size. (Tr. 55). I find these penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $6,236 for Citation 1, Item 6.

Citation 1, Item 7 – Alleged serious violation of 29 C.F.R. § 1910.147(f)(3)(ii)(D)

> (f) *Additional requirements* . . . (3) *Group lockout or tagout*. . . .
> (ii) Group lockout or tagout devices shall be used in accordance with the procedures required by paragraph (c)(4) of this section including, but not necessarily limited to, the following specific requirements: . . .
> (D) Each authorized employee shall affix a personal lockout or tagout device to the group lockout device, group lockbox, or comparable mechanism when he or she begins work, and shall remove those devices when he or she stops working on the machine or equipment being serviced or maintained.

.

The Secretary alleges that a personal lockout or tagout device was not affixed to the group lockout device before working on the calendar machine. (S. Br. 24). Respondent asserts that because there were only two maintenance employees at Home Rubber, and they always knew what the other was doing, it was unlikely there would be a problem with not applying a personal lock. (R. Br. 18-19).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.147(f)(3)(ii)(D).

The standard applied and employees were exposed to the hazard.

Lockout was a regular activity because machines were constantly being serviced by the maintenance department. (Tr. 56). Two maintenance employees were authorized to service the machines, R.B. and V.D. (Tr. 389-90). The standard applied.

The gear on the calendar machine was serviced by R.B. and V.D. (Tr. 55-56). Employee exposure is established.

The terms of the standard were violated.

Where more than one employee services a piece of equipment the standard requires each individual to place his/her lock onto a group lock. "The core concept of lockout/tagout is *personal* protection, that each individual worker controls his/her own lock or tag." *Exelon Generating Corp.*, 21 BNA OSHC 1087, 1090 (No. 00-1198, 2005) (where lockout/tagout requirement for power generation standard mirrored the general industry requirement); Final Rule, Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, 36681 (Sept. 1, 1989), *as amended at,* 55 Fed. Reg. 38677, 38683 (Sept. 20, 1990) (to be codified at 29 C.F.R. pt. 1910) ("the placement of a personal lockout or tagout device enables that employee to control his/her own protection, rather than having to depend upon another person")

In May 2016, a repaired gear was reinstalled on a calendar machine. (Tr. 55-56). The two maintenance employees replaced the machine's gear, but only one lock was applied to the disconnect switch. (Tr. 55-56). The standard requires each authorized employee working on the machine to apply his personal lockout-tagout device. 29 C.F.R. § 1910.147(f)(3)(ii)(D).

Home Rubber violated the standard's requirements.

Home Rubber had knowledge of the hazard.

Home Rubber's lockout-tagout procedure required each employee to apply a lockout device to a machine in service. (Ex. P-13, pp. 6, 9, 10, 12, 14, 16, 18, 22, 23, 25, 27, 30).

> If more than 1 employee is locking out this machine or equipment then a tree lock shall be used and each employee shall follow the outlined procedure below for group lockout devices. . .. NOTE: When servicing or maintenance is to be performed by a group or crew of persons, *each employee* doing the servicing or the maintenance *must apply their own, individual lockout device* on the machine or equipment. Also, with the group lockout devices, primary responsibility for the group or crew of persons must be vested in one designated, authorized employee, who shall be responsible for coordinating the work forces and ensuring continuity of the lockout protections.

(emphasis added.) (Ex. P-13, p. 14).

Mr. Bole told the CO that he knew there was only one lock in use and thought that was enough since the two employees worked together. (Ex. P-13, p. 3). *See Phoenix*, 17 BNA OSHC at 1079-1080 (knowledge is directed to the physical condition that constitutes the violation).

Because Mr. Bole knew that each employee did not use a personal lock and Home Rubber's policy states that each employee must apply a lockout device, knowledge is established.

Serious Classification and Penalty

The citation was characterized as serious due to possible injuries, including amputation and fractures, that can result if parts move while an employee is still servicing the machine. (Tr. 56-57). The gravity was rated as moderate because the machines had more than one energy source. (Tr. 57; Ex. P-13). The gravity-based penalty was reduced by 30% to $6,236 for employer size. (Tr. 57). I find the penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $6,236 for Citation 1, Item 7.

Citation 1, Item 8 – Alleged serious violation of 29 C.F.R. § 1910.157(g)(2)

> (g) *Training and education*.
> (1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.
> (2) The employer shall provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter.

The Secretary alleges that employees were not trained on the general use of a fire extinguisher at hire and at least annually thereafter. (S. Br. 25). Respondent contends that one of its employees was a trained fire fighter and several other employees were trained on fire extinguisher use. (R. Br. 19-20).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.157(g)(2).

The standard applied and employees were exposed.

Home Rubber supplied fire extinguishers for employee use throughout the facility. (Tr. 160, 391). The standard applied. Employees had used fire extinguishers when a fire occurred a few years before. (Tr. 58; Ex. P-14, p.3). Employees working at Home Rubber were exposed to the hazard of lack of training in the hazards and use of fire extinguishers. Employee exposure is established.

The terms of the standard were violated.

Respondent admits that all employees were not trained; Respondent asserts that "several" employees had been trained. (R. Br. 20). During the inspection, Mr. Balka told the CO that the

Trenton Fire Dept used to provide training to employees, but he could not recall the last time training had been provided. (Tr. 59, 461). The Trenton Fire Department had not done training for at least 5 years.[21] (Tr. 59; Ex. P-14, p. 4).

Respondent asserts that OSHA regulations only required it to train one employee. (R. Br. 20). However, Respondent does not provide support for this assertion.[22] Respondent's assertion that only certain employees must be trained is rejected. The cited standard requires Home Rubber to train all employees who could use a portable fire extinguisher.

Respondent also asserts it trained employees through the fire extinguisher policy in its employee handbook. (R. Br. 20; Ex. P-37, p. 41). The policy consisted of a sole sentence that stated, "Do not block fire exits or fire extinguishers in the production or warehouse areas." (Ex. P-37, p. 41). This sentence in its handbook did not train an employee on the hazards and use of a fire extinguisher.

I find Respondent did not train its employees at hire and annually thereafter as required by the standard. The standard was violated.

Home Rubber had knowledge of the hazard.

Mr. Balka knew the Trenton Fire Department no longer provided training to Home Rubber's employees. (Tr. 391). *See Phoenix*, 17 BNA OSHC at 1079-1080 (knowledge is directed to the physical condition that constitutes the violation). With reasonable diligence Mr. Balka could have known that employees were not trained at hire and annually on fire extinguisher use and hazards. *See NLLC,* 19 BNA OSHC at 1472 (Reasonable diligence for constructive knowledge includes, among other factors, the "'obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence"' of hazards.). Knowledge is established.

Serious Classification and Penalty

The hazard was serious because of fire-related injuries, such as burns and smoke inhalation. (Tr. 59). The $3,742 penalty was based on a low gravity assessment and a 30%

[21] Respondent subsequently trained all its employees in January 2017. (Ex. R-1).

[22] I do note that a different standard, not cited here, 29 C.F.R. § 1910.158(g)(4), requires training only for employees designated to use *firefighting equipment*. That is not pertinent to the standard cited here, which requires training for all employees on *portable fire extinguishers*.

reduction for employer size. (Tr. 59-60; Ex. P-14). I find the penalty adjustments are appropriate for this violation.

Respondent asserts the violation should be classified as other-than-serious because fire extinguishers were in the facility and the severity, probability, and gravity are low. (R. Br. 19-20). Respondent cites to *Thermal Reduction Group,* 1986 WL 53480, *21 (No. 83-1073, 1986) (ALJ) as support that a violation of § 1910.157(g)(2) can be categorized as other-than-serious. (R. Br. 19-20). However, *Thermal* provides no rationale for the other-than-serious classification; the ALJ simply affirmed the Secretary's recommended classification. *Id*. Further, *Thermal* has no precedential value. *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2114 n. 4 (No. 07-1578, 2012) (*Elliot*) (Unreviewed administrative law judge decisions have no precedential value.). Respondent's reliance on *Thermal* is inapt.

The classification of a citation as serious is based on the severity of harm if an accident occurs. *See Mosser Constr.,* 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). Respondent's assertion that the classification should be other-than-serious is rejected. I affirm the serious classification and penalty of $3,742 for Citation 1, Item 8.

Citation 1, Item 9 – Alleged serious violation of 29 C.F.R. § 1910.178(l)(4)(iii)

> (l) Operator training. . .. (4) *Refresher training and evaluation*. . .. (iii) An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

The Secretary alleges that Respondent had not conducted an evaluation for its powered industrial truck operators at least once every three years. (S. Br. 26).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.178(l)(4)(iii).

The standard applied, employees were exposed, and the terms of the standard were violated.

Powered industrial trucks (forklifts) were used in Home Rubber's facility to move rolls of rubber and pallets of chemicals. (Tr. 63-64; Ex. P-15). The standard applied.

Three employees operated these forklifts. (Tr. 61-63; Ex. P-15, p.2). Documentation shows that one operator was last evaluated in 2010.[23] The other two operators had been evaluated at a previous employer, more than three years before the OSHA inspection. (Tr. 61-

[23] Home Rubber had documentation for a forklift evaluation conducted by the safety and compliance manager, Michael Strasser, in June 2010. (Ex. P-33, p. 3).

62, 64, 163, 217; Ex. P-15, p. 2; Ex. P-33, p. 3). Tim Fisher, safety and compliance manager at the time of the inspection, evaluated new hires during the two years that he worked at Home Rubber but had not re-evaluated any existing employees. (Tr. 62, 461). The cited standard was violated and employees were exposed.

Home Rubber had knowledge of the hazard.

Home Rubber did not evaluate a forklift operator's performance at least once every three years. Mr. Fisher knew that he had not re-evaluated any employee hired by Home Rubber before he became the safety and compliance manager.[24] (Tr. 62). As a manager, his knowledge is imputed to Home Rubber. *See AEDC*, 23 BNA OSHC at 2095. Home Rubber's documentation showed that a forklift operator, Mr. Lopez, had not been evaluated since 2010. (Tr. 217; Ex. P-33, p. 3). With reasonable diligence Mr. Balka could have known that forklift operators were not being evaluated every three years. *See NLLC,* 19 BNA OSHC at 1472 (Reasonable diligence for constructive knowledge includes, among other factors, the "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence" of hazards.). Knowledge is established.

Serious Classification and Penalty

The hazard was classified as serious because injuries such as broken bones and lacerations can occur when a forklift is not operated properly. (Tr. 62). The $4,988 penalty was based on a moderate gravity assessment and a 30% reduction for employer size. (Tr. 62-63; Ex. P-15). I find the penalty adjustments are appropriate for this violation.

Respondent asserts the violation is other-than-serious because Home Rubber believed there was low likelihood of injury because the forklifts were operated in a limited area. (R. Br. 22). This assertion is rejected. The classification of a citation as serious is not based on the likelihood of occurrence, but instead is related to the severity of harm when an accident occurs. *See Mosser,* 23 BNA OSHC at 1046. I affirm the serious classification and penalty of $4,988 for Citation 1, Item 9.

Citation 1, Item 10 – Alleged serious violation of 29 C.F.R. § 1910.212(a)(1)

> (a) *Machine guarding*. (1) *Types of guarding*. One or more methods of machine guarding shall be provided to protect the operator and other employees in the

[24] Tim Fisher became the safety and compliance manager about two years before the inspection. (Tr. 347, 353).

> machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.

The Secretary alleges that employees were exposed to an unguarded rotating arm on the Kobe Mill. (S. Br. 27). Respondent asserts the rotating arm could only be accessed if an employee intentionally placed his hand there. (R. Br. 22).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.212(a)(1).

The standard applied.

The Kobe Mill had a rotating shaft that extended from the left side of its gear box. The standard applied.

Employees were exposed to the hazard and the standard was violated.

To establish exposure under the cited standard, 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) (*Fabricated*). The zone of danger is "that area surrounding the violative condition that presents the danger to employees [that] the standard is intended to prevent." *S&G*, 19 BNA OSHC at 1507*; see Delek Refining, Ltd.*, 25 BNA OSHC 1365, 1374 (No. 08-1386, 2015), *aff'd in relevant part,* 845 F.3d 170 (5th Cir. 2016) (Secretary must show how close an employee is to the zone of danger, "either as their work required or through inadvertence"). The Commission has long held the definition of the hazard depends on how the machine functions and how it is operated. *Fabricated,* 18 BNA OSHC at 1074.

There is no dispute the rotating shaft was not guarded. The dispute is whether the unguarded rotating shaft exposed an employee to injury. The Secretary asserts that employees could get their clothing caught on the rotating shaft when filling the oil pot next to the rotating shaft. (Tr. 65). I agree.

The Kobe Mill consisted of a series of horizontally interconnected components, such as the motor and gearbox, that rested on an I-beam platform a few inches above the floor. (Tr. 394-96). The Kobe Mill's first module was a metal box that contained the mill's motor. The next module in line, and to the left of the motor, was the gearbox that contained the mill's main gears. (Tr. 394, 403-04).

The rotating shaft that is the subject of this citation item was to the left of gearbox. The oil pot was a tall plastic cylinder next to the rotating shaft. (Tr. 67, 394, 403-04; Ex. P-40, #1040681). The horizontal distance from the gearbox to the oil pot was 6-1/2 inches. (Tr. 406).

I find that an employee's clothing could get caught on the rotating shaft when adding oil. Oil was added to the oil pot while the machine was operating. (Tr. 66). A photograph and video taken by the CO shows the machine's operator, his back to the camera, standing on the Kobe Mill's raised platform facing the oil pot cylinder directly in front of him. (Tr. 67; Ex. P-40, Video #12; Ex. P-40, #1040681). The photographs and video show the employee's body was very close to the rotating shaft. (Ex. P-16, pp. 3, 5; Ex. P-40, Video #12; Ex. P-40, #1040681). The heels of his boots were on the edge of the raised I-beam platform. *Id.* His right hand rested on the gearbox to his right, as he faced the oil pot. (Ex. P-40, #1040681). The oil pot and rotating shaft were about 15 inches from the outer edge of the platform. (Tr. 398). The rotating shaft, slightly behind and a few inches to the right of the oil pot, was at about the level of the employee's upper leg.[25] *Id.* In other words, the employee was standing *within* the 15-inch space between the rotating shaft and platform's edge. This puts the employee's body close enough to make inadvertent contact with the rotating shaft.

Respondent's assertion that the shaft was too far away for contact is not credible based on the actual location of the Kobe Mill operator in the video. I find that while filling the oil pot cylinder, an employee could inadvertently contact the rotating shaft. Guarding would prevent contact.

The standard was violated and an employee was exposed to the hazard.

Home Rubber had knowledge of the hazard

While the CO was taking a video of the Kobe Mill in operation, the operator stepped onto the platform next to the oil pot cylinder and rotating shaft. (Ex. P-40, Video #12, Photo #1040681). The Kobe Mill's configuration was open and in plain view. Home Rubber's managers were in the production area "all the time every day." (Tr. 345). The plant manager, Mr. Bole, stated that he routinely travelled through the various departments. (Tr. 330). *See Hamilton*, 16 BNA OSHC at 1091 (an employer has constructive knowledge of conditions

[25] A close-up photograph, without an employee, also showed the rotating shaft close to the oil pot. (Ex. P-16, pp. 3, 5).

that are plainly visible to its supervisory personnel). Because the hazardous condition was in plain view, knowledge is established.

Serious Classification and Penalty

The citation was characterized as serious[26] due to possible injuries, such as lacerations and broken bones, if an employee was pulled into the machine's rotating parts. (Tr. 65). The gravity was rated as moderate and the penalty was reduced by 30% to $4,988 for employer size. (Tr. 66; Ex. P-16). I find these penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $4,988 for Citation 1, Item 10.

Citation 1, Item 11 – Alleged serious violation of 29 C.F.R. § 1910.212(a)(3)(ii)

> (a) *Machine guarding—*
> (3) *Point of operation guarding*.
> (i) Point of operation is the area on a machine where work is actually performed upon the material being processed.
> (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

The Secretary alleges that ingoing nip points were not guarded at the point of operation on the Chrome Mill, the Kobe Mill, Mill One, and Mill Three. (S. Br. 29). Respondent contends that guarding was infeasible. (R. Br. 28).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.212(a)(3)(ii).

The standard applied and employees were exposed to the hazard.

Each mill had a point of operation where the mill operator performed work on the rubber being processed. The standard applied.

Working at the ingoing nips points was a routine step in processing the rubber on all four mills. An employee operating the Chrome Mill was injured when his left hand was pulled into the ingoing nip point while he was manipulating the rubber product. Exposure is established.

Home Rubber had knowledge of the hazard

[26] The classification of a citation as serious is not based on the likelihood of occurrence, but instead is related to the severity of harm when an accident occurs. *See Mosser,* 23 BNA OSHC at 1046.

The mills were large and in plain view. Operators worked near each mill's ingoing nip points to make the rubber products. Home Rubber's managers were in the production area "all the time every day." (Tr. 345). Mr. Bole routinely travelled through the various departments. (Tr. 330). Managers would have seen operators working at a mill's ingoing nip points.

Because the machines were in plain view and management knew that employees were routinely near the ingoing nip points when working on the rubber product, knowledge of the hazard is established. *See Hamilton*, 16 BNA OSHC at 1091 (an employer has constructive knowledge of conditions that are apparent to its supervisory personnel).

The terms of the standard were violated.

To produce a 1-inch thick sheet of thoroughly mixed rubber compound, an operator began by placing a block of natural rubber into the mill's ingoing nip point.[27] (Tr. 410, 418-19). After placed into the nip, the rubber block went around the rollers and "just like chewing gum" the rubber started to soften until it warmed up enough to bond around the roller and smooth out. (Tr. 411). When that happened, the operator added ingredients, including chemicals, binders, and oils, to the rubber. (Tr. 411-12). The ingredients were in pellet, powder, or oil form. (Tr. 418). Chemicals added to the rubber included carbon black, sulfur, and Industrene R. (Tr. 147; Ex. P-7).

A mill operator poured the additives into the rubber at the ingoing nip point of the rollers. (Tr. 410, 412, 418). Some of the added ingredients mixed into the rubber and some fell into a pan beneath the rollers. (Tr. 418). During the first 10-15 minutes of the mixing process, the mill operator scooped up the ingredients that fell through the rollers and added them back into the rubber compound at the ingoing nip point. (Tr. 418-19). The rubber and additives were continuously fed back through the rollers to create a final, compounded product. (Tr. 416).

When processing the rubber, the operator folded the rubber back into itself to achieve a final well-mixed 1-inch sheet of rubber compound. (Tr. 412, 416, 419). The operator cut the rubber sheet just below the center-point of the roller, where he had leverage in front of his chest. He then held the rubber against the roller to build a mound of banked rubber at the rollers' nip point. (Tr. 413). The banked rubber compound could be up to 16 inches high. (Tr. 415). The

[27] The operator adds half of the 75-pound block of the natural rubber into the in-running nip area of the machine's rollers at a time. (Tr. 410, 415).

operator built the rubber compound into a loose, round cylinder that allowed the machine to carry the rubber sheet back up to the bank so that was pulled in again. (Tr. 416).

The manufacturing process required an operator to work near the mill's ingoing nip points. The point of operation (ingoing nip point) on the Chrome Mill was not guarded. Instead, the Chrome Mill had a brake cord 61 inches above the ground, at an employee's head or shoulder height. (Tr. 70-71, 168, 194; Ex. P-17, pp. 5, 7). When pulled, the brake cord stopped and reversed the machine's roller. (Tr. 194-95). However, it did not prevent an operator from contacting the nip point as he fed the rubber into the machine. (Tr. 68).

Mill One had an overhead brake cord (trip wire) as well. There was no guard at Mill One's point of operation. (Tr. 68, 72; Ex. P-17, p. 8). The Kobe Mill had a non-adjustable safety bar near the bottom of the mill that stopped the mill when contacted. (Tr. 68-69, 167). The bar might have prevented a shorter employee from reaching the nip point; however, a taller operator could reach into the machine while feeding the rubber into the nip point. There was no guard at the Kobe Mill's point of operation. (Tr. 69-71; Ex. P-17, p. 6). Mill Three's nip point area was also unguarded. (Tr. 68; Ex. P-17, p. 1).

There is no dispute the four machines did not have guards to prevent an employee placing his hands into the ingoing nip points. The Secretary proved the points of operation on the four mills were not guarded and the standard was violated. However, Home Rubber asserts that it was infeasible to guard the point of operation for the four mills because the operators had to work near the ingoing nip points to process the rubber.

Infeasibility Defense

To succeed in an infeasibility defense the Respondent must show that: (1) literal compliance with the terms of the cited standard was infeasible; and (2) an alternative protective measure was used or there was no feasible alternative measure. *Otis Elevator Co.,* 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *aff'd*, 762 F.3d 116 (D.C. Cir. 2014). Infeasibility can be either economic or technological. *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1874 (No. 91-1167, 1994). Respondent bears the burden of proof for this defense. *See Briones Util. Co.*, 26 BNA OSHC 1218, 1220 (No. 10-1372, 2016).

To succeed with an economic infeasibility defense the employer must show that the cost of compliance would have adversely affected the company's existence. *Gregory & Cook, Inc.,* 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995) (*Gregory*). Home Rubber made no argument

and presented no evidence of the costs of compliance or the effect on the company's finances. This leaves a defense based solely on technological infeasibility.

First, Respondent must demonstrate that literal compliance was infeasible. Respondent asserts that a physical guard cannot be placed between the ingoing nip point and the operator's hands because of its manufacturing method. The processing of the rubber compound requires its operators to manipulate the rubber and additives near the nip point and the banking of rubber during mixing prevents the use of a barrier near the nip point. (Tr. 418-19). A fixed guarding approach cannot be used because it blocks an operator's access to the materials that fall between the rollers, which must be scooped up and put back into the rubber being mixed. (Tr. 418-19; Ex. P-38, p. 18). Further, it would block the operator from getting to the bottom of the roller to cut off the rubber and feed it back into the nip. (Tr. 419).

Respondent established that a simple barrier guard could not be used. However, guarding is not limited to a physical barrier. As set forth in 29 C.F.R. § 1910.212(a)(1), "guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc." Respondent has not demonstrated that it was infeasible to utilize non-barrier guarding methods.

The Secretary's expert, Dr. Howard,[28] gave examples of other possible means to guard a machine. He suggested a conveyor system, raising the height of the mill, and using an e-stop safety mat. (Tr. 309, 314; Ex. P-38). Mr. Balka explained why Home Rubber had not tried these methods. (Tr. 417-423).

Mr. Balka explained that a conveyor system would not work at Home Rubber, because a conveyor system high enough to allow for their rubber banking method, would require the ventilation hood be raised up four to five feet above the mill. (Tr. 421-22). At that distance, the ventilation hood would not be effective at keeping chemicals and other materials from escaping the area. (Tr. 421-22).

Mr. Balka also stated that raising the mill's height 12-24 inches would not work. (Tr. 416-422). An operator needed leverage to cut through the 1-inch rubber sheet on the roller; raising the mill would place the operator in a difficult and less safe position to make the cut. (Tr.

[28] Dr. William Howard was Secretary's expert on the issue of machine guarding. (Tr. 298-326). Dr. Howard visited Home Rubber's facility and watched two of the mills operate for about 10 minutes each. (Tr. 317). He was an expert in machine design and guarding; however, he had no experience or knowledge of the specific type of rubber processing done at Home Rubber. (Tr. 305-06, 457-58).

416, 422). Further, it would be more difficult for the operator to feed the rubber back into the mill's nip point and the operator would not be able to see the ingredients that are mixed into the batch at the nip point. (Tr. 422).

Mr. Balka explained that the use of an e-stop safety mat device[29] floor mat would be unusable because a mill operator had to get close to the rollers to cut the rubber and to scoop up the material that fell below. (Tr. 421-23).

Respondent provided no evidence that it had attempted or explored possible guarding methods beyond a barrier guard. Mr. Balka admitted Home Rubber had not implemented any guarding or similar methods on the mills since the inspection. (Tr. 444-45).

The burden for this affirmative defense lies with Respondent. Respondent must demonstrate that it was infeasible to utilize any guarding method, not just physical barrier guards. The definition of guarding methods includes "two-hand tripping devices [and] electronic safety devices." Respondent did not determine whether a two-hand tripping device or electronic safety device could be used to prevent contact at the point of operation. The Commission expects "employers to exercise some creativity in seeking to achieve compliance." *Gregory*, 17 BNA OSHC at 1191. Respondent did not establish that all types of guarding methods would not work on Home Rubber's mills. Thus, Respondent did not establish that literal compliance with the standard was infeasible.

Secondly, if literal compliance is not feasible, Respondent must show that it used an alternative measure or that no feasible measure was available, to support its infeasibility defense. Respondent had not explored all non-guarding options available that could prevent an employee from contact with the ingoing nip points on its mills. (Tr. 424-25, 444-45).

Mr. Balka stated that he had not observed other local rubber manufacturers using the guarding methods suggested by Dr. Howard.[30] (Tr. 424-25). This argument is rejected. Respondent cannot shift its burden for this affirmative defense to the Secretary with a claim that the Secretary's expert did not propose an acceptable guarding method. *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429, 1433 (No. 90-1349, 1993) (employer's burden to show infeasibility as an

[29] A safety mat device is "a device consisting of a sensing surface and control, which detects the presence of a person on its surface." (Ex. P-38, p. 20).

[30] "Section 1910.212(a)(1) is specific in its requirements. Accordingly, a reference to industry custom and practice is unnecessary." *Ladish Co*., 10 BNA OSHC 1235, 1238 (No. 78-1384, 1981)

affirmative defense, not the Secretary's burden to show feasibility). Further, an employer "cannot generally avoid abatement by relying on industry custom and practice alone." *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1227 (No. 88-821, 1991); *see, Consolidated Aluminum Corp.*, 9 BNA OSHC 1144, 1158 (No. 77-1091, 1980) (defense failed where employer had not considered possible methods of preventing employees from contacting the ingoing nip points). This is especially so here, where Respondent made no effort to explore creative methods for guarding nor explored alternative means of protection.

Respondent's infeasibility defense fails because it did not demonstrate that literal compliance was infeasible, that an alternative protective measure was used or there was no feasible alternative measure available.

I find the Secretary has proved his prima facie case and affirm the citation item.

Serious Classification and Penalty

The violation was classified as serious due to injuries that can occur if an employee is drawn into the ingoing nip points, including lacerations, broken bones, and amputation. (Tr. 69). Here, an employee's hand was drawn into the nip point of the Chrome Mill resulting in amputation of four fingers. (Tr. 69).

The gravity was rated as high and the maximum penalty was reduced by 30% for employer size to $8,730. (Tr. 70). I find the penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $8,730 for Citation 1, Item 11.

Citation 1, Item 12 – Alleged serious violation of 29 C.F.R. § 1910.215(b)(9)

> (b) *Guarding of abrasive wheel machinery—*
> (9) *Exposure adjustment*. Safety guards of the types described in subparagraphs (3) and (4) of this paragraph, where the operator stands in front of the opening, shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in paragraphs (b)(3) and (4) of this section shall never be exceeded, and *the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch*.

(emphasis added.)

The Secretary alleges that distances greater than one-fourth inch between the grinding wheel and the periphery existed because tongue guards were missing on both sides of a double-sided bench grinder. (S. Br. 31). Respondent states that it abated the condition by making the

needed adjustments and the condition was added to Home Rubber's weekly inspection checklist. (R. Br. 29)

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.215(b)(9).

The standard applied and employees were exposed.

Employees sharpened their rubber-cutting knives on the double-sided bench grinder. (Tr. 74; Ex. P-18, p. 4). The standard applied and employees were exposed.

The terms of the standard were violated.

The double-sided bench grinder was not adjusted to no more than one-quarter of an inch between the periphery and the grinding wheel. (Tr. 72-73). The CO measured the openings between the grinding wheel and the periphery on each side of the bench grinder. One side had a gap of one-half inch and the other a gap of three-fourths inch. (Tr. 74-75; Ex. P-18, pp. 5-6). Respondent does not refute the grinder was not compliant with the cited standard, but simply asserts it has fixed the problem. (R. Br. 29; Ex. R-1).

I find the standard was violated because the distance between the grinding wheel and the periphery exceeded one-fourth of an inch.

Home Rubber had knowledge of the hazard.

Home Rubber's managers were in the production area daily. (Tr. 345). The grinder was in plain view. *See Hamilton*, 16 BNA OSHC at 1091 (an employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel). Because the hazard was in plain view and managers could have known of the condition with reasonable diligence, knowledge is established. *See NLLC,* 19 BNA OSHC at 1472 (Reasonable diligence for constructive knowledge includes, among other factors, the "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence" of hazards.).

Serious Classification and Penalty

The classification of a citation as serious is not based on the likelihood of occurrence, but instead is related to the severity of harm when an accident occurs. *See Mosser,* 23 BNA OSHC at 1046. The citation was characterized as serious due to possible injuries, such as lacerations and amputations from a gap exceeding one-fourth inch. (Tr. 73). Respondent's assertion that the classification should be other-than-serious is rejected. The gravity was rated as medium-lesser

and reduced for employer size by 30% to $4,988. (Tr. 73.). I find these penalty adjustments are appropriate for this violation.

I affirm the serious classification and penalty of $4,988 for Citation 1, Item 12.

Citation 1, Item 13 – Alleged serious violation of 29 C.F.R. § 1910.219(i)(2)

> (i) *Collars and couplings—*
> (2) *Couplings.* Shaft couplings shall be so constructed as to present no hazard from bolts, nuts, setscrews, or revolving surfaces. Bolts, nuts, and setscrews will, however, be permitted where they are covered with safety sleeves or where they are used parallel with the shafting and are countersunk or else do not extend beyond the flange of the coupling.

The Secretary alleges that a rotating shaft on the Kobe Mill had unguarded bolts that extended beyond the flange coupling. (S. Br. 32). Respondent contends that no one working near the machine could get clothing caught on the bolts and there had been no history of injuries related to these bolts. (Tr. 397).

The lack of prior injury is not a defense to a violation of the cited standard. *Peacock*, 26 OSHC at 1590 (finding absence of prior injury not dispositive since goal of the Act is to prevent the first accident).

For the following reasons, I find that the Secretary established a violation of the cited standard.

The standard applied.

Bolts that protruded from a coupling on the Kobe Mill's spinning shaft were not covered with a safety sleeve. The standard applied.

Employees were exposed to the hazard and the terms of the standard were violated.

There was no dispute the bolts extended from the shaft's coupling and were not sleeved. The dispute lies in whether an employee would predictably contact these bolts during machine operation.

The Commission has long held the definition of the hazard depends on how the machine functions and how it is operated. *Fabricated,* 18 BNA OSHC at 1074. To establish exposure under the cited standard, "the Secretary must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Id*. The zone of danger is "that area surrounding the violative

condition that presents the danger to employees [that] the standard is intended to prevent." *S&G*, 19 BNA OSHC at 1507.

As discussed above, the Kobe Mill was a series of interconnected modules resting on an I-beam platform. (Tr. 394-397). A horizontal shaft between the mill's motor and the gear box had a flange coupling with bolts that protruded one inch. (Tr. 397, 77; Ex. P-19, p. 5). The shaft rotated at 1700 rpm during the mill's operation. (Tr. 76; Ex. P-19, p. 1). The coupling with the protruding bolts was about eight inches to the right of the gearbox. (Tr. 397). The shaft was about 15 inches from the front edge of the raised platform the Kobe Mill rested on. (Tr. 398). Employees walked along the front edge of the mill's platform during operation. (Tr. 399; Ex. R-23, #P1040677).

I find an employee could inadvertently contact these bolts because employees worked in close proximity to the rotating shaft. The gears powering the Kobe Mill's rollers were constantly bathed in oil during operations. (Tr. 400-03). A bucket used to add oil into the gear box as the oil level dissipated was placed on the floor directly in front of the coupling's bolts.[31] (Tr. 399, 400-03; Ex. R-23, #P1040677). Employees walked past the rotating shaft during the mill's operation, as illustrated in the video taken by the CO. (Tr. 76, 197-98; Ex. P-40, video #12). The video shows the employee was at least as close as 15 inches when he walked by the spinning bolts on the coupling. Further, the bucket placed directly in front of the coupling demonstrated an employee was near the rotating shaft when oil was added during the mill's operation. There was no barrier or structure to prevent an employee from placing a hand on the shaft or from standing on the platform directly in front of the spinning shaft.

The standard was violated because the bolts that extended past the flange of the coupling were not covered with a safety sleeve. Further, employees were exposed to the bolts on the rotating shaft while the Kobe Mill operated.

Home Rubber had knowledge of the hazard.

The Kobe Mill was a large machine and in plain view. As the CO was recording a video of the machine in operation, the operator walked along the front edge of the Kobe Mill. (Ex. P-40, Video #12). Mr. Balka stated that Home Rubber's managers were in the production area "all the time every day." (Tr. 345).

[31] The photograph also shows a large drum of oil nearby. (Ex. P-19, p. 4).

Because the spinning shaft was in plain view and management knew that employees worked in the area, knowledge of the hazard is established. *See Hamilton*, 16 BNA OSHC at 1091 (an employer has knowledge of conditions that are plainly visible to its supervisory personnel).

Serious Classification and Penalty

The citation was characterized as serious[32] due to possible injuries, such as broken bones, if clothing was caught and an employee was pulled into the machine's rotating parts. (Tr. 76). The gravity was rated as moderate and the penalty was reduced by 30% to $4,988 for employer size. (Tr. 77; Ex. P-19). I find these penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $4,988 for Citation 1, Item 13.

Citation 1, Item 14 – Alleged serious violation of 29 C.F.R. § 1910.242(b)

> (b) *Compressed air used for cleaning*. Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

The Secretary alleges that employees used compressed air above 30 p.s.i. to clean clothing without the use of effective chip guarding and personal protective equipment. (S. Br. 34). Respondent contends that it was unaware employees used the compressed air to clean clothing and the serious classification is excessive. (R. Br. 31).

For the following reasons, I find that the Secretary established a violation of the cited standard.

The standard applied, its terms were violated, and employees were exposed.

The CO observed an employee using compressed air to clean off his clothing. (Tr. 79-80). Employees told the CO they used the air to clean off the mills and to clean dust from their clothes. (Tr. 79). Photographs taken by the CO show the setting was above 90 p.s.i. (Tr. 79-81; Ex. P-20, pp. 4-5).

The standard was violated, employees were exposed, and the standard applied.

Home Rubber had knowledge of the hazard.

An employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel. *See Hamilton*, 16 BNA OSHC at 1091.

[32] The classification of a citation as serious is not based on the likelihood of occurrence, but instead is related to the severity of harm when an accident occurs. *See Mosser,* 23 BNA OSHC at 1046.

Employees used the compressed air in plain view, as witnessed by the CO. (Tr. 79). Home Rubber management employees were in the production area every day; Mr. Bole, plant manager, and R.B., maintenance manager, walked the plant throughout the week looking for safety hazards. (Tr. 79-80, 330, 345). Additionally, text on the face of the compressed air device stated that a setting above 30 p.s.i. was a federal violation. (Ex. P-20, p. 5). Knowledge is established.

Serious Classification and Penalty

The classification of a citation as serious is not based on the likelihood of occurrence, but instead is related to the severity of harm when an accident occurs. *See Mosser,* 23 BNA OSHC at 1046. The citation was classified as serious due to possible injuries of particles blown into the eye and embolism if the nozzle deadheaded against skin. (Tr. 78-79). Respondent's argument the classification should be other-than serious is rejected. The gravity was rated as low and the penalty was reduced for employer size by 30% to $3,741. (Ex. P-20). I find these penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $3,741 for Citation 1, Item 14.

Citation 1, Items 15a, 15b, 15c, and 15d

These four alleged serious violations of the electrical standard were grouped together for a proposed penalty of $3,742. The four violations are for improperly installed equipment, broken equipment, a missing receptacle cover and an unclosed opening on a receptacle in the Mill Three area.

With respect to Item 15a, Respondent contends the violation should be classified as other-than-serious because the hazard was remedied during the inspection. For Items 15b, 15c, and 15d, Respondent contends these items are impermissibly duplicative because they arise from the same factual scenario. (R. Br. 31-33).

As discussed separately below, the Secretary proved applicability, exposure and a violation of each cited standard. The four citations are combined for discussion of knowledge.

Citation 1, Item 15a, 29 C.F.R. § 1910.303(b)(2) applied, was violated, and employees were exposed.

> (b) *Examination, installation, and use of equipment*. . .. (2) *Installation and use*. Listed or labeled equipment shall be installed and used in accordance with any instructions included in the listing or labeling.

The CO observed and photographed a 2x4 receptacle box near Mill Three that was designed to be mounted to the wall. Instead of being mounted to the wall, it was suspended by an electrical cord that ran over a door frame and was used to power two fans. (Tr. 82-83; Ex. P-21, p.4). The standard applied. The unmounted receptacle box was not installed as designed; thus, the standard was violated. Employees worked in and around the Mill Three area. Exposure is established.

Citation 1, Item 15b, 29 C.F.R. § 1910.303(b)(7)(iv) applied, was violated, and employees were exposed.

> (iv) There shall be no damaged parts that may adversely affect safe operation or mechanical strength of the equipment, such as parts that are broken, bent, cut, or deteriorated by corrosion, chemical action, or overheating.

The CO observed and photographed a junction box in the Mill Three area with a broken conduit line. (Tr. 84, 86; Ex. P-22, p. 4). The standard applied. Respondent does not dispute the line was broken. The conduit line was damaged; thus, the standard was violated. Employees worked in and around the Mill Three area. Exposure is established.

Citation 1, Item 15c, 29 C.F.R. § 1910.305(b)(1)(ii) applied, was violated, and employees were exposed.

> (b) *Cabinets, boxes, and fittings* (1) *Conductors entering boxes, cabinets, or fittings*. . .. (ii) Unused openings in cabinets, boxes, and fittings shall be effectively closed.

The CO observed and photographed an unmounted 2x4-inch metal receptacle box near the Mill Three area that had an opening at the top. (Tr. 86; Ex. P-23, p. 4 #30). The standard applied. The opening allowed dust to get inside causing a fire hazard from dust buildup. (Tr. 86). Respondent does not dispute there was an unclosed opening in the receptacle box. The box's opening was not closed; thus, the standard was violated. Employees worked in and around Mill Three area. Exposure is established.

Citation 1, Item 15d, 29 C.F.R. § 1910.305(b)(2)(i) applied, was violated, and employees were exposed.

> (b) (2) *Covers and canopies*. (i) All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the

purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

The CO observed and photographed a wall-mounted 2x4 inch metal receptacle box, used to power the unmounted receptacle, that did not have a cover. (Tr. 88; Ex. P-23, p. 4 #29). The Respondent does not dispute the cover was missing. The wall-mounted receptacle box's cover was missing; thus, the standard was violated. Employees worked in and around the Mill Three area. Exposure is established.

Items 15a, 15b, 15c, and 15d are not duplicative.

The Commission may find a citation duplicative where the "standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in the abatement of the other item as well." *Rawson Contractors, Inc.,* 20 BNA OSHC1078, 1082 n.5 (No. 99-0018, 2003) citing *Flint Eng'g. & Constr. Co.*, 15 BNA OSHC 2052, 2056-57 (No. 90-2873, 1992).

Here, each item requires a separate abatement measure. Respondent's assertion that the items are duplicative is rejected.

Knowledge for Citation 1, Items 15a, 15b, 15c, and 15d.

The unmounted, hanging receptacle box in items 15a and 15c was in plain view just outside the Mill Three production area. (Tr. 82; Ex. P-21, pp. 4-5). The broken conduit line of item 15b was in plain view near Mill Three. (Tr. 84, 86; Ex. P-22, p. 4 #30). The wall-mounted receptacle box of item 15d was also in plain view in the Mill Three area. (Ex. P-23, p. 4 #29).

All violative conditions were in plain view. Home Rubber management employees were in the production area every day and the plant manager and maintenance manager walked the plant throughout the week looking for safety hazards. (Tr. 79-80, 330, 345). An employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel. *See Hamilton*, 16 BNA OSHC at 1091. Knowledge is established.

Serious classification and penalty for Citation 1, Items 15a, 15b, 15c, and 15d.

The classification of a citation as serious is related to the severity of harm when an accident occurs, not the likelihood of occurrence. *See Mosser,* 23 BNA OSHC at 1046. The citation items were classified as serious due to possible injuries from electrical shock and burns. (Tr. 82, 84-86, 88). For item 15a, wires can become loose inside an unmounted receptacle box and electrify the box. (Tr. 82). For item 15b, the conduit to the junction box was broken

exposing the conductors inside. (Tr. 84-85). For time 15c, the opening on the top of the unmounted 2x4 receptacle box allowed dust to accumulate inside creating a fire hazard. (Tr. 86). For item 15d, the mounted receptacle box had a missing cover allowing employee contact with the wires inside the box. (Tr. 88). Respondent's argument the classification should be other-than-serious is rejected.

The gravity was rated as low and the penalty was reduced for employer size by 30% to $3,742. (Ex. P-21, Ex. P-22, Ex. P-23, Ex. P-24). I find these penalty adjustments are appropriate for these violations. [33] I affirm the serious classification and the grouped penalty of $3,742 for Citation 1, Items 15a, 15b, 15c, and 15d.

Citation 1, Item 16 – Alleged serious violation of 29 C.F.R. § 1910.305(g)(2)(iii)

> (g) *Flexible cords and cables* . . . (2) *Identification, splices, and terminations.* . .. (iii) Flexible cords and cables shall be connected to devices and fittings so that strain relief is provided that will prevent pull from being directly transmitted to joints or terminal screws.

The Secretary alleges that flexible cords in the Mill department had torn strain relief in three instances: a control panel for the slitter machine, an extension cord to a pedestal fan in Mill Three area, and an electrical safety bar near the Kobe warm-up mill. (S. Br. 37).

For the following reasons, I find the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.305(g)(2)(iii).

The standard applied, its terms were violated, and employees were exposed.

The CO observed and photographed the three flexible cords used to power a pedestal fan in the Mill room, a safety bar on the Kobe Mill, and the control panel of a slitter machine. (Tr. 89-91; Ex. P-25, pp. 5-7). The control panel to the slitter machine's cord had torn strain relief.[34] (Tr. 89; Ex. P-25, p. 7). The extension cord to a pedestal fan used to cool rubber in the Mill Three area had torn strain relief at both ends. (Tr. 89; Ex. P-25, p. 7). And, the flexible cord that powered a safety bar on the Kobe Mill had torn strain relief. (Tr. 89-90; Ex. P-25, pp. 5, 6).

[33] Respondent asserted the penalty amounts were excessive and cited two unreviewed ALJ decisions as support for this assertion. Because these decisions have no precedential value, Respondent's argument is rejected. *See Elliot*, 23 BNA OSHC at 2114 n.4 (Unreviewed administrative law judge decisions have no precedential value.).

[34] This was repaired during the CO's inspection. (Tr. 89).

Employees worked in these areas several times a week or daily. (Tr. 38, 89, 344). I find the standard's requirements were violated, employees were exposed, and the standard applied.

Home Rubber had knowledge of the hazard.

Photographs show the damaged strain relief was in plain view. (Tr. 90-91, Ex. P-25, pp. 5-7). Home Rubber management employees were in the production area every day and Mr. Bole, plant manager, and R.B., maintenance manager, walked the plant throughout the week looking for safety hazards. (Tr. 79-80, 90, 330, 345). An employer has constructive knowledge of conditions that are plainly visible to its supervisory personnel. *See Hamilton*, 16 BNA OSHC at 1091. Knowledge is established.

Serious Classification and Penalty

Respondent contends that the violation should be classified as other-than-serious. (R. Br. 34). The classification of a citation as serious is related to the severity of harm when an accident occurs, not the likelihood of occurrence. *See Mosser,* 23 BNA OSHC at 1046. Respondent's argument the classification should be other-than-serious is rejected.

The citation was classified as serious because when the strain relief is torn, conductor wires are exposed and can become damaged, which can result in fire and related injuries, such as, burns. (Tr. 90). The gravity was rated as low and a 30% size reduction was applied for a penalty of $3,742. (Tr. 90). I find these penalty adjustments are appropriate for this violation. I affirm the serious classification and penalty of $3,742 for Citation 1, Item 16.

Citation 1, Items 17a & 17b

Citation 1, Item 17a alleged a serious violation of 29 C.F.R. § 1910.1030(c)(1)(i):

> *Bloodborne pathogens*. . .. (c) *Exposure control*--(1) *Exposure Control Plan*. (i) Each employer having an employee(s) with occupational exposure[35] as defined by paragraph (b) of this section shall establish a written Exposure Control Plan designed to eliminate or minimize employee exposure.

Citation 1, Item 17b alleged a serious violation of 29 C.F.R. § 1910.1030(g)(2)(i):

> *Bloodborne pathogens*. . .. (g) *Communication of hazards to employees* . . . (2) *Information and Training*. (i) The employer shall train each employee with

[35] *Occupational Exposure* means "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties." 29 C.F.R. § 1910.1030(b).

> occupational exposure in accordance with the requirements of this section. Such training must be provided at no cost to the employee and during working hours. The employer shall institute a training program and ensure employee participation in the program.

With respect to Item 17a, the Secretary alleges that Respondent did not develop and implement a written bloodborne pathogen Exposure Control Plan for employees that were expected to cleanup blood or bodily fluids. With respect to Item 17b, the Secretary alleges that Respondent did not provide a bloodborne pathogen training program for employees that were expected to cleanup blood or bodily fluids. (S. Br. 38, 40).

For the following reasons, I find that the Secretary established a violation of the cited standards, 29 C.F.R. § 1910.1030(c)(1)(i) and § 1910.1030(g)(2)(i).

The standards applied and the standards were violated.

Because employees used knives to cut rubber there was always a possibility an employee could be cut. (Tr. 312, 416). Maintenance employees were expected to clean up blood in the plant. (Tr. 91-92, 312). The standard applied.

The employees tasked with cleaning up the blood told the CO that Home Rubber had not provided training.[36] (Tr. 93). Mr. Balka thought there had been training, but there was no record of training in the office of the original safety and compliance manager, Mr. Zigler. (Tr. 426). Home Rubber had not provided bloodborne pathogen training.

Mr. Balka thought Home Rubber had a written policy; instead, he found it was merely a pamphlet from the National Safety Council. (Tr. 92, 425-26; Ex. R-15). Respondent admits it did not have a written Exposure Control Plan for bloodborne pathogens. (R. Br. 35).

[36] Mr. Balka believed that the maintenance manager, R.B., had received training outside of Home Rubber due to his work as a volunteer fireman. (Tr. 430). Nonetheless, this does not relieve Home Rubber's duty under the cited standard to provide an Exposure Control Plan and training. *See Gary Concrete Prod., Inc.*, 15 BNA OSHC 1051, 1055 (No. 86-1087, 1991) (employer cannot rely on employee's judgment, work experience or non-specific training); *A.P. O'Horo Co*., 14 BNA OSHC 2004, 2010 (No. 85-369, 1991) (improper for the employer to rely entirely on the prior experience of its crew in lieu of providing specific trenching instruction tailored to the job at hand).

Home Rubber violated the standard's requirements because it did not establish a written Exposure Control Plan and did not provide training to the employees assigned to clean up blood.

Employees were exposed to the hazard.

Maintenance employees were responsible for cleaning up blood at Home Rubber. (Tr. 92). On May 6, 2016, two maintenance employees cleaned up the blood after a mill operator's hand was caught in the Chrome Mill. (Tr. 92). Employee exposure is established.

Home Rubber had knowledge of the hazard.

Mr. Balka knew that knives were used to cut the rubber so there was a risk of blood from cuts. (Tr. 312, 416). Both Mr. Balka and Mr. Bole, plant manager, expected the maintenance employees to clean up the blood. (Tr. 335, 368, 427-28). Mr. Balka was nearby immediately after the accident and knew that R.B. and V.D. cleaned up the blood. (Tr. 427-28). Mr. Balka knew a bloodborne pathogen policy and training were needed but did not ensure the policy and training were developed and implemented. (Tr. 426). *See Phoenix*, 17 BNA OSHC at 1079-1080 (knowledge is directed to the physical condition that constitutes the violation). Knowledge is established.

Serious Classification and Penalty

Respondent contends the violations should be classified as other-than-serious because management mistakenly believed it had a written bloodborne pathogen policy and training program. (R. Br. 34-35). The classification of a citation as serious is not based on the likelihood of occurrence, but instead is related to the severity of harm when an accident occurs. *See Mosser*, 23 BNA OSHC at 1046. The citation items were classified as serious because of the potential of exposure to pathogens in the blood, such as Hepatitis B. (Tr. 92). Respondent's argument the classification should be other-than serious is rejected.

The gravity was rated as moderate and the penalty was adjusted 30% for the employer's size resulting in a grouped penalty of $6,236 for the two items. (Ex. P-26, p. 1). I find these penalty adjustments are appropriate for these violations. I affirm the serious classification and grouped penalty of $6,236 for Citation 1, Item 17a and Item 17b.

Citation 1, Item 18 – Alleged serious violation of 29 C.F.R. § 1910.1030(f)(2)(i)

> (2) *Hepatitis B Vaccination*. (i) Hepatitis B vaccination shall be made available after the employee has received the training required in paragraph (g)(2)(vii)(I) and within 10 working days of initial assignment to all employees who have occupational exposure unless the employee has previously received the complete

hepatitis B vaccination series, antibody testing has revealed that the employee is immune, or the vaccine is contraindicated for medical reasons.

The Secretary alleges that upon initial assignment to the Mill department Respondent did not provide the Hepatitis B vaccination for employees that were expected to cleanup blood and bodily fluids. (S. Br. 41). Respondent contends that the one of the employees had already received the vaccine and the other employee declined. (R. Br. 36-37).

For the following reasons, I find that the Secretary established a violation of the cited standard, 29 C.F.R. § 1910.1030(f)(2)(i).

The standard applied and employees were exposed.

Maintenance department employees working in the Mill department were expected to clean up blood and bodily fluids, thus Home Rubber was required to offer the Hepatitis B vaccine within 10 days of assignment. (Tr. 94). The standard applied.

On May 6, 2016, maintenance employees cleaned up the blood after an accident in the Chrome Mill area. (Tr. 92-93). Employee exposure is established.

The standard was violated.

During the inspection, the maintenance employee, V.D., told the CO he had not received a Hepatitis B vaccination. (Tr. 94-95, 182-83). Mr. Balka testified that just after the accident, he did not know if the vaccine was offered to V.D. (Tr. 335). Maintenance manager R.B. had received the Hepatitis B vaccination before working at Home Rubber. (Tr. 430).

As a part of its abatement documentation, Home Rubber submitted a waiver from V.D. that stated the Hepatitis B vaccine had been offered and he declined the vaccination. (Ex. R-1, p. 16). The waiver was dated January 9, 2017. *Id.* Home Rubber was required to offer the vaccine to a maintenance employee within 10 days of initial assignment. Even if May 6, 2016, was considered the initial day of assignment, a waiver dated January 9, 2017 was not within ten days of that assignment. The standard's requirements were violated.

Home Rubber had knowledge of the hazard.

Mr. Balka knew that maintenance employees cleaned up the blood after the accident. (Tr. 427-28). *See Phoenix*, 17 BNA OSHC at 1079-1080 (knowledge is directed to the physical condition that constitutes the violation). Mr. Balka did not know whether the Hepatitis B vaccine had been offered to employees. (Tr. 335). Knowledge is established because with reasonable diligence Mr. Balka would have known the vaccine was not offered to maintenance

employees within 10 days of assignment to the maintenance department. *See NLLC,* 19 BNA OSHC at 1472 (Reasonable diligence for constructive knowledge includes, among other factors, the "obligation to . . . take measures to prevent the occurrence" of hazards.)

Serious Classification and Penalty

The citation was classified as serious because of potential exposure to bloodborne pathogens, such as Hepatitis B. (Tr. 95). The classification of a citation as serious is not based on the likelihood of occurrence, but instead is related to the severity of harm when an accident occurs. *See Mosser*, 23 BNA OSHC at 1046. Respondent's argument the classification should be other-than-serious is rejected. The gravity was rated as moderate and adjusted 30% for employer size to $6,236. (Tr. 95; Ex. P-28, p. 1). These penalty adjustments are appropriate for this violation.

The serious classification and penalty of $6,236 for Citation 1, Item 18 is affirmed.

OTHER-THAN-SERIOUS CITATIONS

Citation 3, Item 1 – Alleged other-than-serious violation of 29 C.F.R. § 1904.39(a)(2)

> (a) *Basic requirement*. . .. (2) Within twenty-four (24) hours after the in-patient hospitalization of one or more employees or an employee's amputation or an employee's loss of an eye, as a result of a work-related incident, you must report the in-patient hospitalization, amputation, or loss of an eye to OSHA.

The Secretary alleges that Respondent did not report the work-related in-patient hospitalization and amputation that occurred on May 6, 2016. (S. Br. 42). Respondent contends the accident and hospitalization were reported on the next business day, Monday, May 9, 2016. (R. Br. 37).

The standard applied, employees were exposed, the standard was violated, and knowledge is established.

Employers are required to notify OSHA within 24 hours of an inpatient hospitalization related to a work injury. There is no dispute that Respondent did not notify OSHA within 24 hours of the in-patient hospitalization of the mill operator. The injury occurred at approximately 11:15 a.m. on May 6 and the employee was hospitalized that afternoon. (Tr. 429; Ex. P-31, p. 2). Employee exposure and applicability are established.

Home Rubber notified OSHA on May 9, three days after the accident. (Tr. 102, 429). Because the accident occurred on Friday, Mr. Balka thought he could report the next business

day, Monday, May 9. (Tr. 430). Nonetheless, the standard's 24-hour requirement is clear. (Tr. 429). A violation of the standard occurred because Respondent did not notify OSHA of the hospitalization within 24 hours.

Mr. Balka was at the mill when the employee was injured and knew the employee was admitted to the hospital on Friday, May 6. Knowledge is established.

Other-than-serious Classification and Penalty

The citation was classified as other-than-serious because it was a reporting violation and the cited hazard would not likely lead to death or serious injury. (Tr. 103); *See generally, Super Excavators, Inc.*, 15 BNA OSHC 1313, 1317 (No. 89-2253, 1991) (lack of MSDS would not result in serious injury); *see also, Crescent*, 1 BNA OSHC at 1222. The maximum penalty for an other-than-serious violation is $12,471.[37]

Citation 3, Item 1 was grouped with Item 2 and Item 3 for a $3,500 proposed penalty. (S. Br. 42-43). The other-than-serious classification for Citation 3, Item 1 is affirmed and the grouped penalty of $3,500 is assessed.

Citation 3, Item 2 – Alleged other-than-serious violation of 29 C.F.R. § 1910.134(k)(6)

> (k) *Training and information*. . .. (6) The basic advisory information on respirators, as presented in appendix D of this section, shall be provided by the employer in any written or oral format, to employees who wear respirators when such use is not required by this section or by the employer.

The standard applied, employees were exposed, the standard was violated, and knowledge is established.

The standard applied because Home Rubber supplied N95 respirators (dust mask) for voluntary use by its employees. (Tr. 104). Employees working in the mill were not given the necessary information from appendix D about the use of the respirators. (Tr. 104). The standard was violated and employees were exposed. Mr. Bole and Mr. Balka knew the respirators were provided for employee use. (Tr. 105). Knowledge is established.

[37] OSHA established new penalties effective August 1, 2016 for violations occurring after November 2, 2015, pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). 81 Fed. Reg. 43430 (July 1, 2016). The violation in the instant case occurred after November 2, 2015 and was assessed after August 1, 2016 and on or before January 13, 2017, thus the statutory maximum of $12,471 applied. *Id.*

The Secretary classified the cited hazard as other-than-serious. (Tr. 104-05). The penalty was grouped with Citation 3, Item 1. The other-than-serious classification for Citation 3, Item 2 is affirmed and the grouped penalty is assessed.

Citation 3, Item 3 – Alleged other-than-serious violation of 29 C.F.R. § 1910.178(l)(6)

> (l) . . . (6) *Certification*. The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

The standard applied, employees were exposed, the standard was violated, and knowledge established.

The standard applied and employees were exposed because employees operated forklifts at Home Rubber. (Tr. 63-64, 393). The standard was violated when the safety and compliance manager, Mr. Fisher, did not document the certification for a new employee as required by the cited standard. (Tr. 105). Mr. Fisher knew that he had not documented the required information. As the safety and compliance manager, his knowledge is imputed to Home Rubber. *See AEDC*, 23 BNA OSHC at 2095. (Knowledge is imputed through an employer's supervisory employees.) Knowledge is established.

The Secretary classified the cited hazard as other-than-serious. (Tr. 106). The penalty was grouped with Citation 3, Item 1. The other-than-serious classification for Citation 3, Item 3 is affirmed and the grouped penalty assessed.

Citation 3, Item 4 – Alleged other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1)

> (e) *Written hazard communication program*. (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following: (i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and, (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

The standard applied, employees were exposed, the standard was violated, and knowledge is established.

The standard applied because Home Rubber used hazardous chemicals in its rubber production. Mr. Balka provided the material safety data sheets for several chemicals used, including naptha, toluene, carbon black, sulfur, and Industrene R. (Tr. 107; Ex. P-34, pp. 5, 24, 32, 132, 143). There was no written hazard communication plan for the employees that used the chemicals in their work areas. (Tr. 107). Thus, the standard was violated and employees were exposed. The material safety data sheets showed the hazards of the chemicals used. (Tr. 107-08). Mr. Balka knew the chemicals were used daily and Home Rubber had no written program. (Tr. 107-08). Knowledge is established.

The Secretary proposed a zero penalty and classified the cited hazard as other-than serious because it was a violation for lack of documentation. (Tr. 107). The other-than-serious classification for Citation 3, Item 4 is affirmed and zero penalty assessed.

Citation 3, Item 5 – Alleged other-than-serious violation of 29 C.F.R. § 1910.1200(h)(3)(iv)

> (h) *Employee information and training*. . . (3) *Training.* Employee training shall include at least: . . . (iv) The details of the hazard communication program developed by the employer, including an explanation of the labels received on shipped containers and the workplace labeling system used by their employer; the safety data sheet, including the order of information and how employees can obtain and use the appropriate hazard information.

The standard applied, employees were exposed, the standard was violated, and knowledge is established.

The standard applied because employees used chemicals in rubber production. Employees were not trained on OSHA's newly adopted global harmonization system, which would have provided information to employees about symbols on the safety data sheets and how to read a safety data sheet. (Tr. 109). The employees had received prior hazard communication training, but not on the new requirements of the standards. (Tr. 110). Employees were exposed and the standard was violated. Mr. Fisher, safety and compliance manager, knew the employees had not been trained. (Tr. 110). Knowledge is established.

The Secretary proposed a zero penalty and classified the cited hazard as other-than serious. (Tr. 109). The other-than-serious classification for Citation 3, Item 5 is affirmed and zero penalty assessed.

In Summary

1. Home Rubber willfully violated the requirements to provide audiometric testing for employees operating Mill Three.
2. Home Rubber did not prove that it was infeasible to guard the ingoing nip points on the Chrome Mill, Kobe Mill, Mill Three, and Mill One.
3. The willful and serious violations were properly classified.
4. The Secretary proved his prima facie case for all thirty alleged violations.

Findings Of Fact And Conclusions Of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made in this decision. *See* Fed. R. Civ. P. 52(a). 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 1a, alleging a serious violation of 29 C.F.R. § 1910.22(a)(1) and Citation 1, Item 1b, alleging a serious violation of 29 C.F.R. § 1910.22(a)(2), are AFFIRMED, and a grouped penalty of $6,236 is assessed.

2. Citation 1, Item 2, alleging a serious violation of 29 C.F.R. § 1910.95(d)(1), is AFFIRMED, and a penalty of $8,730 is assessed.

3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1910.95(k)(1), is AFFIRMED, and a penalty of $8,730 is assessed.

4. Citation 1, Item 4, alleging a serious violation of 29 C.F.R. § 1910.106(e)(6)(ii), is AFFIRMED, and a penalty of $3,742 is assessed.

5. Citation 1, Item 5, alleging a serious violation of 29 C.F.R. § 1910.147(c)(6)(i), is AFFIRMED, and a penalty of $6,236 is assessed.

6. Citation 1, Item 6, alleging a serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(B), is AFFIRMED, and a penalty of $6,236 is assessed.

7. Citation 1, Item 7, alleging a serious violation of 29 C.F.R. § 1910.147(f)(3)(ii)(D), is AFFIRMED, and a penalty of $6,236 is assessed.

8. Citation 1, Item 8, alleging a serious violation of 29 C.F.R. § 1910.157(g)(2), is AFFIRMED, and a penalty of $3,742 is assessed.

9. Citation 1, Item 9, alleging a serious violation of 29 C.F.R. § 1910.178(l)(4)(iii), is AFFIRMED, and a penalty of $4,988 is assessed.

10. Citation 1, Item 10, alleging a serious violation of 29 C.F.R. § 1910.212(a)(1), is AFFIRMED, and a penalty of $4,988 is assessed.

11. Citation 1, Item 11, alleging a serious violation of 29 C.F.R. § 1910.212(a)(3)(ii), is AFFIRMED, and a penalty of $8,730 is assessed.

12. Citation 1, Item 12, alleging a serious violation of 29 C.F.R. § 1910.215(b)(9), is AFFIRMED, and a penalty of $4,988 is assessed.

13. Citation 1, Item 13, alleging a serious violation of 29 C.F.R. § 1910.219(i)(2), is AFFIRMED, and a penalty of $4,988 is assessed.

14. Citation 1, Item 14, alleging a serious violation of 29 C.F.R. § 1910.242(b) is AFFIRMED, and a penalty of $3,741 is assessed.

15. Citation 1, Item 15a, alleging a serious violation of 29 C.F.R. § 1910.303(b)(2), and Citation 1, Item 15b alleging a serious violation of 29 C.F.R. § 1910.303(b)(7)(iv), Citation 1, Item 15c alleging a serious violation of 29 C.F.R. § 1910.305(b)(1)(ii), and Citation 1, Item 15d alleging a serious violation of 29 C.F.R. § 1910.305(b)(2)(i) are AFFIRMED, and a grouped penalty of $3,742 is assessed.

16. Citation 1, Item 16, alleging a serious violation of 29 C.F.R. § 1910.305(g)(2)(iii) is AFFIRMED, and a penalty of $3,742 is assessed.

17. Citation 1, Item 17a, alleging a serious violation of 29 C.F.R. § 1910.1030(c)(1)(i), and a serious violation Citation 1, Item 17b, 29 C.F.R. § 1910.1030(g)(2)(i) are AFFIRMED, and a grouped penalty of $6,236 is assessed.

18. Citation 1, Item 18, alleging a serious violation of 29 C.F.R. § 1910.1030(f)(2)(i) is AFFIRMED, and a penalty of $6,236 is assessed.

19. Citation 2, Item 1a, alleging a willful violation of 29 C.F.R. § 1910.95(g)(5)(i), and Citation 2, Item 1b, alleging a willful violation of 29 C.F.R. § 1910.95(g)(6), are AFFIRMED, and a grouped penalty of $74,825 is assessed.

20. Citation 3, Item 1, alleging an other-than-serious violation of 29 C.F.R. § 1904.39(a)(2) is AFFIRMED, and a grouped penalty of $3,500 is assessed for Citation 3, Items 1, 2 and 3.

21. Citation 3, Item 2, alleging an other-than-serious violation of 29 C.F.R. § 1910.134(k)(6) is AFFIRMED and the penalty is grouped with Citation 3, Item 1.

22. Citation 3, Item 3, alleging an other-than-serious violation of 29 C.F.R. § 1910.178(l)(6) is AFFIRMED and the penalty is grouped with Citation 3, Item 1.

23. Citation 3, Item 4, alleging an other-than-serious violation of 29 C.F.R. § 1910.1200(e)(1) is AFFIRMED, and no penalty is assessed.

24. Citation 3, Item 5, alleging an other-than-serious violation of 29 C.F.R. § 1910.1200(h)(3)(iv) is AFFIRMED, and no penalty is assessed.

/s/ _____
Carol A. Baumerich
Judge, OSHRC

Date: September 23, 2019
Washington, D.C.