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. LLOYD INDUSTRIES, INC., Respondent.	:	OSHRC DOCKET NOS. 15-0846, 15-0847

Appearances:

Katherine E. Bissell, Esq., Deputy Solicitor for Regional Enforcement, Oscar L. Hampton III, Regional Solicitor, Judson H. Dean, Senior Trial Attorney, Jordana L. Greenwald, Esq., Office of the Regional Solicitor, Philadelphia, PA
For the Complainant.

Jonathan L. Snare, Esq., Morgan Lewis & Bockius LLP, Washington, D.C., Brandon J. Bingham, Esq., Morgan Lewis & Bockius, LLP Philadelphia, PA
For the Respondent.

Before: Keith E. Bell, Administrative Law Judge

DECISION AND ORDER

Following a complaint from a former employee injured while working at Lloyd Industries, Inc. (Respondent), the Occupational Safety and Health Administration (OSHA) commenced an investigation. OSHA conducted both a safety (No. 1008085) and health inspection (No. 1009661) at Respondent's Montgomeryville, PA facility (Facility). These inspections resulted in the issuance of several citations alleging willful, serious, and other than serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act). Respondent timely contested all the citations and the dockets from the two inspections

(Nos. 1008085 and 1009661) were consolidated for review before the Occupational Safety and Health Review Commission (Commission).

The hearing in this matter stretched over nine days and occurred on the following dates: October 17-21 and October 24-27, 2016. The following witnesses testified:

> two OSHA safety and health compliance officers Glenn Kerschner and Joseph Daniel Orach, OSHA Area Director Jean Kulp, Neal Growney (an expert in machine guarding), Brian Liddell (an expert in noise exposure measure measurement, analysis of noise exposure data, and determining compliance with occupational noise standards), four former employees, four current employees, Respondent's President, William F. Lloyd,

for the Secretary; and,

> Fred Braker, the business representative of the Sheet Metal Workers Local 19, eight current employees, Dennis Driscoll (an expert in occupational noise, noise exposure assessments, hearing conservation and regulatory compliance and occupational noise data analysis), Michael Taubitz (an expert in machine guarding and risk assessment) and Mr. Lloyd,

for the Respondent. Both parties filed post hearing briefs.

For the reasons set forth below, the undersigned finds that Respondent violated the Act and affirms Citation 1, Item 3a; Citation 1, Item 3b (except for Instance (e)); Citation 1, Item 3c; Citation 1, Item 3d (except for Instance (d)); Citation 1, Item 4b; Citation 2, Items 2, 3, 4, 5, 6 and 7 from Inspection No. 1008085; and, from Inspection No. 1009661, Citation 1, Items 1, 2, 3, 4b and 5, and Citation 2, Items 3 and 4.[1] Separately, for the reasons discussed below, Citation 1,

[1] The parties reached a partial settlement agreement resolving Citation 1, Items 1, 2a, and 2b, and Citation 3, Items 1, 2, and 3, from what was initially designated Docket No. 15-0846. (Jt. Ex. J-2.) In an Order dated March 10, 2107, these items were severed from Docket No. 15-0846 and assigned Docket No. 17-0381. The parties also resolved Citation 1, Item 4a, and Citation 2, Items 1 and 2, which arose out of Inspection No. 1009661 and were previously assigned to Docket No. 15-0847. These Citation items were severed from that docket and assigned to Docket No. 17-0382 by an Order dated March 10, 2017.

Item 3b, Instance (e), Citation 1, Item 3d, Instance (d), and Citation 2, Item 1, each from Inspection No. 1008085, are vacated. In addition, the undersigned denies both the Secretary's Motion to Amend the Citation and the Secretary's Motion to Exclude the Testimony and Report of Michael Taubitz.

JURISDICTION

The record establishes that Respondent filed a timely notice of contest. As of the date of the alleged violation, the record also establishes that the employer engaged in business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act. (Stip. 1-3.) Based upon the record, the undersigned concludes that the Commission has jurisdiction over the parties and subject matter in this case. Respondent is, therefore, covered under the Act.

STIPULATIONS

The parties stipulated to the following facts:

1. Mr. Lloyd is the sole owner and President of Lloyd Industries, Inc.
2. Lloyd Industries, Inc. was established in 1981.
3. Lloyd Industries, Inc. has two plants in the United States, one in Montgomeryville, PA and one in Florida.

The parties stipulated to the following legal issues:

1. The Commission has jurisdiction over this matter pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., hereinafter the Act.
2. Respondent is an employer within the meaning Section 3(5) of the Act, 29 U.S.C. Section 652(5).
3. Respondent is an employer engaged in a business effecting commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. Sections 652(3), (5).

4. Respondent is not going to seek EAJA fees.

SECRETARY'S MOTION TO AMEND

During the hearing, the Secretary formally moved to amend the citation to add a general duty clause violation for failure to guard the foot pedal on the Niagara Model 1R10 Mechanical Shear Machine (1R10 shear).[2] Federal Rule of Civil Procedure 15(b) permits amendments during trial when the parties tried the unpled issue and there was either express or implied consent to do so. *McWilliams Forge Co., Inc.*, 11 BNA OSHC 2128, 2129 (No. 80-5868, 1984). "Trial by consent may be found only when the parties knew, that is, squarely recognized, that they were trying an unpleaded issue." *Id.* at 2129-30.

In his Complaint, the Secretary alleged that points of operation were improperly guarded on two shear machines at the Facility: the Niagara Model 18 shear (Niagara 18 shear) and the 1R10 shear. (Compl. Ex. A, Citation 2, Items 4-5.) The Secretary later moved to amend the pleadings to include an allegation that 1R10 shear also violated the general duty clause because it too had an unguarded foot pedal. (Tr. 994-1001.) Promptly objecting to the motion, Respondent argued that an amendment would be improper because it would cause Respondent to experience prejudice. (Tr. 998.)

The undersigned finds that the parties did not fully litigate the issue regarding the foot pedal on the 1R10 shear, and that there was no express or implied consent to do so. The unguarded foot pedal on the 1R10 shear was only directly addressed during the cross-examination of the Secretary's witness:

[2] The Secretary also moved to amend the Complaint to add willful violation of 29 C.F.R. § 1910.212(a)(3)(ii) for failure to guard the point of operation on an Accurshear shear machine, but subsequently withdrew the request. (Mot. to Amend at 1.)

> Q. … for the Niagara press brake, do you have that same concern of a hazard, of an accidental activation of any other foot actuated machines?
> A. Well, as a general principle, yes.
> Q. And it's true, if I'm understanding your opinion correctly, your concern is an unguarded foot pedal presents a risk or a hazard to employees, due to accidental activation, correct?
> A. Yes.
> Q. And so do you have that same opinion if there was another unguarded foot pedal on another foot actuated machine?
> A. In general principle, yes, I reserve the fact that I have to look specifically at the application but in general, yes.
> Q. Are you aware whether there was any other machine at Lloyd Industries' plant that had an unguarded foot pedal?
> A. Yes.
> Q. All right. If we could turn up photo 47, Government Exhibit 47 please. Now, isn't it true this is a picture of you, as you testified earlier, sticking your – trying to stick your hands under the guard of the shear machine, correct?
> A. Yes.
> Q. And isn't it also true that the foot pedal on that machine is unguarded?
> A. Yes.

(Tr. 939-40.) While this testimony refers to the unguarded foot pedal on the 1R10 shear, it also relates to the expert's opinions on foot pedals in general, including the Niagara Model IB-15-3-4 press brake (Niagara Press Brake), which is the subject of Citation 2, Item 1.[3] As this testimony relates both to a pled and an unpled issue, it is not conclusive evidence of Respondent's intent to try the unpled issue. *See Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.,* 676 F.3d 318, 328 (3d Cir. 2012); *McWilliams*, 11 BNA OSHC at 2129 ("consent is not implied by a party's failure to object to evidence that is relevant to both pleaded and unpleaded issues"). The Secretary points to no other testimony evincing Respondent's intent to litigate the foot pedal on the 1R10 shear. (Sec'y Br. at 1-2.) In addition, Respondent asserts that had the 1R10 shear's foot pedal

[3] A former employee also briefly discussed the 1R10's lack of guarding and a photograph of the foot pedal was introduced during the Secretary's questioning of the CO. (Tr. 34, 170-71, 285.) However, like the testimony quoted above, this evidence also relates to pled issues, including Citation 2, Items 4 and 5, and is insufficient to support the amendment. *See Armour Food Co*., 14 BNA OSHC 1817, 1824 (No. 86-247, 1990).

been initially cited, it would have presented specific information, including expert testimony, about whether it violated the general duty clause. (Tr. 998-1000; Resp't Br. at 8-9.) *See ConAgra Flour Milling Co*., 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992) (indicating that to evaluate the appropriateness of amendment, the judge should "look at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence"); *Cornell & Co., Inc. v. OSHRC*, 573 F.2d 820, 824-5 (3d Cir. 1978) (rejecting a late stage amendment).

The parties did not fully litigate the issue of the 1R10 shear's foot pedal. As a result, the amendment the Secretary seeks is not appropriate.[4] *See Armour Food*, 14 BNA OSHC at 1824 (finding a court's granting of a motion to amend improper because the parties never agreed on which machine was the basis of the litigation). Accordingly, the Secretary's Motion to Amend the Citation is DENIED.

FACTUAL BACKGROUND

Respondent manufacturers fire dampers and HVAC products at its Facility. A former employee (JE), whose fingers were amputated by Respondent's Niagara Press Brake, filed a complaint with OSHA alleging numerous safety hazards. (Tr. 26, 30, 34.) In response, OSHA commenced an investigation with Compliance Officer Glen Kerschner (CO) first conducting a site inspection on November 13, 2014. (Tr. 133-5, 139.) An additional safety inspection occurred on November 20, 2014. (Tr. 133-35.)

These inspections resulted in the issuance of one serious citation, of which five items remain contested, and one willful citation, with seven separate items. Specifically, the Secretary

[4] Respondent also asserts that the 1R10 shear's foot pedal cannot be cited because it does not arise out of the same "conduct, transaction, or occurrence" set out in the original pleading. (Resp't Br. at 9-10 discussing Fed. R. Civ. P. 15(c)(1)(B).) Because the undersigned finds that the proposed amendment is not appropriate, there is no need to address the issue of whether such an amendment would relate back to the date of the original pleadings.

alleges the Respondent willfully violated the Act by: (1) failing to guard the foot pedal for the Niagara Press Brake as required by of section 5(a)(1) of the Act; and (2) failing to guard points of operation as required by 29 C.F.R. § 1910.212(a)(3)(ii) on the Niagara Press Brake, the Accurpress Model 7606 Press Brake (Accurpress), the Niagara 18 shear, the 1R10 shear, the Roll Former/Frame Maker Machine (Roll Former), and the Milford brand rivet machines (Rivet Machines). The serious citation relates to Respondent's alleged failure to: (1) guard flywheels on four machines in violation of 29 C.F.R. § 1910.219(b)(1); (2) guard pulleys on five machines in violation of 29 C.F.R. § 1910.219(d); (3) guard horizontal belts on the Niagara Press Brake in violation of 29 C.F.R. § 1910.219(e)(1)(i); (4) guard vertical or inclined belts on four machines in violation of 29 C.F.R. § 1910.219(e)(3)(i); and (5) effectively close unused openings in boxes, cabinets or fittings on two machines in violation of 29 C.F.R. § 1910.305(b)(1)(ii).[5]

In addition to the safety inspections, Compliance Officer Joseph Daniel Orach (Orach) also conducted a health inspection and noise surveys for the Facility. His inspection ultimately led to the issuance of one willful citation, of which six items remain in dispute, and one other-than-serious citation with two items still contested.[6] Specifically, the willful citation alleges that Respondent failed to: (1) annually obtain audiograms for three employees in violation of 29 C.F.R. § 1910.95(g)(6); (2) conduct a training program and ensure participation in that program in violation of 29 C.F.R. § 1910.95(k)(1); (3) conduct annual training for each employee in the hearing conservation program in violation of 29 C.F.R. § 1910.95(k)(2); and (4) provide effective information and training on hazardous chemicals in the work area in violation of 29

[5] As noted above, these inspections also led to one other-than-serious citation, which the parties settled prior to the hearing. (Jt. Ex. 2.)

[6] As indicated above, the parties resolved Citation 1, Item 4a and Citation 2, Items 1 and 2 arising out of this health inspection.

C.F.R. § 1910.1200(h)(1). The other-than-serious citation alleges that Respondent: (1) utilized an improper sampling strategy to identify employees for inclusion in the hearing conservation program in violation of 29 C.F.R. § 1910.95(d)(1)(i); and (2) failed to calibrate instruments used to measure employee noise exposure in violation of 29 C.F.R. § 1910.95(d)(2)(ii).

I. Safety Inspection - Inspection No. 1008085

A. Expert Testimony

Both parties proffered expert testimony on the issue of machine guarding: Neal Growney for the Secretary and Michael Taubitz for Respondent. There was no objection to Growney's qualification as an expert witness. (Tr. 610.) In contrast, the Secretary objected to designating Taubitz as an expert, asserting that his opinions contradict OSHA standards and that he has expressed bias against the agency. (Tr. 2672-73.) The undersigned permitted Taubitz to testify; but, the final ruling on the expert designation was held in abeyance. (Tr. 2673.)

The Commission follows Federal Rule of Evidence 702, which requires judges to serve as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 589 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (extending the court's gatekeeper function to all expert testimony); Commission Rule 71, 29 C.F.R. § 2200.71. The undersigned finds that Taubitz's opinions are admissible. The Secretary's challenges go primarily to the relevance and accuracy of his opinions. *In re TMI Litig.*, 193 F.3d 613, 692 (3d Cir. 1999) (stating that "[s]o long as the expert's testimony rests upon 'good grounds', it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded"); *In re Unisys Savings Plan Litig.*, 173 F.3d 145, 157-58 (3d Cir. 1999) (acknowledging that the

difference between determining admissibility and the weighing of evidence is often a close question).

The Secretary's concerns about the reliability and utility of Taubitz's testimony, while not enough to exclude the testimony, are relevant in determining what weight to give it. *See U.S. Steel v. OSHRC*, 537 F.2d 780, 783 (3d Cir. 1976) (explaining that expert testimony need not be accepted even if uncontradicted); *Conn. Nat. Gas Corp*., 6 BNA OSHC 1796, 1800 (No. 13964, 1978) (noting that it is up to the trier of fact to determine what weight, if any, to give expert testimony). Taubitz's advised approach to safety appears to conflict with the machine guarding standard. (Tr. 2615; Ex. R. 34.) His recommendations were based on work with a prior employer, and he did not convincingly explain why his methodology offered protection at least as sufficient as what the standard provides. *Id.* As described, his approach to safety put most of the burden on employees to avoid hazards, rather than the employer's responsibility to install appropriate guarding. (Tr. 2492-93, 2615-16.) However, the Commission has long accepted the view of the guarding standard as being one designed to protect against employee error and inadvertence. *H.B. Zachary Co*., 8 BNA OSHC 1669, 1674-75 (No. 76-2671, 1980); *Oberdorfer Indus., Inc.,* 20 BNA OSHC 1321, 1327-28 (No. 97-0469, 2003) (consolidated) (noting that skill may lessen the probability of an injury but did not negate exposure to unguarded parts); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1815 (No. 87-692, 1992) (holding that "final responsibility for compliance" rests with the employer). Even when there is little chance of injury when the machine is operated appropriately, "the standard is plainly intended to eliminate danger" that may arise from carelessness or an outright failure to follow training and work rules. *Zachary*, 8 BNA OSHC at 1674-75; *Gen. Elec. Co*., 10 BNA OSHC 1687, 1690 (No. 77-4472, 1982) (finding that the standard requires physical guarding that is not dependent upon correct employee

behavior). For this reason, training and work rules are not a substitute for the guarding standard's requirements. *Am. Luggage Works, Inc*., 10 BNA OSHC 1678, 1682 (No. 77-893, 1982) (rejecting claim that there was no exposure because employer instructed employees to keep out of the point of operation). Taubitz seemed to ignore or at least pay little heed to the reduction of risk that occurs as a result of guarding. (Tr. 2472, 2503-4, 2507-16, 2519, 2622-23.)

Further, Taubitz described a systematic approach to safety that he would suggest employers follow; but, there is no evidence that Respondent had any such system in place. (Tr. 2397-98, 2503, 2644; Ex. R. 24.) Respondent itself did not indicate that the machines were being operated in some way to protect the employees from injury. (Tr. 252.) Taubitz's approach relied heavily on employee behavior. But, delegating employee safety to employees themselves is "inconsistent with the purposes and policies of the Act." *PBR, Inc*., 643 F.2d 890, 895-96 (1st Cir. 1981). Without evidence that Respondent embraced Taubitz's approach, his testimony is not particularly helpful in evaluating the conditions at the Facility.

In addition, the undersigned finds Taubitz's demeanor at the hearing undermined his credibility. His answers to certain questions, including some put forth by the undersigned, were occasionally evasive.[7] They also lacked the depth of the answers provided by Growney, the Secretary's expert. Thus, while Taubitz's opinions are admissible, the undersigned finds Growney's opinions to be of more overall value and, as discussed below, credits his testimony over that of Taubitz to the extent that the two disagreed. *See i4i Ltd. P'ship v. Microsoft Corp.*,

[7] The undersigned notes that Taubitz said he testified as an expert in machine guarding in one previous case, *General Motors,* No. 917-2834-E, 1994 WL 16511004 (O.S.H.R.C.A.L.J. Apr. 19, 1994) (consolidated). (Tr. 2395-96.) This case only involved violations of the lockout/tagout standard. 1994 WL 16511004.

598 F.3d 831, 852 (Fed. Cir. 2010) (noting that a judge can give little weight to expert testimony although found reliable enough to pass the threshold of Federal Rule of Evidence 702), *aff'd*, 564 U.S. 91 (2011).

B. Citation 2, Item 1 - Alleged Willful Violation of The General Duty Clause (Section 5(a)(1)) by Failing to Guard the Foot Pedal on the Niagara Press Brake

To prove a violation of the general duty clause (§ 5(a)(1)), the Secretary must establish that the employer failed to render its workplace free of a hazard, which was "recognized by the employer or its industry and which was causing or likely to cause death or serious physical harm." 29 U.S.C. § 654(a)(1). The Secretary also bears the burden of demonstrating a feasible and useful means of abatement that would eliminate or materially reduce the hazard. *See Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1187 (No. 00-0553, 2005); *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1164 (3d Cir. 1980) (general duty clause violation). Because § 5(a)(1) was designed to augment, rather than supplant standards, a citation cannot be sustained if a specific standard applies. *Active Oil*, 21 BNA OSHC at 1185.

The Niagara Press Brake is a mechanical press brake actuated by pressing fully down on a foot pedal. (Tr. 154-5, 634, 1867-68; Gov. Ex. 4.) This action engages the clutch, causing a ram on the machine to move up and down, allowing the operator to use the machine to bend sheet metal. (Tr. 154-6, 627-9.) The Secretary alleges that there should have been a guard preventing the accidental actuation of the foot pedal. (Sec'y Br. at 3-4.)

Respondent contends that § 5(a)(1) is inapplicable because a more specific standard (29 C.F.R. § 1910.212(a)(3)(ii)) applies and also alleges that the Secretary failed to meet his burden of proof. (Resp't Br. at 24.) Respondent does not suggest that § 1910.212(a)(3)(ii), which focuses on guarding points of operation, requires guarding of foot pedals. *Id.* at 25. Its

contention is that point of operation guarding would prevent the existence of any hazard arising from accidental actuation of an unguarded foot pedal. *Id.*

The application of § 5(a)(1) is preempted, and thus inapplicable, when a specific standard addresses a particular hazard. *See, e.g., Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1261 n.9 (D.C. Cir. 1973). Preemption does not occur merely because another standard also addresses the same machine or a similar hazard. *Gen. Dynamics Land Sys. Div., Inc.*, 15 BNA OSHC 1275, 1276-77 (No. 83-1293, 1991). It is not enough for the hazards to be interrelated—the specific standard must address the particular hazard for which the Secretary cited the employer. *Armstrong Cork Co.*, 8 BNA OSHC 1070, 1073 (No. 76-2777, 1980).

The Secretary's expert, Growney, explained that abating the point of operation hazard would not address the hazard of accidental actuation presented by the unguarded foot pedal.[8] (Tr. 672-75.) The standard Respondent points to (29 C.F.R. § 1910.212(a)(3)(ii)) prevents injuries at one location. In contrast, the hazard of accidental actuation (the basis for the Secretary's § 5(a)(1) citation) relates to any part of the energized machine, not just the point of operation. *Id.* Because of the difference in hazards, 29 C.F.R. § 1910.212(a)(3)(ii) does not preempt citation under § 5(a)(1).

Having found that the § 5(a)(1) is not preempted, we must examine whether the Secretary showed a recognized hazard. As noted above, the Secretary describes the hazard as the accidental actuation of the Niagara Press Brake's foot pedal. (Sec'y Br. at 3; Gov. Ex. 226.) So, the first issue is whether accidental actuation can occur. The foot pedal was located underneath the frame of the machine and the work table. (Tr. 2485-7; Gov. Exs. 2, 4.) The parties agree that

[8] Respondent itself notes that the Secretary has promulgated standards requiring guarding of both foot pedals and the point of operation for some types of machines. (Resp't Br. at 26 n. 5 discussing 29 C.F.R. § 1910.217.)

this location provided some protection from accidental actuation. (Tr. 656, 2497-99.) Growney suggested that the metal around the foot pedal was not close enough to the pedal itself to prevent an object from falling on it or an operator from stepping on it accidentally. (Tr. 643-45.)

However, even accepting that these scenarios could occur, the Secretary did not show that they would be sufficient to actuate the machine. Partially pressing on the foot pedal would not start the machine—the operator needed to fully press down with the ball of his or her foot before the clutch would engage. (Tr. 1466, 1871, 2486-87.) Nor did the Secretary explain what kind of object could be small enough to fit under the table and still be heavy enough to completely depress the foot pedal as was necessary for the machine to function. Considering how much force was necessary to actuate the foot pedal, as well as its partially guarded location, the Secretary failed to show that the hazard of accidental actuation was present. *Id.* Therefore, Citation 2, Item 1 is VACATED and no penalty is assessed.

C. Failure to Guard Points of Operation in Violation of 29 C.F.R. § 1910.212(a)(3)(ii)

For the Secretary to establish a violation of any specific OSHA standard, he must prove that: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving each of these elements by a preponderance of the evidence. *Id.* In addition, for certain standards, such as 29 C.F.R. § 1910.212(a)(3)(ii), the Secretary must also prove the existence of a hazard. *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1073 n.4 (No. 93-1852, 1997) (contrasting the specification standard at issue there with § 1910.212(a)(3)(ii)).

Section 1910.212 addresses general guarding requirements for all machines. It mandates guarding for all points of operation if they expose an employee to injury.[9] 29 C.F.R. § 1910.212(a)(3)(ii). The Secretary alleges that Respondent willfully violated 29 C.F.R. § 1910.212(a)(3)(ii) by failing to guard the points of operation on: (1) the Niagara Press Brake, (2) the Accurpress, (3) the Niagara 18 shear, (4) the 1R10 shear, and (5) the Roll Former. Any guarding device selected must be in conformance with machine specific requirements, if there are any.[10] *Id*. Otherwise, in the absence of a specific standard, the employer has the flexibility to choose among guarding methods as long as the approach taken prevents the operator from having "any part of his body in the danger zone" during operation. *Id.*

The guarding method chosen must be physical; it cannot depend on training or instruction alone. *Zachary*, 8 BNA OSHC at 1674-75. The purpose of the guarding standard is to protect employees from inadvertently entering the point of operation, whether as a result of carelessness, lack of skill, or another reason. *Id.*; *Oberdorfer,* 20 BNA OSHC at 1327-28 (skill did not negate exposure to unguarded parts); *Am. Luggage,* 10 BNA OSHC at 1682 (rejecting claim that there was no exposure because employer instructed employees to keep out of the point of operation). "[T]he standard is plainly intended to eliminate danger from unsafe operating procedures, poor

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[9] Specifically, for hazards created by points of operation, the standard provides:

> The point of operation 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 safety standards, shall be designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

29 C.F.R. § 1910.212(a)(3)(ii).

[10] The standard lists various types of guarding methods, such as barrier guards, two-hand tripping devices, and electronic safety devices. 29 C.F.R. § 1910.212(a)(1).

training, or employee inadvertence." *Zachary*, 8 BNA OSHC at 1674-75; *Pass & Seymour*, *Inc.*, 7 BNA OSHC 1961, 1963 (No. 76-4520, 1979) (concluding that the standard's purpose is "to protect against injury resulting from an instance of inattention or bad judgment as well as risks arising from the operation of a machine"). An employer cannot merely implement work rules that would prevent injury if followed. *Gen. Elec*., 10 BNA OSHC at 1690. Even with training and work rules, it still must provide a compliant guarding device that prevents entry into the point of operation during the operating cycle. *Id.* at 1690-91 (concluding that the standard "rejects reliance upon the skill or attentiveness of employees … and instead requires physical guarding methods that do not depend for their effectiveness on correct employee behavior" (internal citations omitted).)

1. Citation 2, Item 2 - Niagara Press Brake

a) Violation

Citation 2, Item 2 alleges that there was an unguarded point of operation on the Niagara Press Brake in violation of 29 C.F.R. § 1910.212(a)(3)(ii). Respondent does not appear to dispute that the Secretary made out a prima facie case, but argues that guarding was not feasible.[11] (Resp't Br. at 25, 32-34.) It also contests the characterization of any violation as willful. *Id.* at 34-37.

Although the Niagara Press Brake was disposed of before either party's expert could view it, there is no dispute that it lacked a physical device capable of preventing employees from accessing the point of operation. (Tr. 209, 1691-93.) The CO explained that this lack of guarding created a hazard because an employee could inadvertently get his fingers or hands into

[11] Indeed, Respondent explicitly argued that 29 C.F.R. § 1910.212(a)(3)(ii) applies to the Niagara Press Brake. (Resp't Br. at 25-26.)

the point of operation resulting in injury. (Tr. 204.) Indeed, JE had three fingers crushed while using the Niagara Press Brake on July 11, 2014. (Tr. 27-30; Gov. Exs. 16, 17, 187.) While not a prerequisite for finding a violation, evidence of past injuries supports the conclusion that employees are exposed to a hazard when operating the machine. *S&G Packaging Co.*, 19 BNA OSHC 1503, 1505 (No. 98-1107, 2001) (finding, under § 1910.212(a)(1), that evidence of injuries "clearly establish[es] the existence of a hazard").

As for exposure, the Secretary presented uncontested evidence that in addition to Respondent's President, Mr. Lloyd, two other current employees used the machine—one who acknowledged operating the machine as a regular part of his work and another who indicated he operated the machine within six months of the citation's issuance. (Tr. 188-189, 457, 2054.) Mr. Lloyd corroborated this testimony indicating that after the machine crushed JE's fingers he continued to let employees operate it. (Tr. 1689.)

JE and a current employee explained how routine tasks required them to put their hands close to and, on occasion, into the point of operation. (Tr. 86-90, 103-4.) The CO indicated that if an employee had to use the piece of metal that was on the machine at the time of the inspection his hands would be within three and a half inches of the point of operation. (Tr. 207-9, 460-61.) Growney agreed that the operator's fingers would be "very close" or "right next to" the point of operation. (Tr. 664-666.) Mr. Lloyd largely corroborated this testimony, conceding that the operator's fingers come within two to two and a half inches of the point of operation. (Tr. 1684-86.) The proximity of the employees to the point of operation shows that they were exposed to a

hazard.[12] *Oberdorfer,* 20 BNA OSHC at 1328 (finding exposure to a hazard when employees had their hands three to eight inches from the unguarded parts); *Sheet Metal Specialty Co.*, 3 BNA OSHC 1104, 1105 (No. 5022, 1975) (finding exposure in connection with a violation of 29 C.F.R. § 1910.212(a)(3)(ii) when press brake operator positioned sheet in the die and held it within twelve inches of the point of operation).

Mr. Lloyd acknowledged that he knew the machine lacked any type of physical guarding to prevent access to the point of operation. (Tr. 1691-93.) He operated the machine himself after the accident and the lack of guarding was in plain view. (Tr. 210, 249-50, 1690.) *See Nordam Grp.,* 19 BNA OSHC 1413, 1417 (No. 99-0954, 2001) (finding knowledge when conditions were in plain view and supervisor was regularly in the area), *aff'd*, 37 F. App'x 959 (10th Cir. 2002) (unpublished). Additionally, Respondent was cited twice before for failing to guard the points of operation on machines, including press brakes. (Tr. 218, 256-58; Gov. Exs. 137, 153.)

b) Affirmative Defense of Infeasibility

While the parties agree that the Secretary made out a prima facie case, they disagree as to whether Respondent established the affirmative defense of infeasibility. This defense requires the employer to show, by a preponderance of evidence, 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. *See, e.g., Otis Elevator Co.*, 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *aff'd*, 762 F.3d 116 (D.C. Cir. 2014); *Faultless Div., Bliss & Laughlin Indus., Inc. v. Sec'y of Labor,* 674 F.2d 1177, 1189 (7th Cir. 1982) (finding Secretary did not

[12] The undersigned notes that there was also evidence that the Niagara Press Brake repeatedly malfunctioned. (Tr. 91, 1686-87; Gov. 278.) During some of these incidents, the machine continued to operate even when the pressure from the foot pedal was removed. (Tr. 91, 191-92.)

have to show feasibility of machine guarding); *E&R Erectors, Inc. v. Sec'y of Labor*, 107 F.3d 157, 163 (3d Cir. 1997) ("[t]he burden of establishing an affirmative defense is on the employer, and every element must be established"). The fact that compliance is difficult or expensive does not excuse compliance with standards. *State Sheet Metal Co*., 16 BNA OSHC 1155, 1160 (No. 90-1620, 1993) (consolidated) (rejecting defense); *Hughes Bros., Inc*., 6 BNA OSHC 1830, 1835 (No. 12523, 1978) (finding that difficulty of compliance did not defeat citation). Further, even if complete compliance is not possible, the employer must comply to the extent possible. *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. 1981); *Brock v. Dun-Par Engineered Form Co.,* 843 F.2d 1135, 1139 (8th Cir. 1988) (finding that the employer has the burden of showing both infeasibility and availability of reasonable alternative measures).

As to the first element of the defense—was compliance infeasible—Growney explained that the Niagara Press Brake could have been guarded with a restraint or pullback device, by utilizing two hand controls, or through the installation of a light curtain. (Tr. 668-9, 1014, 1039; Gov. Ex. 247.) The CO agreed that all of these guarding methods could have been used on the Niagara Press Brake. (Tr. 210-11, 216-18.) *Long Beach Container Terminal Inc. v. OSHRC*, 811 F.2d 477, 479 (9th Cir. 1987) (concluding that a workable method of abatement defeated defense); *Gregory & Cook Inc*., 17 BNA OSHC 1189, 1190-92 (No. 92-1891, 1995) (finding that defense failed when guarding was technologically and economically feasible).

Although Respondent suggests some limitations with each of Growney's guarding proposals, it never establishes that compliance was infeasible and certainly does not show that it complied to the extent possible. Taubitz expressed his belief that operator restraints and

pullback devices preclude employees from crossing their hands or turning all the way around.[13] (Ex. R. 34 at 21.) But Respondent never explained when these actions were necessary to complete the work. Likewise, Taubitz criticized pullback devices in general because they can require frequent adjustments. *Id.* However, employees only made two parts with the Niagara Press Brake. (Tr. 942, 961, 1684, 1693.) Employees did not use the machine for small quantity runs, and the size of the pieces being worked with changed infrequently. (Tr. 1684; Gov. Ex. 187 at 3.) Further, Growney explained that the whole course of action necessary for the work—turning, picking up material, inserting it, actuating the machine, adjusting the material and stacking it when complete— would not be inhibited by restraints.[14] (Tr. 1040; Gov. Ex. 247 at 20.) To the extent that there were any tasks other than these for which a restraint could not be used, Respondent still needed to guard the device for the tasks for which it was feasible, including the work done the day JE was injured. Accordingly, Respondent failed to satisfy either element of the defense and the violation is affirmed.

c) Characterization

It is undisputed that Respondent knew the requirements of the standard and knew that the Niagara Press Brake lacked guarding. However, Respondent claims it had a good faith belief it could make out the affirmative defense of infeasibility and that this belief precludes characterizing the violation as willful. It also asserts it was not plainly indifferent to employee safety.

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[13] Growney disputed that a pullback would preclude an operator from turning around but conceded that they did inhibit some employee movement as that was the purpose of the device. (Tr. 1008-9.)

[14] As discussed above, Growney's testimony about the feasibility of pullbacks for this machine is credited over Taubitz's testimony. (Gov. Ex. 247 at 20.)

A willful violation of the Act is one "done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements." *Bianchi Trison Corp. v. Chao,* 409 F.3d 196, 208 (3d Cir. 2005), quoting *Ensign-Bickford Co. v. OSHRC*, 587 F.2d 1419, 1422 (D.C. Cir. 1983). Critical to a finding of willfulness is the employer's state of mind. *See, e.g., Thomas Indus. Coatings, Inc.,* 23 BNA OSHC 2082, 2091-93 (No. 06-1542, 2012) (finding a violation willful when the employer knew about the standard's specific requirements and the conditions present). "[A]n employer's prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature." *MJP Constr. Co*., 19 BNA OSHC 1638, 1648 (No. 98-0502, 2001), *aff'd*, 56 F. App'x 1 (D.C. Cir. 2003) (unpublished); *Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1891 (No. 92-3684, 1997) (finding willfulness may depend on the totality of circumstances), *aff'd*, 131 F.3d 1254 (8th Cir. 1998). An employer's motive for failing to comply with the Act need not be evil or malicious. *Kaspar Wire Works, Inc.,* 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

Respondent has a long history with OSHA that should have made it well aware of the Act's requirement in general as well as the specific responsibility to guard points of operation. It has received eighty violations since 2000, including twenty willful violations and many violations of the same standard cited here, 29 C.F.R. § 1910.212. (Tr. 1489-90.) In 2002, after receiving a complaint, OSHA commenced an investigation that identified multiple serious point of operation guarding violations, including the failure to guard the point of operation on a press brake. (Tr. 1501-3; Gov. Ex. 124.) Three years later, following another employee complaint, Respondent was cited again for failing to guard the points of operation on various machines,

once again including a press brake.[15] (Tr. 1506, 1508; Gov. Exs. 129, 137.) These citations were resolved in 2006 through a settlement agreement (2006 Settlement Agreement). (Gov. Ex. 139.) This agreement included a promise by Respondent to ensure that "all machines" at its Facility "are properly guarded" as required by 29 C.F.R. § 1910.212(a)(3)(ii). (Gov. Ex. 139 at 10.)

But, Respondent persisted in its failure to abate the point of operation guarding issues and was cited again in 2008 for, among other things, failing to guard points of operation in violation of 29 C.F.R. § 1910.212(a)(3)(ii). (Tr. 1531-32; Gov. Ex. 153.) The 2008 citations were resolved by another settlement agreement (2009 Settlement Agreement). (Tr. 1533-34; Gov. Ex. 157.) OSHA Area Director Jean Kulp explained how OSHA wanted to bring the company into compliance so, the 2009 Settlement Agreement included a requirement to retain an independent consultant to conduct evaluations of the Facility, make recommendations, and provide written reports. (Tr. 1534-35; Gov. Ex. 157.) Consistent with its past, Respondent failed to comply with the 2009 Settlement Agreement. (Tr. 1536-37; Gov. Ex. 157 at 10.)

Respondent's history of citations for violating 29 C.F.R. § 1910.212(a)(3)(ii) gave it a "heightened awareness" of the need to guard points of operation on press brakes and supports the willful characterization. *Active Oil*, 21 BNA OSHC at 1098, 2004-09 (finding heightened awareness based on a previous citation and a written safety program); *A.J. McNulty & Co., Inc. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002) (noting that prior citations for similar violations may sustain a violation's classification as willful); *MJP*, 19 BNA OSHC at 1648 (stating that relevant considerations include prior history of violations and awareness of

[15] The 2002 citation refers to a "Chicago Press Brake" and the 2005 citation refers to the "Accurpress Model 7606, serial number 5251 press brake." (Gov. Exs. 124, 137.) The Niagara Press Brake that JE was injured on had not been previously cited. *Id.*

standard's requirements); *Anderson*, 17 BNA OSHC at 1892-93, 1995-97 (relying on history of recent citations for violations of the same standard as part of willful determination).

Violations are willful where an employer exhibits plain indifference with respect to the violative conditions themselves. *A.E. Staley Mfg. Co*., 295 F.3d 1341, 1350-53 (D.C. Cir. 2002). The Respondent was not only specifically aware of the standard, but it also knew that there was no guarding on the Niagara Press Brake. (Tr. 1691-92; Gov. Exs. 124, 137, 153.) Still, there was no attempt to guard, or even investigate the possibility of guarding the machine. (Tr. 252, 1658, 1691-93, 1941.) Mr. Lloyd's view that the Niagara Press Brake could not be guarded in any way was not the product of research or failed attempts at guarding. [16] (Tr. 252, 1684, 1691-93, 1941.) He did not get involved with training and delegated responsibility for safety to someone without evaluating that employee's knowledge or skill to be responsible for the task. (Tr. 1880.) Even after repeated citations, he neither reviewed any OSHA or ANSI machine guarding standards himself, nor hired a qualified safety and health professional to do so. (Tr. 1658, 1683-84.) Instead, despite no OSHA training, he relied on his own view of "what safe is." (Tr. 1683.) *See Conie Constr., Inc.,* 16 BNA OSHC 1870, 1872 (No. 92-0264, 1994) (finding violation willful when foreman substituted his own judgment for that of the standard), *aff'd,* 73

[16] Mr. Lloyd did not indicate he thought the machine was compliant—his assertion was that he did not believe the machine could be guarded. (Tr. 1692.) Certainly, by the time of the hearing, Mr. Lloyd understood that OSHA might not view the machine as compliant as he said he disposed of it to avoid further citation. *Id.*

F.3d 382 (D.C. Cir. 1995). In short, Mr. Lloyd's belief about the feasibility of guarding was not objectively reasonable.[17]

Mr. Lloyd's response to a severe injury suffered on the Niagara Press Brake is indicative of his indifference to safety. (Sec'y Br. at 15.) After an employee's fingers were crushed, Mr. Lloyd did not ask him how the accident occurred or speak to anyone who witnessed it. (Tr. 1697-99.) He assumed the accident was the result of operator error and allowed other employees to use the machine the same day.[18] (Tr. 1071, 1102, 1697.) He did this even though he was aware that the machine sometimes malfunctioned before the accident occurred. (Tr. 1686-88.) Similar to the present matter, in *A. Schonbek & Co., Inc.*, 9 BNA OSHC 1189 (No. 76-3980, 1980), an employee's fingers were partially amputated while he used a power press. 9 BNA OSHC at 1190-91, *aff'd,* 646 F.2d 799 (2d Cir. 1981). The employer undertook an investigation and determined that the machine had not malfunctioned at the time of the accident. *Id.* It then decided to add a barrier guard only to the machine on which the employee was injured. *Id.* The

[17] Respondent also cites OSHA Instruction CPL 02-01.025, February 14, 1997 (hereafter, "Press Brake Guidance") and claims that this document shows that Mr. Lloyd's personal belief "aligned with OSHA's." (Resp't Br. at 34.) Respondent withdrew its request to admit the Press Brake Guidance and does not request that the undersigned take judicial notice of it. (Tr. 563-65.) Neither Taubitz, nor Mr. Lloyd, nor any other employee indicated they read or relied on the Press Brake Guidance. (Ex. R-34 at 32.) In any event, even if the undersigned were to find it appropriate to consider the Press Brake Guidance, it does not support Respondent's position. The Press Brake Guidance suggests that when physical guarding is infeasible, for small quantity runs, guarding by location may be sufficient on a limited basis and only when alternative safety measures are taken. The Niagara Press Brake was always unguarded regardless of the part being made and Respondent failed to show that guarding was infeasible for any function, let alone every one. (Tr. 554, 1014; Gov. Ex. 247.) Moreover, although Respondent claims it took all necessary precautions, it fails to point to record evidence that it fulfilled the requirements the Press Brake Guidance sets out.

[18] The undersigned notes that the same malfunction the injured employee said happened when he was operating the Niagara Press Brake was also observed by the CO during the inspection when Mr. Lloyd operated it. (Gov. Ex. 278.)

Commission concluded that failing to take action with respect to other similar machines amounted to careless disregard for employee safety.[19] *Id.* at 1191. Here, Mr. Lloyd did not even undertake the investigation. He simply fired the injured employee and directed other employees to continue to use the machine. Plain indifference is established by an employer's failure to take appropriate corrective action despite actual knowledge that a dangerous condition exists.[20] *Nat'l Eng'g & Contracting Co*., 18 BNA OSHC 1075, 1080-81 (No. 94-2787, 1997), *aff'd*, 181 F.3d 715 (6th Cir. 1999); *Valdak Corp*., 17 BNA OSHC 1135, 1139 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir.1996).

Mr. Lloyd's claimed good faith belief that the Niagara Press Brake was compliant is rejected. *See McNulty,* 283 F.3d at 338-39 (upholding violation as willful and rejecting claims that belief in an affirmative defense and reliance on ALJ decisions gave the employer a good faith belief it was complying). Respondent acted recklessly by disregarding the requirements of Act and directing employees to continue to use an unguarded machine with a history of malfunctions. *See Kaspar,* 18 BNA OSHC at 2181-82.

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[19] The Secretary also presented evidence about Mr. Lloyd's view of employee safety and the Act's requirements. *See A. E. Staley Mfg. Co*., 19 BNA OSHC 1199, 1202-3 (No. 91-0637, 2000) (consolidated) (finding willfulness established by showing plain indifference), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002). In 2005, following the issuance of several citations, Mr. Lloyd candidly informed Ms. Kulp that he would not allow OSHA to enter his Facility. (Tr. 1508.) He was also uncooperative at the start of the 2008 inspection. (Tr. 1526-27.) Mr. Lloyd believes OSHA should not tell him what to do. (Tr. 1463; Gov. Ex. 145.)

[20] Respondent's failure to take any action despite a heightened awareness of the cited standard distinguishes this violation from the situation the D.C. Circuit confronted in *Dayton Tire v. Sec'y of Labor,* 671 F.3d 1249 (D.C. Cir. 2012).

d) Penalty Amount

When setting the penalty amount, the Act requires consideration of the violation's gravity and the employer's size, history, and good faith. 29 U.S.C. § 666(j). The Secretary proposes a penalty of $70,000.[21] The CO indicated that the violation had a high gravity due to the seriousness of injuries that can, and in the case of one employee did, occur. (Tr. 220-21; Gov. Ex. 187.) In terms of size, between fifty and seventy employees work at the Facility, and there are approximately 42 additional workers at other locations. (Tr. 1577, 1599, 1637, 1837, 2480.) While this size could support a penalty reduction, the undersigned finds that the evidence relating to gravity, history, and lack of good faith outweighs the size factor. *See Orion Constr. Co., Inc.,* 18 BNA OSHC 1867, 1868 (No. 98-2014, 1999) (giving less weight to the size and history factors); *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994) (finding that while gravity is normally the primary factor, a "substantial history of prior violations may skew the importance of gravity"). As noted above, Respondent has an extensive history with OSHA including prior citations of the same standard and related to the same type of machine. Similarly, for the same reasons that the willful characterization is appropriate, the undersigned finds that the record does not support a reduction in the penalty amount. Accordingly, a penalty of $70,000 is appropriate for Citation 2, Item 2.

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[21] The Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015) granted OSHA the ability to increase the statutory minimum and maximum penalties for violations of the Act. OSHA has exercised this authority but the revised penalties apply only to violations occurring after November 2, 2015. 81 Fed. Reg. 43430 (July 1, 2016); 29 C.F.R. § 1903.15(d). All of the violations in the instant matter occurred prior to November 2, 2015, so the statutory maximum applicable here is $7,000 for serious violations and $70,000 for willful or repeat violations. 29 U.S.C. § 666(a-b). For the same reason, the statutory minimum for each willful violation presently before the undersigned is $5,000. *Id.*; 29 C.F.R. § 1903.15(d).

2. Citation 2, Item 3 - Accurpress

a) Violation

Citation 2, Item 3 alleges that Respondent willfully violated 29 C.F.R. § 1910.212(a)(3)(ii) by failing to guard the point of operation on the Accurpress, a hydraulic press brake. There is no dispute that the point of operation lacks the required guarding. However, Respondent argues it was denied due process because the machine was not cited in prior inspections and contests the violation's characterization as willful. (Resp't Br. at 38-44.)

The Accurpress' point of operation is where a ram descends and pushes metal down into the die to bend it. (Tr. 243, 684-6; Gov. Ex. 267.) The CO observed and filmed an employee operating the Accurpress during the inspection. (Tr. 687-8; Gov. Ex. 267.) This employee indicated that he used the machine at least two hours per day. (Tr. 1701.) The CO explained that the operator's fingers come within a half inch of the point of operation. (Tr. 243-44; Gov. Exs. 21, 267.)

The testimony from the CO and Growney, along with the videographic evidence, show a hazard and exposure. (Gov. Exs. 21, 247, 267.) The Commission has never required an operator's hands to be placed within the point of operation to find a violation. *See, e.g., Mayhew Steel Prods., Inc.,* 8 BNA OSHC 1919, 1920 (No. 77-3970, 1980) (rejecting the argument that there was no hazard because employees did not place hands or fingers in point of operation). Indeed, the Commission has upheld violations of the cited standard even when employees' hands were much further away from the point of operation. *See, e.g., Sheet Metal*, 3 BNA OSHC at 1105 (finding a violation when press brake operator's hands were twelve inches from the point of operation.) The lack of any physical device preventing the operator's fingers from entering the point of operation violates the cited standard. (Tr. 248-9, 687.)

Mr. Lloyd observed an employee operate the machine and also operated it himself. (Tr. 252, 1641.) He knew that the work brought employees extremely close to the point of operation when they were not using the two hand controls.[22] (Tr. 1701-3.) The employee the CO observed operating the Accurpress was working in a manner compliant with company policy. (Tr. 1702-3; Gov. Ex. 21.) Mr. Lloyd confirmed this observation, indicating that the employee was operating the machine correctly, even when his fingers were right next to the point of operation. *Id.* Mr. Lloyd was aware of the risks to employees. (Tr. 1701-3.) He knew that an error could lead to crushed fingers. *Id.* Thus, the Secretary made out his prima facie case.

b) Infeasibility Defense

In challenging the characterization, Respondent alleges that it reasonably believed guarding was infeasible when the Accurpress was used for certain parts. (Resp't Br. at 40-43.) However, Respondent does not contend its belief satisfies the requirements of the affirmative defense. *Id.* In any event, the undersigned finds that guarding was feasible and therefore, had Respondent appropriately raised the defense it would have been rejected.

The Accurpress was already equipped with two methods of guarding. (Tr. 687-91, 845-6; Gov. Exs. 29A, 247, 274A.) Rather than using the foot pedal, it could be operated with the two hand control buttons or by using a feature on the machine called two hands down, foot through. (Tr. 690, 1018-20; Gov. Ex. 247.) Growney was not aware of any reason why these features

[22] Respondent does not allege it had a work rule, much less an enforced one, requiring the use of two hand controls. The employee who frequently operated the Accurpress said he was told to use the two hand controls depending on the size of the piece he was working with. (Tr. 2120, 2123, 2132-33, 2139.) But, the supervisor did not tell Respondent's expert that two hand controls were ever used. (Tr. 2531, 2638-39.) Similarly, Mr. Lloyd saw nothing wrong when an employee operated the machine with foot pedal instead of the two hand controls. (Tr. 1702-3; Gov. Exs. 21, 267.) Growney believed that either the two hand controls or the two down, foot through method of guarding could be used for all parts worked on with the machine. (Tr. 690.)

could not be used for Respondent's operations. *Id.* In addition, Growney explained that a pullback device or light curtain could be added.[23] *Id.*

Mr. Lloyd knew that the machine had two hand controls and even understood how these controls could prevent injury. (Tr. 1702-5, 2131.) Employees used the machine exclusively to make one type of bend in the metal. (Tr. 1700, 1806.) Besides the existing guarding, the Accurpress could have been equipped with an additional guard capable of stopping the operating cycle if a part of the operator's body "breaks" a light beam. In fact, Respondent did equip the Accurpress with this type of additional guard after the inspection. (Tr. 253-55, 842-46, 1934, Gov. Ex. 274.) This guard does not inhibit work with the machine, further demonstrating the feasibility of guarding. (Tr. 1703-4, 2120, 2137.)

c) Notice – Due Process Claim

As noted above, OSHA repeatedly inspected the Facility. In 2005, the Respondent received a citation for failing to guard the point of operation on an Accurpress brand press brake. (Gov. Ex. 137.) While the machine cited in 2005 was the same model of the press brake cited in the most recent inspection, it was not the exact same machine.[24] (Tr. 257.) Respondent resolved

[23] As discussed above, Growney's opinion is credited over Taubitz's on the feasibility of guarding. Besides the reasons already noted for crediting Growney over Taubitz, there are others applicable to this violation. First, Taubitz was not aware that the Accurpress had two hand controls before the inspection. (Tr. 2637.) Second, his conclusions about when employees were at risk was based on what he was told the work process was, not how the employee actually performed the work or the video taken at the time of the inspection. (Tr. 2645.) Third, the machine operator indicated that he could make all the parts he needed while the laser guard was in place. (Tr. 2136.) Mr. Lloyd corroborated that the laser guard did not need to be adjusted for the work done on the cited Accurpress. (Tr. 1884.)

[24] Mr. Lloyd indicated that there are four or five Accurpress brand press brakes at the Facility that are the same model as the one cited. (Tr. 1699; Ex. R-27.) It is unclear if the exact same machines were present during the prior inspections.

this citation, along with several others, by entering into the 2006 Settlement Agreement. (Tr. 1519-21; Gov. Ex. 139.) As part of this agreement, Respondent agreed to ensure every machine had point of operation guarding and to submit information about its abatement efforts, including how it addressed the point of operation guarding on the cited press brake. (Gov. Ex. 139.) In 2008, Respondent submitted a letter to OSHA stating that it was "in compliance" with the 2006 Settlement Agreement but did not provide any details. (Gov. Ex. 231.) Partially because it viewed Respondent's submission to be lacking, OSHA arranged for an inspection at the Facility. (Tr. 1525-26.) This inspection identified several violations, including failure to guard "[p]oint(s) of operation of machinery" in violation of 29 C.F.R. § 1910.212(a)(3)(ii). (Gov. Ex. 153 at 7.) But, the citation does not refer explicitly to any of the Accurpress brand press brakes. *Id.*

Respondent contends that because it did not subsequently receive any citations for the Accurpress brand press brake as a result of the 2008 inspection, it rightfully believed its use of the machine was appropriate. (Resp't Br. at 38.) It makes a similar argument in connection with Items 4, 5, and 7 of Citation 2. For the reasons set forth below, the undersigned finds that Respondent had fair notice of its obligations and was not deprived of due process.

First, there is no suggestion that any of the cited standards were invalidly promulgated, not published in Code of Federal Regulations (CFR), or unconstitutionally vague. *See Faultless*, 674 F.2d at 1186 (construing machine guarding requirement as "sufficiently specific ... to reasonably apprise [the employer] in clear terms" of conduct the standard requires). Second, there is no contention that the citation failed to give adequate notice. *Cf. Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256 (3d Cir. 2002) (finding failure to abate notification lacked sufficient particularity).

Third, the failure to cite a condition in one inspection does not preclude citing the condition in a subsequent inspection.[25] *Columbian Art Works, Inc.,* 10 BNA OSHC 1132, 1133 (No. 78-29, 1981) (holding that failure to cite in past inspection did not result in immunity to cite for failure to guard as required by § 1910.212(a)(3)(iii)); *Lukens Steel Co.,* 10 BNA OSHC 1115, 1126 (No. 76-1053, 1981) (finding a violation of the personal protective equipment standard willful and noting that the "Secretary's failure to cite conditions … during earlier inspection does not 'exculpate' the Respondent or preclude a finding that the violation … was willful"); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1223-24 (No. 88-821, 1991) (finding that prior inspections neither "give rise to an inference that OSHA made an earlier decision that there was no hazard" nor "preclude the Secretary from pursuing a later citation").

The Accurpress had two hand controls and a programmable ram speed. (Tr. 1702-5.) Neither of these safety features was being used when the CO observed an employee working at the machine in 2014. (Tr. 693-94.) There is no evidence about how (or even if) an Accurpress was in use when OSHA employees were eventually allowed into the Facility to conduct their inspection in 2008. (Tr. 1205, 1526-28.) Without evidence of similar conditions, the undersigned cannot determine why an Accurpress model press brake was not cited in 2008.

[25] For example, in this matter, the CO indicated that he did not recommend a citation for Respondent's Connecticut Press Brake as it did not appear to be in use at the time of his inspection and employee interviews did not indicate exposure. (Tr. 250-51.) This does not suggest that he found the Connecticut Press Brake compliant. Likewise, although the foot pedal on the 1R10 machine was not initially cited, the Secretary subsequently argued it represented a violation. While the undersigned does not believe amending the citation is appropriate, this does not preclude citation of the 1R10 in the future.

Finally, and arguably most significantly, OSHA never told Respondent that the machine did not require guarding or that employees did not have to use the existing guarding.[26] *See Fluor Daniel v. OSHRC,* 295 F.3d 1232, 1238 (11th Cir. 2002) (concluding that lack of citations in previous inspections is insufficient to establish the absence of fair notice unless OSHA specifically reviews and approves conditions); *Gen. Dynamics Land Sys. Div., Inc*., 15 BNA OSHC 1275, 1285 (No. 83-1293, 1991) (holding that past failure to cite does not preclude finding knowledge). Indeed, the 2009 Settlement Agreement explicitly requires Respondent to retain an independent consultant to evaluate the company's compliance with § 1910.212(a)(3) across the Facility, not just on the cited machines. (Gov. Ex. 157 at 8-9.)

Due process requires only that the employer receive a "fair and reasonable warning; it does not demand that the employer be *actually aware* that the regulation is applicable … ." *Am. Bridge Co.,* 17 BNA OSHC 1169, 1172 (No. 92-0959, 1995) (emphasis in original). The standard provided sufficient notice of the guarding requirement. The past inspections do not preclude the current citation. *Buckeye Indus., Inc*., 3 BNA OSHC 1837, 1840 n.3 (No. 8454, 1975) (finding that § 1910.212(a)(3)(ii) provided adequate notice "of what is expected in the way

[26] Respondent cites to *Trinity Marine Nashville, Inc. v. OSHRC,* 275 F.3d 423 (5th Cir. 2001), where the Fifth Circuit found that because OSHA ultimately withdrew a citation related to an electrical box, the company had a fair expectation that the box was satisfactory. (Resp't Br. at 39-40.) The present situation is distinguishable because OSHA never withdrew a citation related to the Accurpress nor is there evidence OSHA affirmatively approved the equipment. *See Austin Indus. Specialty Servs., L.P. v. OSHRC*, 765 F.3d 434 (5th Cir. 2014) (finding fair notice when nothing in OSHA report indicated a particular procedure was satisfactory). Respondent also attempts to rely on *Miami Industries., Inc*., 15 BNA OSHC 1258, 1263 (No. 88-671, 1991), *aff'd in relevant part*, 983 F.2d 1067 (6th Cir. 1992). *Miami Industries* concerns a more broadly worded provision of the guarding standard than the one at issue here. 15 BNA OSHC at 1263. Because that provision, 29 C.F.R. § 1910.212(a)(1), is so broadly worded, statements by OSHA personnel can affect the employer's notice of its obligations. *Id.* Not only is the provision at issue here different, so too are other facts. Miami Industries was told that its approach was acceptable and there was a long pattern of conduct by the Area Office that made reliance on that statement reasonable. *Id.*

of guarding"), *aff'd,* 587 F.2d 231 (5th Cir. 1979); *A. Schonbek.,* 9 BNA OSHC at 1190 (upholding willful violation even though past inspection only cited the lack of point of operation guarding on a different machine); *Omaha Paper Stock Co.*, 19 BNA OSHC 1584, 1591 n.16 (No. 99-0353, 2001) (finding that the standard itself provided the employer with the "fair notice" required), *aff'd*, 304 F.3d 779 (8th Cir. 2002).

d) Characterization

"Proof of willfulness … requires proof only that defendant was aware of risk, knew that it was serious, and knew he could take effective measures to avoid it, but did not; in short, that he was reckless in the most commonly understood sense of word." *Dukane Precast, Inc. v. Perez,* 785 F.3d 252, 256 (7th Cir. 2015), citing *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004); *Valdak Corp. v. OSHRC*, 73 F.3d 1466, 1468–69 (8th Cir. 1996). Here, Respondent knew about the standard's requirements and its applicability to the Accurpress. It also knew that its employees improperly operated these machines without using the guarding. As a result, Respondent knew about the risk the failure to use the guarding created for employees. (Tr. 1701-5, 2139-40; Gov. Exs. 124, 128, 137, 139 at 10, 148 at 1-3, 157 at 9.) It is incumbent on employers to be aware of the requirements of the Act. Deliberate blindness to dangerous conditions or the Act's requirements does not preclude a finding of willfulness. *A.E. Staley*, 295 F.3d at 1353; *A.G. Mazzocchi, Inc*., 22 BNA OSHC 1377, 1388 (No. 98-1696, 2008) (finding that a violation can be willful even without proof of actual knowledge that action violated the Act).

Without addressing the machine's two hand controls, Respondent argues it had a good faith reasonable belief that guarding was infeasible because OSHA allowed the Accurpress to be operated without a physical guarding device. It bases this belief on the fact that the machine was

cited in 2005, but not as a result of the 2008 inspection. (Resp't Br. at 41.) However, the record shows that the machine was equipped with two hand controls, which Growney explained would keep an operator from having any part of his or her body in the danger zone during the operating cycle. (Gov. Ex. 247.) Thus, the machine was equipped with a compliant guarding device.[27] *See Fluor Daniel,* 295 F.3d at 1238-40 (finding that past inspection did not preclude finding violation willful); *Gen. Dynamics*, 15 BNA OSHC at 1285 (same). The violation is as a result of the machine being used without the guarding during the inspection. The citation did not result from some misunderstanding about the feasibility of guarding. It is the result of a failure to require the use of existing guarding. There is no indication that OSHA told Respondent that employees did not need to use the machine's guarding features or that its use of the Accurpress was compliant.[28] Moreover, neither Mr. Lloyd, nor any other employee, indicated that he or she believed that the machine's use was compliant because it was cited in 2005, but not 2008.[29]

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[27] In *Kaspar Wire Works*, OSHA repeatedly inspected an employer's injury records without issuing citations. 18 BNA OSHC at 2183. At some point, the employer changed its records keeping policies and thus the prior failure to cite did not preclude finding the violation willful. *Id.* at 2184. Here, there is no evidence that conditions at the Facility were the same in 2008 as they were during the most recent inspection.

[28] In its brief, Respondent alleges that OSHA "informed" it that the affirmative steps it took after the prior inspection were sufficient. (Resp't Br. at 43.) In fact, there is no evidence that OSHA ever informed Respondent that any changes it allegedly made were sufficient. (Tr. 252.) On the contrary, the settlement agreement reached after the 2008 inspection required several compliance related actions to be taken. (Gov. Ex. 157.)

[29] According to the CO, during the inspection, Mr. Lloyd expressed his view that it was not feasible to guard the Accurpress. (Tr. 252.) But, considering the machine had two hand controls, it's not clear what Mr. Lloyd meant by this. The only suggestion of Lloyd's belief about compliance is that when the undersigned asked Mr. Lloyd why he failed to be more proactive about health and safety, he indicated, without elaboration, that it was because he received "mixed messages" from OSHA. (Tr. 1729.)

Respondent also alleges that its "good faith response" to the latest citation "militates against a finding of willfulness.[30] (Resp't Br. at 43, citing *Access Equip. Sys. Inc.*, 18 BNA OSHC 1718 (No. 95-1449, 1999).) In *Access Equipment*, the employer took certain steps as result of past violation of the same standard. 18 BNA OSHC at 1727. The Commission declined to reach the parties arguments about the past corrective measures but noted in *dicta* that even if it were to consider the actions they would weigh against willfulness. *Id.* at 1728. Ultimately, relying on a number of factors, including the prompt remedial action taken, the Commission concluded that the violation was not willful. *Id.*

Here, Respondent not only knew about the standard, but it also knew that the standard applied to the Accurpress. Respondent's decision to add a third type of guarding after being cited for the exact same type of machine a second time does not explain its failure to require the use of the existing guarding before the inspection.[31] (Tr. 252; Gov. Ex. 137.) Had Respondent instructed employees to consistently use the two hand controls or the two down foot through feature, the undersigned may have reached different conclusions. (Tr. 690-91, 1018, 1020.)

Plain indifference is present when the employer possesses a state of mind such that if it had been informed of the standard it would not have cared. *Johnson Controls, Inc.*, 16 BNA OSHC 1048, 1051 (No. 90-2179, 1993) (affirming violation as willful). Respondent was well informed that all of its machines, including the Accurpress model press brakes, needed point of operation guarding. It was equally well informed that the existing guarding was not being used.

[30]"Good faith" is considered as part of the penalty analysis. 29 U.S.C. § 666(j).

[31] The undersigned notes that during the inspection Mr. Lloyd did not indicate that the Accurpress had been re-programmed or was being operated in some way so as to minimize injury. (Tr. 252.) But, even assuming that employees consistently used a slower ram speed setting, this would go only to the probability of an injury, which is a part of the gravity analysis, not characterization.

Any claimed belief that guarding was infeasible is not objectively reasonable.[32] *MJP*, 19 BNA OSHC at 1648.

e) Penalty Amount

The Secretary proposes a penalty of $70,000. The CO indicated that the violation had a high gravity due to the seriousness of injuries that can occur and the frequency of the machine's use. (Tr. 258; Gov. Ex. 187.) As with Citation 2, Item 2, although Respondent employs about 100 people, the undersigned finds that the size factor is outweighed by the evidence relating the gravity, history, and lack of good faith. *See Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994) (giving more weight to history); *Orion,* 18 BNA OSHC at 1868 (giving less weight to the size). Respondent has an extensive history with OSHA including prior citations of the same standard for the same type of machine. Similarly, for the same reasons that the willful characterization is appropriate, the record does not support a reduction in penalty amount. Accordingly, a penalty of $70,000 is appropriate for Citation 2, Item 3.

[32] Respondent also argues that the Press Brake Guidance supports its position. (Resp't Br. at 41.) As noted above, this document was not admitted into evidence or relied on by the experts. In any event, the undersigned finds that it has limited relevance to the circumstances present at the Facility and does not undermine the Secretary's evidence of willfulness. *See McNulty*, 283 F.3d at 338 (willful characterization appropriate when company did not have a good faith belief that it had an infeasibility defense). For example, the Press Brake Guidance requires physical barriers or devices whenever feasible. *See* Press Brake Guidance, ¶¶ D, 5. Growney explained that multiple different methods of guarding were feasible, including two methods that did not require any machine modifications. (Tr. 690, 1018-20; Gov. Ex. 247.) Nor does Respondent claim that the conditions under which the Press Brake Guidance suggests that alternatives to physical guarding devices might be acceptable were present. *See* Press Brake Guidance, ¶¶ D, E-K.

3. Citation 2, Item 4- Niagara 18 shear

a) Violation

Citation 2, Item 4 alleges another willful violation of § 1910.212(a)(3)(ii) for failing to guard the point of operation on the Niagara 18 shear, a machine used to cut sheet metal. (Tr. 261; Gov. Ex. 30-32.) To use the Niagara 18 shear, the operator places the sheet metal on a table and then slides it towards the blades. When the operator steps on a foot pedal, a number of vertical cylinders, or "hold down pins," descend and keep the metal in place while a blade makes the cuts. (Tr. 261-65, 271-72, 847-49; Gov. Ex. 30 A, 36A, 37A, 264.) There are two points of operation on the machine: (1) the area where the blade cuts the metal, and (2) the area underneath the hold down pins. (Tr. 266, 273, 847-50; Gov. Exs. 37A, 38A.) Respondent does not dispute that these areas lacked compliant guarding. (Resp't Br. at 44-45.) Rather, it claims that the Secretary did not show exposure and that any citation for the lack of guarding would violate its due process rights. *Id.*

The Niagara 18 shear has metal grating in front of its blades.[33] (Gov. Exs. 33, 37A, 38.) But, the grating is not sufficient to prevent an operator's fingers from entering the point of operation. There is a gap of more than half an inch between the table on which the operator places the metal and the bottom of the grate. (Tr. 266-68, 858-62.) This makes it possible for an employee's fingers to go into the point of operation. *Id.* Thus, while the grating likely precluded an entire hand from being in the point of operation, it was not sufficient because the standard requires guarding capable of preventing any part of the body from entering the point of

[33] Respondent notes this guarding but does not contend that it meets the standard's requirements. (Resp't Br. at 11, 44-45.)

operation. 29 C.F.R. § 1910.212(a)(3)(ii). *See A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991) (noting that partial compliance does not preclude finding a violation).

Further, the grating offered no protection for the point of operation located underneath the hold down pins. (Tr. 267-69; 272-3; 850-1, 866-72.) The distance between the table and the hold down pins was more than 3/8 of an inch. (Tr. 269, 850-51; 866-72; Gov. Ex. 33.) JE testified that on one occasion the hold down pins missed crushing his fingers only "by a hair." (Tr. 68-70.) The unguarded points of operation represented a hazard and Respondent failed to comply with the standard's requirements.

As for exposure, the CO observed an employee operating the Niagara 18 shear during the inspection and an employee indicated that he operates the machine for two to three hours every day. (Tr. 261, 1716-17; Gov. Ex. 30-32.) Mr. Lloyd himself used the Niagara 18 shear and also observed other employees doing so. (Tr. 1717.)

Respondent argues that this is insufficient to show exposure because the employee the CO observed maintained a distance of six inches from the point of operation. (Tr. 271; Gov. Ex. 30; Resp't Br. at 44-45.) While the Commission has occasionally held that employees were too far from a point of operation for there to be exposure, neither the parties, nor the undersigned, has identified any case where the facts are analogous to the ones in this matter—the operator's fingers coming within six inches of an unguarded point of operation while working with materials of a narrow dimension. *Compare Oberdorfer,* 20 BNA OSHC at 1328 (finding exposure when employees' hands were three to eight inches from unguarded parts) *with Jefferson Smurfit,* 15 BNA OSHC 1419, 1421 (No. 89-553, 1991) (concluding there was no exposure when employees never got closer than 16 inches to an in-running nip point).

In claiming that there was no exposure, Respondent relies on a case where the Commission found there was no hazard or exposure. (Resp't Br. at 45 discussing *Buffets, Inc.,* 21 BNA OSHC 1065 (No. 03-2097, 2005).) In *Buffets*, the Secretary alleged that the employee's fingers could come within 10 inches of a moving part but did not explain how they could get any closer than that. 21 BNA OSHC at 1067 (discussing how it would be difficult for employees to depart from the distance of ten inches because of the containers they were using). *See also Armour Food*, 14 BNA OSHC at 1824 (finding no hazard when employees had no reason to put hands in the area near the mixing blades and it was difficult to do so). In contrast, the fingers of Respondent's employee came very close to the point of operation during the inspection and JE explained how a worker's hands could enter the point of operation because nothing inhibited direct contact.[34] (Tr. 69-70, 271; Gov. Ex. 30.) How the Niagara 18 shear functions and the way it is operated at the facility exposed employees to a hazard.[35] *See Fabricated Metal*, 18 BNA OSHC at 1074 (concluding that there is if "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").

[34] The judge in *Buffets* stated that the evidence presented by the Secretary was "exceedingly sparse," and the Commission noted that the compliance officer in that case failed to take any measurements to determine the possibility of exposure. 21 BNA OSHC at 1066. The record here is not lacking as the one in *Buffets*.

[35] Respondent seeks to conflate exposure with the probability of injury. (Resp't Br. at 44-45.) However, the probability of injury is examined in connection when assessing the gravity of a violation for penalty purposes. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993). In contrast, exposure turns on access to a violative condition. *See, e.g., Tube-Lok Prods.,* 9 BNA OSHC 1369, 1374 (No. 16200, 1981) (finding exposure in connection with a violation of 29 C.F.R. § 1910.212(a)(3)(ii) even though the possibility of an incident was low); *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996.)

The Secretary also satisfied the knowledge requirement. Mr. Lloyd used the Niagara 18 shear himself and knew that there was no physical guard between the operator and the hold down pins. (Tr. 1717-18.) He also knew that the grating did not offer any protection from one of the points of operation. (Tr. 1717.)

Respondent's final argument relates to an alleged lack of notice about the standard's requirements. (Resp't Br. at 45-46.) As a threshold matter, OSHA properly promulgated the standard and that it is accurately published in the CFR. 29 C.F.R. § 1910.212. Upon receiving the citation, Respondent suggests that it was not provided with sufficient notice because OSHA inspected the Facility in 2002 and 2005, but, on those occasions, did not issue citations specifically referring to either the Niagara 18 shear or the 1R10 shear.

Consistent with the discussion above regarding Citation 2, Item 3, the undersigned finds that Respondent received sufficient fair notice of the regulation and its requirements. *See, e.g., Simplex Time Recorder Co*., 12 BNA OSHC 1591, 1596 (No. 82-12, 1985) (upholding citation despite nine previous OSHA inspections when the condition was not cited), *aff'd in pertinent part,* 766 F.2d 575 (D.C. Cir. 1985); *Seibel,* 15 BNA OSHC at 1225 (noting that an employer cannot deny the existence of or its knowledge of a hazard by relying on the Secretary's earlier failure to cite the condition). There is no evidence that OSHA ever told Respondent that the Niagara 18 shear or the 1R10 shear were compliant.[36] *See Fluor Daniel,* 295 F.3d at 1238 (finding that there was no lack of fair notice even though past inspection dealt with the same type of equipment). Nor is there evidence that the machines were in use in the same manner as they

[36] The undersigned notes that Lloyd claimed that despite signing it, he never read the 2006 Settlement Agreement. (Tr. 1673-74.) Such an assertion is contrary to finding that anything in the 2006 Settlement Agreement led him to sincerely believe that the machine guarding requirements were not applicable to machines in the Facility.

are currently being used in the prior inspections. The standard provides "fair and reasonable warning," of the requirements. *Buckeye*, 3 BNA OSHC at n. 3. Even after accepting Respondent's argument that Mr. Lloyd was not actually aware of the violative condition, this is not a valid defense to the citation.[37] *See, e.g., Am. Luggage,* 10 BNA OSHC at 1682-83.

b) Characterization

To support a willful characterization the Secretary must show the violation was committed with intentional disregard or demonstrated plain indifference. *MJP*, 19 BNA OSHC at 1647. As stated before, assessing the employer's state of mind requires consideration of a number of factors. *Id.*

Respondent, having been repeatedly cited for violating 29 C.F.R. § 1910.212(a)(3), was aware of the standard and its requirements.[38] (Tr. 1489-90, 1545-47.) However, unlike the Niagara Press Brake, which lacked any type of guarding, or the Accurpress where the guarding features were not being used, the Niagara 18 shear has a permanently attached grating that consistently provided some protection to employees. (Gov. Exs. 33, 37, 45.) This grating did not protect employees to the extent required, but represents some meaningful effort at compliance. *See Dayton Tire v. Sec'y of Labor,* 671 F.3d 1249, 1255 (D.C. Cir. 2012)

[37] Respondent does not pursue the affirmative defense of infeasibility for Citation 2, Item 4 or Citation 2, Item 5. It is undisputed that a barrier guard could have been installed between the operator and the hold down pins that would have prevented the operator's fingers from entering into either point of operation. (Tr. 275-76, 873-74, 1718-19; Gov. Exs. 39, 40.) Indeed, Respondent installed guards after the inspection and Mr. Lloyd acknowledged that they provide additional protection for employees. *Id.* Thus, Respondent cannot meet the burden of the affirmative defense of infeasibility. *See Otis*, 24 BNA OSHC at 1087.

[38] Although the shear machines were not previously cited, the 2005 Settlement Agreement as well as the 2009 Settlement Agreement certainly put Respondent on notice of the standard's applicability to all of the Facility's machines. (Gov. Exs. 139 at 4; 157 at 9.)

(concluding that some effort at compliance was sufficient to rebut finding of willfulness); *Am. Wrecking Corp. v. Sec'y of Labor,* 351 F.3d 1254, 1263 (D.C. Cir. 2003) (determining that violation was not willful when company made a "good faith effort to comply with a standard or eliminate a hazard"). Respondent also took prompt action after the citation to address the violation. *See Access Equip*., 18 BNA OSHC at 1728 (considering the employer's response to the violation when evaluating willfulness). Accordingly, the Secretary failed to meet his burden on willfulness.

c) Penalty Amount

Although the violation was not willful, the Secretary established that it was serious because death or serious physical harm could result from the lack of guarding.[39] In terms of the penalty amount, the Secretary proposed a penalty of $70,000. Because the violation is affirmed as serious instead of willful, the maximum penalty that can be imposed is $7,000. 29 U.S.C. § 666(j). The CO indicated that the violation had a high gravity due to the seriousness of injuries that can occur and the frequency of the machine's use. (Tr. 285-87; Gov. Ex. 189.) Respondent has an extensive history with OSHA, including past violations for failure to guard points of operation on machinery. (Tr. 1489-90, 1545-47.) This history also undermines Respondent's claims about acting in good faith. *See Quality Stamping*, 16 BNA OSHC at 1929 (noting the importance of history when there are a number of violations). Respondent failed to abide by past agreements with OSHA to guard all machines at the Facility. It has not demonstrated concern for employee safety such that a reduction for good faith is appropriate. *See Valdak*, 17 BNA OSHC at 1139 (giving no good faith credit when employer had cavalier attitude about employee

[39] In his Complaint, the Secretary alleged that each of the "willful" violations were also "serious" within the meaning of the Act.

safety). As with the other violations, while Respondent's size could support a penalty reduction, the undersigned finds that the evidence relating to gravity, history, and lack of good faith outweighs giving a reduction for size. *Orion,* 18 BNA OSHC at 1868 (giving less weight to the size factor). Accordingly, a penalty of $7,000 is appropriate for Citation 2, Item 4.

4. Citation 2, Item 5 – 1R10 shear

a) Violation

Citation 2, Item 5 alleges a similar violation to Citation 2, Item 4, but relates to a different shear machine: the 1R10 shear. Respondent does not allege that the machine complied with the standard. (Resp't Br. at 44-45.) Rather, as it did with the Niagara 18 shear, Respondent alleges that the Secretary failed to show exposure and also claims it did not receive fair notice of the standard's requirements.

Looking first at the Secretary's prima facie case, the 1R10 shear has the same two points of operation as the Niagara 18 shear —the blades and the hold down pins. (Tr. 874-75; Gov. Exs. 43, 44A.) And, in the same manner as the Niagara 18 shear, the operator's fingers can slide between the blades of the shear or underneath the hold down pins. (Tr. 877-9; Gov. Ex. 44.) Although there is metal grating in front of the shear blades, there is a gap of greater than three-eighths of an inch between the table and the bottom of this grate. (Tr. 282, 880.) This gap permits an operator's fingers to come into contact with the point of operation. *Id.* Further, the grating provided no protection from the point of operation underneath the table where the hold down pins are. *Id.*

Employees used the 1R10 shear for multiple purposes and operated it at least one hour per day. (Tr. 1720-21.) One of the employees who frequently used the machine explained how, on occasion, he placed his fingers between the hold pins, directly next to where the pins clamp

the material into place. (Tr. 1720-21, 2147, 2152.) This same employee acknowledged that an operator's hands can be oily and slip while using the machine. (Tr. 2152.) Mr. Lloyd was familiar with the 1R10 and knew there was no barrier guard in front of the hold downs at the time of the inspection. (Tr. 1720-21.) These facts show employee exposure to the hazardous condition and Respondent's knowledge of it.

As noted above, Respondent's claims about a lack of fair notice are rejected. Other than the prior inspections, Respondent offers no evidence why it did not have notice about the machine guarding standard. The Commission has long held that § 1910.212(a)(3)(ii) provides adequate notice. *Buckeye*, 3 BNA OSHC at n.3. "Whether or not employers are in fact aware of each OSHA regulation and fully understand it, they are charged with this knowledge and are responsible for compliance." *Ed. Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1272 (11th Cir., 1991).

b) Characterization

As indicated before, a willful violation is one in which the employer's state of mind is that of intentional disregard of the Act's requirements or plain indifference to employee safety. *MJP,* 19 BNA OSHC at 1647. Evidence of attempted compliance may weigh against finding that an employer had the requisite state of mind support the characterization. *See Dayton Tire,* 671 F.3d at 1255 (concluding that some effort at compliance rebutted willfulness characterization).

Respondent suggests that it had a good faith reasonable belief that the machine was sufficiently guarded until the citation alerted it to the deficiencies. (Resp't Br. at 47-48.) The 1R10 shear had two points of operation, one of which was partially guarded by grating. (Gov. Ex. 37, 45.) Although this grating would not prevent an employee's fingers from reaching the

shear blades, it did lessen such a possibility. The partial grating also suggests that, in the context of this violation, Respondent did not completely disregard or act plainly indifferent to the requirements of the standard. *Dayton Tire,* 671 F.3d at 1255. Considering the partial effort at compliance before the inspection and its prompt action to come into compliance afterwards by installing additional guarding, the Secretary failed to clear the high bar for willfulness. *See id., Access Equip.*, 18 BNA OSHC at 1728.

c) Penalty Amount

The Secretary proposed a penalty of $70,000 but because the violation is affirmed as serious, the penalty cannot exceed $7,000. 29 U.S.C. § 666(j). The CO indicated that the violation had a high gravity as the injuries that could result from the violative condition could include amputations of fingers. (Tr. 285.) Employees used the 1R10 shear daily. (Tr. 287.) As with the other violations, the undersigned finds that credit for good faith is not appropriate for the same reasons discussed above. *See Valdak*, 17 BNA OSHC at 1139. Likewise, the violation's gravity, along with Respondent's history, outweighs the size factor. *See Quality Stamping*, 16 BNA OSHC at 1929; *Orion,* 18 BNA OSHC at 1868. Accordingly, a penalty of $7,000 is appropriate for Citation 2, Item 5.

5. **Citation 2, Item 6 –Roll Former**

a) Violation

Citation 2, Item 6 alleges that the Roll Former, a machine used to form pieces of sheet metal into frames for access doors, lacked point of operation guarding in violation of 29 C.F.R. § 1910.212(a)(3)(ii). (Tr. 295-96, 1047.) Respondent argues that the cited standard does not apply, and that even if it did, the Secretary failed to make out his prima facie case.

Respondent maintains that the Secretary improperly treated the Roll Former as a single machine, when it is actually two separate machines—a roll former and a seal maker. (Resp't Br. at 49.) It alleges that the seal maker was not in service. *Id.* Although it frames its arguments as being about applicability, it is not Respondent's position that the outboard rolls could be unguarded if they were being used to make seals. Instead, it contends that when the machine is being used as a frame maker, the outboard rolls are not a point of operation. *Id.*

(1) Applicability and Hazard

Mr. Lloyd designed and built the Roll Former. (Tr. 883, 1892-93). Inside the machine, gears attached to rollers shape the metal as it passes through each roll. (Tr. 883-86; Gov. Ex. 50D, 59C.) This part of the machine is used to make frames for doors. (Tr. 883-84; Gov. Ex. 50D, 59C.) Another part of the machine has several shafts or "outboard rolls," which rotate when the machine is in operation. (Tr. 303, 888.) These outboard rolls can be used to make a completely different part—stainless steel "seals." (Tr. 46-47; 888-91; Gov. Exs. 50A, 59C.)

There are two points of operation on the machine: (1) the rotating gears and rolls where the metal is pressed inside the machine; and (2) the outboard rolls used to make stainless steel seals. (Tr. 300-5, 891-96; Gov. Exs. 50C, 59, 62A, 63.) Respondent does not dispute that the rotating gears that pressed metal into frames are a point of operation. Instead, its complaint focuses on the characterization of the outboard rolls as a point of operation. (Resp't Br. at 49-50.) Following Respondent's rationale, the outboard rolls ceased to be a point of operation when employees used the machine for one function (frame-making) rather than another (seal making). *Id.*

This distinction is inconsistent with the standard's language, meaning, and purpose. The standard defines a "point of operation" as the area where "work is actually performed upon the

material being processed." 29 C.F.R. § 1910.212(a)(3)(i). The guarding requirement, however, is not limited to only those times when material is in the point of operation—employees must be protected during the entire "operating cycle." *Id.* The outboard rolls are present on the machine because they are capable of pressing metal into seals. (Tr. 1893.) However, they rotate regardless of whether employees are making a frame, a seal, or both.[40] (Tr. 889.)

Both points of operation exposed employees to the hazards associated with coming into contact with rotating gears or rolls. (Tr. 895.) Such exposure could lead to crushed fingers or even more severe injuries. *Id.* JE explained that material jammed in the machine a couple of times a week. (Tr. 43-44.) To address the issue, employees leaned over the top of the machine to free the lodged material. (Tr. 43-44, 1054-63.) The rotating shafts on the side of the machine also created a hazard when unguarded because employees regularly walked within two feet of the machine, creating an entanglement risk. (Tr. 47-48.) JE experienced this, albeit without injury, when his shirt once became caught on the outboard rolls when he walked by the machine. *Id.* Mr. Lloyd acknowledges that he built a guard for the machine to protect workers from rotating parts both within the machine and the outboard shafts. (Tr. 1897.) This shows his awareness of both the parts and the need to protect workers from them. *Id.*

(2) Violation

While the machine was equipped with a sheet metal guard, two former employees testified that this guard was rarely on the machine during use. (Tr. 41-42, 47, 51-53, 1047-48; Gov. Ex. 50, 59D.) MS testified that he saw the machine uncovered on the morning of the inspection before the CO entered the shop floor and also explained that the cover for the machine

[40] The undersigned notes that even if there was no point of operation associated with the outboard rolls, guarding of rotating parts is still required under 29 C.F.R § 1910.212(a)(1).

was frequently left off, including in the days prior to the inspection. (Tr. 1048-54, 1091-95.) Thus, the violative condition was present within six months of the issuance of the citation.

(3) Exposure

One current and one former employee indicated they used the machine within six months of the citation being issued. (Tr. 538-39, 1045-46, 2034.) To operate the machine, the employee typically stood with his arms and hands about a foot away from it. (Tr. 1062.) When pieces became jammed, he would move to the center of the machine to see where the issue occurred. (Tr. 1054-63.) To clear a jam or make mechanical repairs, the cover needed to be off the machine. (Tr. 51-53, 1054-63.) Two former employees explained that because of the frequency of jams and the need for repairs, the machine was frequently left uncovered. (Tr. 51-53.)

(4) Knowledge

MS explained that he saw Mr. Lloyd on the shop floor every day frequently walking by the uncovered Roll Former. (Tr. 1065-66.) He never saw Mr. Lloyd replace the cover or direct anyone else to do so. (Tr. 1066.) JE also testified that Mr. Lloyd regularly saw the machine uncovered. (Tr. 49-50.) Mr. Lloyd agreed that he was regularly in the area. (Tr. 1843.) The lack of guarding was plainly visible and capable of being discovered. *See Nordam,* 19 BNA OSHC at 1417 (finding knowledge when conditions were in plain view and supervisor was regularly in the area).[41]

[41] The undersigned notes that even if the outboard rolls are not a point of operation, the Secretary still established a violation based on the point of operation the parties agree upon.

b) Characterization

To find willfulness, there must be evidence of intentional disregard of the requirements of the Act or plain indifference to employee safety. *MJP,* 19 BNA OSHC at 1647. Looking first at the evidence of intentional disregard, Respondent previously received citations for failure to guard points of operation. And, Mr. Lloyd acknowledged that the machine potentially exposes employees to injuries and should be guarded. (Tr. 1897.)

The Secretary seeks an inference about Mr. Lloyd's state of mind based on conduct that occurred before the CO entered the shop floor. (Sec'y Br at 28-29.) One former and one current employee explained that on November 13, 2014, the day the inspection began, after the CO arrived but before he was permitted on the shop floor, employees took several steps to address safety issues. (Tr. 1047-48, 1451-58.) These actions involved, among other things, placing guards on several machines, including the Roll Former. *Id.* Respondent does not dispute that the above explained event occurred, but argues that it is wrong to impute any bad motive for the activities. (Resp't Br. at 58.)

The testimony about the rush to guard machines before the CO could view them supports the Secretary's position that the guard was off the machine frequently, including on the day of the inspection. This evidence supports finding that Respondent violated the standard and exposed employees to a hazard. But, it is insufficient to establish willfulness because the guarding may have been off due to carelessness rather than a conscious disregard of the standard's requirements. *Babcock*, 622 F.2d at 1165-66 (concluding a violation of the general duty clause was not willful). Further, the presence of guarding indicates some effort at compliance and distinguishes the Roll Former from the Niagara Press Brake, which was completely unguarded. *Dayton Tire,* 671 F.3d at 1255.

c) Penalty Amount

The Secretary proposed a penalty of $70,000 but because the violation is affirmed as serious the maximum penalty is $7,000. 29 U.S.C. § 666(j). The CO indicated severe injuries, including amputations that could result from the violative condition. (Tr. 309.) The probability of any injury was greater given the frequency with which employees use the machine and how often the guarding was removed. (Tr. 41-42, 47, 51-53, 309-10, 1047-48.) Credit for history or good faith is not appropriate for the same reasons discussed above. *See Valdak*, 17 BNA OSHC at 1139. Likewise, the gravity of the violation, along with Respondent's history, is such that giving credit for size is inappropriate. *See Quality Stamping,* 16 BNA OSHC at 1929 (giving more weight to history); *Orion*, 18 BNA OSHC at 1868 (giving less weight to the size factor). Accordingly, a penalty of $7,000 is appropriate for Citation 2, Item 6.

6. Citation 2, Item 7 – Rivet Machines

a) Applicability and Hazard

Citation 2, Item 7 concerns the lack of guarding on the Rivet Machines. There are approximately twenty Rivet Machines at the Facility, which the employees use to connect, or rivet, two or more pieces of metal together. (Tr. 322-23, 903, 910-11, 1898.) To start the process, the operator inserts metal from the side and positions it on top of an anvil, beneath a punch. (Tr. 904-6.) The operator then presses on a foot pedal causing the punch to come down and force a rivet through the metal. *Id.* This spot where the punch makes contact with the metal is the point of operation. (Tr. 321, 325, 910-13; Gov. Ex. 66C, 92A.)

Unguarded Rivet Machines can, and have, caused serious injuries. (Tr. 326, 811.) Mr. Lloyd acknowledges that the Rivet Machines are some of the most dangerous machines at the Facility. (Tr. 1843.) If an operator's finger is in the point of operation when the machine is

actuated, he or she can suffer cracked bones, lacerations and/or puncture wounds. (Tr. 326, 915.) Two current employees testified about injuries received while operating one of the Rivet Machines. (Tr. 713-14, 716, 811-13.) One described an incident where he accidentally pressed the foot pedal too soon, and the other indicated that the materials slipped and a rivet went through one of his fingers. (Tr. 713-14; 811-13, 815.) Both were taken to the hospital and missed work. (Tr. 716, 811-13, 815.) A former employee discussed a third similar incident. (Tr. 73-74.)

Respondent does not dispute the standard's applicability to the Rivet Machines, but argues that it was in largely compliance, and to the extent it was not, OSHA failed to provide fair notice of the standard's requirements. (Resp't Br. at 55-58.)

b) Violation

During the inspection, the CO observed guards, referred to as "ring guards," on the Rivet Machines. (Sec'y Br. at 31; Gov. Ex. 67, Tr. 322-23, 535-36.) When installed correctly, the ring guard is approximately a quarter of an inch above the metal to be riveted. (Tr. 907-11.) If an object (including a finger) enters the point of operation on top of the metal, the ring guard should be pushed upward and stop the machine from operating. (Tr. 809-10, 907-11.) Even though the machines had ring guards at the time of the inspection, at least one of them was installed incorrectly. (Gov. Ex. 92A.) The CO observed an employee using a Rivet Machine with a ring guard that was two and a half inches above the metal instead of a quarter of an inch. *Id.* At this

location, the ring guard would not have stopped the machine at a point where injury could be avoided if the employee's fingers slipped into the point of operation.[42] (Tr. 907-13.)

Although Growney considered any gap in guarding greater than one-quarter of an inch to be ineffective, Respondent argues that the standard does not indicate such a threshold. (Resp't Br. at 56.) This argument misses the mark. The standard requires guarding that prevents "the operator from having any part of his body in the danger zone during the operating cycle." 29 C.F.R. § 1910.212(a)(3)(ii). A finger could enter the two and a half inch gap present on the Rivet Machine. The guarding was, therefore, not compliant. Considering the machine was in use, the Secretary established both a violation and employee exposure.[43] (Gov. Ex. 91, 92.) *See F.H. Lawson*, 8 BNA OSHC 1063, 1066-67 (No. 12883, 1980) (finding a violation of § 1910.212(a)(3)(ii) when the Secretary showed that operator's hands were ten to twenty inches from the point of operation on a rivet machine).

The improper ring guard was in plain view and Mr. Lloyd indicated that he was in the work area nearly every day. (Tr. 1065-67, 1638-41.) An employer is chargeable with knowledge of conditions that are plainly visible to its supervisory personnel. *Hamilton Fixture*, 16 BNA OSHC 1073, 1089 (No. 88–1720, 1993) (finding an employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel), *aff'd*, 28 F.3d

[42] In addition to this improperly installed ring guard, the Secretary also presented evidence suggesting that the ring guards were not consistently used. One current employee acknowledged that ring guards were regularly removed. (Tr. 1452-53.) Mr. Lloyd disputed this testimony and indicated that ring guards were always in place. (Tr. 1901.) The evidence of past injuries and the need to install multiple guards on the morning of the inspection undercuts Mr. Lloyd's testimony.

[43] Besides the employee shown in the CO's photograph, another employee testified that he uses the Rivet Machines for several hours every day. (Tr. 807-8.) He acknowledged that sometimes the ring guards are not on, but denied using an unguarded machine. (Tr. 810.)

1213 (6th Cir.1994) (unpublished); *Am. Airlines, Inc.*, 17 BNA OSHC 1552, 1555 (No. 93-1817, 1996) (consolidated) (finding knowledge when conditions were in plain view and supervisory personnel were present). Respondent also agreed to specifically inspect the Rivet Machines for guarding following past citations for failing to guard. (Tr. 1520; Gov. Ex. 153 at 7, 157 at 7-8.)

The Secretary suggests Mr. Lloyd had employees hastily install ring guards on the Rivet Machines in the time between the CO's arrival at the site and when he was permitted into the work area of the Facility. (Sec'y Br. at 32-33.) Respondent does not directly dispute this but argues it was done so there was no confusion as to whether the employees had permission to remove the guards. (Resp't Br. at 58.) The timing of the ring guard installation, whether it took place before or after the inspection began, does not alter the outcome. The Secretary satisfied his burden by showing that the guarding was not compliant and Respondent knew the machines had to be guarded.

c) Fair Notice

Respondent argues that it had permission not to use ring guards when manufacturing a particular part—a type of damper with a blanket attached.[44] (Resp't Br. at 57; Tr. 536-37.) There is, however, no evidence that Respondent was producing this part during the inspection

[44] DS, the former plant manager, indicated that he placed a sign on one Rivet Machine, which read: "safety device on this equipment temporarily removed due to current production approved by OSHA, 2009." (Tr. 1792-93; Ex. R-384.) This sign also has several handwritten dates, which DS indicated were specific dates when the safety equipment was removed temporarily. (Tr. 1792-93; Ex. R-384.) Although the sign references OSHA approval, neither the CO nor DS had information about any such approval. (*Id.,* Tr. 537-38.) Further, Respondent does not allege that OSHA indicated ring guards were not necessary whenever feasible, such as on the day of the inspection. (Gov. Ex. 247.) The undersigned notes that the most recent date noted on the sign was several months before the inspection date. (Ex. R-384.) Considering the evidence that the ring guards could remain in place to produce the parts being fabricated during the inspection, the presence of the sign DS made is not relevant.

when the CO observed the employee using a Rivet Machine with an improperly installed ring guard. As Respondent recognizes, OSHA never granted a blanket exception to the guarding requirement. Moreover, Respondent never counters the Secretary's evidence that guarding was feasible. Additionally, Respondent knew about the ring guard requirements and specifically directed employees to install them before the CO saw any machines without them. (Tr. 1454.)

d) Characterization

As stated above, willfulness requires evidence of intentional disregard of the Act's requirements or plain indifference to employee safety. *MJP,* 19 BNA OSHC at 1647. OSHA previously cited Respondent for failing to guard points of operation on its Rivet Machines. Thus, Respondent was aware of the standard and its applicability to the Rivet Machines. However, the Secretary failed to establish that the use of the Rivet Machines without compliant guarding was the result of intentional disregard or plain indifference. *See Bianchi,* 490 F.3d at 208. In addition, the presence of the ring guards on the majority of Rivet Machines shows some effort at compliance. *Dayton Tire,* 671 F.3d at 1255.

e) Penalty Amount

The Secretary proposed a penalty of $70,000 but because the violation is affirmed as serious instead of willful, the maximum penalty is $7,000. 29 U.S.C. § 666(j). The CO indicated severe injuries that could result from unguarded Rivet Machines, including having a rivet inserted into a finger. (Tr. 326.) Employees frequently use the Rivet Machines. (Tr. 309.) There have been multiple injuries, and Respondent did not have a strong safety program to ensure that guards were in place. Moreover, there is no evidence of discipline for using an unguarded Rivet Machine. Credit for size, history, or good faith is not appropriate for the same reasons discussed above. *See e.g., Valdak*, 17 BNA OSHC at 1139; *Quality Stamping*, 16 BNA

OSHC at 1929; *Orion*, 18 BNA OSHC at 1868. Considering the gravity of the violation as well as the other factors, a penalty of $7,000 is appropriate for Citation 2, Item 7.

D. Serious Safety Violations: Citation 1, Items 3a, 3b, 3c, and 3d

The machine guarding standard has several machine and part specific requirements. Unlike the guarding provision alleged to have been violated in Citation 2 (§ 1910.212), the Secretary does not have to prove a hazard in order to meet his burden of establishing a violation of 29 C.F.R. § 1910.219, the standard at issue in Citation 1, Items 3a-d. *See ConAgra Flour Milling Co.,* 16 BNA OSHC 1137, 1149-50 (No. 88-1250, 1993) ("Secretary does not have to establish that unguarded pulleys present a hazard"), *rev'd in part on other grounds*, 25 F.3d 653 (8th Cir. 1994). Citation 1 includes violations for unguarded flywheels (Citation 1, Item 3a), unguarded pulleys (Citation 1, Item 3b), an unguarded horizontal belt (Citation 1, Item 3c), and unguarded vertical belts (Citation 1, Item 3d). The Secretary grouped all of these alleged violations for penalty purposes.

Respondent does not contest § 1910.219 applicability or its knowledge of the violative conditions. (Resp't Br. at 61-63.) Rather, it argues that all of these violations should be vacated because the Secretary did not prove employee exposure to the violative conditions. *Id*.

Respondent's arguments, although framed as being about exposure, are better understood as relating to the characterization and penalty amount. *See RPM Erectors, Inc.*, 2 BNA OSHC 1187, 1188 (No. 1114, 1974) (noting that the probability of an injury is related to gravity). As the Commission has long held, to sustain a violation the Secretary must show that employees were exposed to the violative condition. *Astra Pharm.*, 9 BNA OSHC at 2129. Satisfying this obligation does not require an injury or actual exposure to a condition. *See, e.g., ConAgra,* 16 BNA OSHC at 1149-50. It is sufficient to "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." *Delek Refining, Ltd.*, 25 BNA OSHC 1365, 1374 (No. 08-1386, 2015) (finding no exposure in connection with a violation of § 1910.219(c)(2)(i)), *aff'd relevant part,* 845 F.3d 170 (5th Cir. 2016) (not addressing alleged violation of § 1910.219). How likely exposure would result in injury and the type of injury (if any) that could result from this exposure is examined in connection with determining the characterization and setting the appropriate penalty amount. 29 U.S.C. § 666. *See also Quality Stamping*, 16 BNA OSHC at 1928-29 (assessing the gravity of the violation involves consideration of the precautions taken and the probability of an injury); *Charles W. Mason, DDS*, 25 BNA OSHC 1792, 1795-96 (No. 10-2313, 2015) (evaluating risk of exposure claims when determining the appropriate characterization of a violation).

For the reasons discussed below, all instances set forth in Citation 1, Items 3a and3c are AFFIRMED, as are instances (a-d) of Item 3b and instances (a-c) of Item 3d. Instance (e) of Citation 1, Item 3b as well as Instance (d) of Citation 1, Item 3d, both of which relate to the Roll Former, are VACATED.

1. Citation 1, Item 3a – Serious Violation of § 1910.219(b)(1) for unguarded flywheels on the Niagara Press Brake and certain Rivet Machines

Citation 1, Item 3(a) alleges four instances of violations of § 1910.219(b)(1) for unguarded flywheels. Instance (a) is for the flywheel on the Niagara Press Brake while Instances (b), (c), and (d) are for flywheels on three Rivet Machines located in the 75A department. The cited standard requires: "[f]lywheel located so that any part is seven (7) feet or less above a floor or platform shall be guarded in accordance with the requirements of this subpart." 29 C.F.R. § 1910.219(b)(1). The standard includes various options for guarding including covering the

flywheels: "[w]ith an enclosure of sheet, perforated, or expanded metal, or woven wire." 29 C.F.R. § 1910.219(b)(1)(i).

a) Instance (a) – Flywheel on the Niagara Press Brake

The flywheel at the back of the Niagara Press Brake was less than seven feet above the floor and was not guarded in a manner compliant with the standard. (Tr. 224-26; Gov. Ex. 7.) When an employee powers on the machine, the flywheel begins to move and keeps moving regardless of whether or not the employee presses the foot pedal. (Tr. 228-9; 635-37.)

At least two employees used the machine. (Tr. 542.) Although the sides of the flywheel were partially guarded on two sides the CO explained that the employees were still exposed to the violative condition when they checked the backstops on the machine and in the event of a malfunction. (Tr. 227-28; Gov. Ex. 265.) Mr. Lloyd himself demonstrated the possibility of employees going to the back of the machine during the inspection. (Gov. Ex. 265.) When the machine malfunctioned during the inspection, Mr. Lloyd promptly went to the back of the machine where the exposed flywheel is visible. (Tr. 344; Gov. Ex. 265.) Growney also opined that it is reasonably likely employees would go behind the machine to pick up materials stored there. (Tr. 676-77; Gov. Exs. 1, 2.)

Mr. Lloyd acknowledges that he is familiar with the Niagara Press Brake and operated in many times. The exposed flywheels are in plain view and capable of discovery. *See Nordam,* 19 BNA OSHC at 1417. Respondent protests that employees kept a safe distance from the flywheel. (Resp't Br. at 61-63.) However, safe distance guarding is not permissible when physical devices can be used. *See Otis*, 24 BNA OSHC at 1087. The flywheel on the Niagara Press Brake could have been covered by sheet metal or metal mesh. (Tr. 227-29, 678.) Indeed, flywheels on other mechanical presses at the Facility were covered this way. (Tr. 227-29.)

b) Instances (b), (c) and (d) on the Rivet Machines

Respondent failed to guard the flywheels on three Rivet Machines in the 75A department. (Tr. 341-47; Gov. Exs. 68A, 68B.) Each of these flywheels was located less than seven feet above the floor. (Tr. 345-46.)

As with the flywheel on the Niagara Press Brake, the flywheels on the Rivet Machines rotate continuously when the power is on even if the foot pedal is not actuated. (Tr. 346-7; 921-26; Gov. Ex. 69A.) Employees can come into the vicinity of the flywheel while working at or near the machines and when using the aisle behind them. *Id.* Growney considered the back of the Rivet Machines to be "clearly accessible," and noted a tripping hazard in the aisle behind the machines. (Tr. 922.) An employee was also seen sitting in a chair near the exposed flywheels. (Tr. 340, 922-24; Gov. Ex. 64, 66, 68.) Further, the CO noted that employees may come into contact with flywheels when examining a machine in the event of a malfunction. (Tr. 922.) In fact, he observed Mr. Lloyd come within inches of a flywheel on one of the Rivet Machines when he examined a ring guard. (Tr. 342-44, 924; Gov. Ex. 69A.)

This evidence distinguishes the present matter from *Buffets.* 21 BNA OSHC at 1066-67. In *Buffets*, employees had access to an aisle near large mixing bowls, but the Secretary did not show how this access would bring employees into contact with rotating parts contained within mixing bowls. *Id.* In contrast, at the Facility, employees could come very close to the flywheels when adjusting the backstops, in the event of a malfunction (as Mr. Lloyd himself did), or if they were to accidentally trip on the pallets that extended into the aisle behind the machines. (Tr. 352, 928.) The Secretary presented sufficient evidence of exposure.

The lack of guarding was plainly visible, and Mr. Lloyd indicated that he was routinely on the shop floor. *See Nordam,* 19 BNA OSHC at 1417 (finding knowledge when conditions

were in plain view and supervisor was regularly in the area). When the lack of guarding was pointed out to him during the inspection, he acknowledged the possibility of injury but surmised it was no riskier than a car door. (Tr. 352-53.) Respondent guarded the flywheels on the Rivet Machines with sheet metal after the inspection and does not allege that guarding was infeasible prior to that time. (Tr. 348-51; 926-27.) Because physical guarding was feasible, Respondent could not rely on safe distance guarding.[45] (Tr. 926-27.)

Accordingly, all five instances of Citation 1, Item 3a are AFFIRMED. For penalty purposes, this Item is grouped with Items 3b, 3c, and 3d, and the amount assessed is discussed below.

2. Citation 1, Item 3b – Serious Violation of § 1910.219(d)(1) for unguarded pulleys on the Niagara Press Brake, Rivet Machines, and Roll Former

Citation 1, Item 3b alleges five instances of violations of § 1910.219(d)(1). Each instance concerns a different machine. The cited standard requires pulleys located seven feet or less from the floor or work platform must be guarded and includes various options for physical guarding. 29 C.F.R. §§ 1910.219(d)(1), (m). Respondent challenges exposure, implicitly conceding applicability, violation, and knowledge. It does not assert that compliance was infeasible as the pulleys were guarded after the initial inspection.

[45] Further, the Secretary showed that Respondent did not have effective safe distance guarding practices in place. As noted above, there were materials located behind the Niagara Press Brake and Rivet Machines that could bring workers in contact with unguarded flywheels as part of their regular course of duties. (Tr. 228-30, 676-77; Gov. Exs. 1, 2.)

a) Instances (a), (b), (c), and (d)

The Secretary showed that pulleys on the Niagara Press Brake and three of the Rivet Machines were located less than seven feet above the floor and were not covered by a physical barrier as required. (Tr. 541 Gov. Ex. 7, 50, 66.) The pulleys on these machines were located near the flywheels. (Tr. 224, 344-45; Gov. Ex. 7, 66, 68.) In the same manner as the Secretary established exposure to the unguarded flywheels, it was also shown with respect the pulleys. *See Con Agra,* 16 BNA OSHC at 1149-50 (finding exposure when employees worked 1 to 1.5 feet away from unguarded belts and pulleys); *Clement Food Co.,* 11 BNA OSHC 2120, 2123 (No. 80-607, 1984) (finding exposure and a violation of § 1910.219(d)(1) when employees walk within reaching distance of the unguarded parts). Mr. Lloyd knew the backs of these machines were unguarded. The area was covered by mesh guarding after the inspection, so there is no basis for arguing infeasibility of guarding.

b) Instance (e) – Roll Former

For the Roll Former, the pulley was located on the underside of the machine two to three feet above the ground. (Tr. 357-58; 896-900, 1919; Gov. Ex. 52A, 52B.) The Secretary argues that an employee could reach under the machine and come into contact with the unguarded pulley. The Secretary did not provide evidence about how far from the edge of the machine the pulley was located (i.e., was it within an arm's length of the edge such that inadvertent contact was possible). When pulleys, flywheels, or belts are located at the back of machines, an employee can just walk around the machine and come into contact with the exposed rotating parts. In contrast, with the Roll Former, there is not sufficient evidence establishing that even through inadvertence employees could come in contact with parts underneath the machine. *See Fabricated Metal*, 18 BNA OSHC at 1075 (discussing exposure test).

Accordingly, Instances (a), (b), (c), and (d) of Citation 1, Item 3b are AFFIRMED and Instance (e) of Citation 1, Item 3b is VACATED.

3. Citation 1, Item 3c - Serious Violation of § 1910.219(e)(1)(i) for unguarded horizontal belt on the Niagara Press Brake

Citation 1, Item 3c alleges a violation of § 1910.219(e)(1)(i) for the unguarded horizontal belt on the Niagara Press Brake. The cited standard requires horizontal belts located 42 inches or less from the floor to be "fully enclosed." 29 C.F.R. § 1910.219(e)(1)(i). The standard applies to the Niagara Press Brake because the belt connecting the motor with the flywheel was less than 42 inches from the floor. (Tr. 235; Gov. Ex. 7C.) As was the case with Citation 1, Item 3a, the horizontal belt was located at the back of the machine. Employees checking the back stops or picking up materials stored behind the machine could come into contact with the unguarded belt. (Tr. 227-28; Gov. Ex. 265.) Because the back of the machine was completely open, employees could come into contact with the belt; and, if they did, injuries could include lacerations, fractures, and hair or scalp injuries. (Tr. 234-37; 679; Gov. Exs. 7C, 181.) Mr. Lloyd himself operated the machine and was in a position to observe the violative condition, including during the inspection. Accordingly, Citation 1, Item 3c is AFFIRMED.

4. Citation 1, Item 3d – Serious Violation of § 1910.219(e)(3)(i) for unguarded vertical belts on the Rivet Machines and the Roll Former

Citation 1, Item 3d alleges a violation of § 1910.219(e)(3)(i) for unguarded vertical belts on three different Rivet Machines and the Roll Former. The cited standard requires that "[v]ertical and inclined belts shall be enclosed by a guard conforming to standards in paragraphs (m) and (o) of this section." 29 C.F.R. § 1910.219(e)(3)(i).

a) Instances (a), (b), and (c) – Belts on Rivet Machines

For the Rivet Machines, the vertical belts were attached to the flywheels and pulleys discussed above. None of the belts were covered and employees had access to them for the same reasons they had access to the flywheels and pulleys. The parts move continuously even if the foot pedal is not actuated and an aisle walkway behind the machines increased the likelihood of exposure. (Tr. 346-47, 921-28; Gov. Ex. 69A.) As with the other violations of § 1910.219, Mr. Lloyd used the Rivet Machines many times and knew that the back was unguarded. (Tr. 352-53; Gov. Ex. 69A.) Guarding was feasible and added to the Rivet Machines after the inspection. (Tr. 348-50, 926; Gov. Ex. 70A.)

b) Instance (d) – Belt on Roll Former

Like the pulleys discussed in connection with Citation 1, Item 3(b), the unguarded belt on the Roll Former was located underneath the machine, a few feet above the floor. While it was possible for employees to reach under the machine, the Secretary did not show if it was possible to reach far enough under the machine such that an employee could come into contact with the unguarded belt. Thus, the Secretary failed to show exposure to this violative condition.

Accordingly, Instances (a), (b), and (c) of Citation 1, Item 3(d) are AFFIRMED and Instance (d) of Citation 1, Item 3(d) is VACATED.

5. Characterization and Penalty Amount for Citation 1, Items 3a, 3b, 3c and 3d

Respondent's arguments, although framed as being about exposure, are better understood as relating to the characterization and penalty amount. The CO explained that the lack of guarding created an entanglement hazard which, if it were to occur, would result in serious injuries. (Tr. 227, 230-31 347, 359.) Likewise, Growney explained that injuries could include

crushed fingers, amputated fingers, lacerations, scalp or hair being ripped out. (Tr. 679-80, 921.) While these injuries are severe, the location of the hazard reduced the probability of their occurrence. In particular, the CO conceded that the flywheels, pulleys, and horizontal belts on the Niagara Press Brake were partially guarded and that this lessened the probability of injury on that machine. (Tr. 230-31.)

The Secretary grouped Items 3a, 3b, 3c and 3d for penalty purposes and proposes a single $5,000 penalty for all the violations. Although the gravity of each individual violation is less, the number of affirmed instances, twelve, is notable. The violations relate to four different machines and include multiple unguarded parts. Consistent with the findings above, the undersigned finds that any reduction for size is inappropriate considering Respondent's history and Respondent has not demonstrated sufficient good faith meriting a penalty decrease. *See Quality Stamping*, 16 BNA OSHC at 1929. Accordingly, the undersigned finds that a penalty of $5,000 is appropriate.

E. Citation 1, Item 4 – Alleged Serious Violation of § 1910.305(b)(1)(ii) for improperly closed openings on the radial saw and flange machine

Citation 1, Item 4 alleges three instances of violations of § 1910.305(b)(1)(ii), which requires "[u]nused openings in cabinets, boxes, and fittings" to be effectively closed. Instances (a) and (b) allege that a "Square D brand switch gear box mounted to the table of Skill Brand, Model 450 radial saw" had "a knock out opening on the left side that was not effectively closed" as well as "a rectangular shape opening on the front that was not effectively closed." Respondent does not dispute that the condition existed but alleges there was no employee exposure. (Resp't Br. at 63.) This contention is rejected as an employee operated the saw regularly, sometimes multiple times per day, and this work necessitated coming near the gear box. (Tr. 365-69, 373-75; Gov. Ex. 106A.) The violative condition was in plain view and could

have been observed by supervisors, including Mr. Lloyd who indicated that he has operated every machine in the Facility and was frequently on the shop floor for hours a day.[46] (Tr. 365-66, 1638.) *See Nordam,* 19 BNA OSHC at 1417.

Instance (c) relates to a switch gear box on the flange machine with an opening that was not effectively closed. (Tr. 370-71; Gov. Ex. 102A, 103.) An employee explained that he used the flange machine to bend materials. (Tr. 371-73, 2145-47.) To do so, he turned the machine on by using the handle located directly above the open gear box. *Id.* Thus, there was employee exposure to the violative condition. *See Fabricated Metal*, 18 BNA OSHC at 1074 (finding exposure if "employees have been, are, or will be in the zone of danger"). In terms of knowledge, the employee who operated the flange machine was a supervisor, and in order to use the machine, he would have to come within inches of the violative condition. (Tr. 371-73, 2145-47.) The condition was in plain view and Mr. Lloyd and other supervisors were capable of observing the condition. (Tr. 370, 1638-41.) *See Nordam*, 19 BNA OSHC at 1417.

The CO explained that the openings could lead to exposure to arc flashes and result in burns. (Tr. 367, 371.) The gravity of the violation was less significant because the typical location of employees relative to the openings reduced the probability of injury. (Tr. 375.) As with the other violations, the undersigned finds that no credit for size, history, or good faith is appropriate. However, given the probability of injury, the gravity of the violations warrants a reduction in the penalty amount. With particular emphasis on the gravity of the violations, the undersigned finds that a single $5,000 penalty for the three instances of violation as set forth in Citation 1, Item 4 is appropriate.

[46] Respondent does not argue that it lacked knowledge of the violative conditions.

II. Health Inspection- Inspection No. 1009661

A. Violations of the Noise Standard

The Secretary alleges five violations of the noise standard, 29 C.F.R. § 1910.95, which requires employers to "establish and maintain an audiometric testing program . . . by making audiometric testing available to all employees whose exposures equal or exceed an 8-hour time-weighted average of 85 decibels." 29 C.F.R. § 1910.95(g)(1). The 8-hour time-weighted average of 85 decibels is referred to as the action level. *Id.* As part of the hearing conservation program, employers must monitor noise exposure levels in a way that accurately identifies employees exposed to noise at or above the action level. 29 C.F.R. § 1910.95(d), (g). (Tr. 1190-91, 1195.) The exposure measurement must include all continuous, intermittent, and impulsive noise within the range of 80 decibels to 130 decibels and must be taken during a typical work situation. 29 C.F.R. § 1910.95(d)(2). Employers must carefully check or calibrate instruments used for monitoring employee exposure to ensure measurements are accurate. *Id.*

Respondent has a history of known employee exposure to noise above the action level in the assembly area. (Tr. 1518.) OSHA investigations in 2005 and again in 2008 identified employees working in that area as being exposed to noise above the action level. (Tr. 1198; Gov. Exs. 130, 132, 144.) A 2009 survey by an audiometric testing company Respondent retained also showed exposure above the action level in the same assembly area of the Facility. (Gov. Ex. 111.) Because of this exposure, Respondent needed to maintain an audiometric testing program with annual audiograms for affected employees. 29 C.F.R. § 1910.95(g)(6); *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1151 (11th Cir. 1994).

Citation 1, Items 1, 2, and 3 relate to Respondent's alleged willful failure to obtain the required annual audiograms for three employees, referred to herein as FA, FTM, and RG.

Citation 1, Item 4b concerns Respondent's alleged willful failure to conduct annual noise related training as required by 29 C.F.R. § 1910.95(k)(2). And Citation 2, Items 3 and 4 allege that Respondent committed other-than-serious violations by failing to calibrate its instruments or review the monitoring results as required by 29 C.F.R. § 1910.95(g).

B. Expert Testimony

Both parties called expert witnesses to testify at the hearing about noise exposure. The Secretary called Brian Liddell, who the parties agreed was an expert in the areas of noise exposure measurement, analysis of noise exposure data, and determining compliance with occupational noise standards. (Tr. 2310.) Respondent called Dennis Driscoll, who the parties agreed was an expert in the areas of occupational noise and noise exposure assessments for both hearing conservation and in regulatory compliance. (Tr. 2179-80.) Each expert also submitted a written report. The undersigned admitted the testimony and reports of both experts with the belief that doing so would assist with an understanding of the evidence, consistent with *Daubert*, 509 U.S. at 593-94.

Having accepted both parties' experts, the undersigned finds that the relative utility of two experts was not equal. Driscoll's testimony was largely limited to theoretical possibilities rather than facts. *See Gulf & W. Energy Prod. Grp.*, 14 BNA OSHC 1968, 1972-73 (No. 79-4053, 1991) (concluding that notwithstanding the errors in the sampling process, the Secretary established a violation). He did not use a sound level meter or noise dosimeter to independently measure noise at the Facility. (Tr. 2284.) Indeed, he never visited the Facility. (Tr. 2331.) His testimony was limited to whether OSHA followed its own procedures and suggesting possible issues with the data collected. (Tr. 2231-32, 2289.) He admitted that he did not know to a

degree of scientific certainty whether OSHA's noise exposure measurements were inaccurate. (Tr. 2289.)

In contrast, Lindell focused on whether any of the choices Orach made when conducting the noise surveys resulted in material differences in the data collected. (Gov. Ex. 225.) He also offered a reasonable, coherent view of the OSHA Technical Manual and what it suggests in terms of best practices for data collection and how it relates to the testing that was done at the Facility. *Id.* Lindell's testimony and report were consistent with past analyses of noise exposure at the Facility.

In furtherance of my gatekeeper function under Rule 702 of the Federal Rules of Evidence, the undersigned has weighed the testimony and reports of both experts. The testimony and report of Lindell are accorded more weight than the testimony and report of Driscoll.

1. Citation 1, Items 1, 2 and 3 – Willful Failure to Obtain Annual Audiograms

Orach placed personal noise monitoring devices on three employees (FG, FTM, and RG) who worked in the assembly area. (Tr. 1157-59, Gov. Ex. 225.) An additional employee (FA) who also works in the assembly area arrived late on the day of testing was not individually monitored. (Tr. 1154, 1330-31.) The monitoring devices showed that employees working in the assembly area were exposed to noise above the action level of 85 decibels.[47] (Gov. Ex. 225.)

As noted above, when work conditions expose employees to noise above the action level, employers must establish and maintain audiometric testing programs that make audiometric testing available to all employees whose exposures equal or exceed the action level. 29 C.F.R.

[47] Orach also monitored a fourth employee, VM. Because VM did not engage in his typical duties on the day of the monitoring, his results were not used to support any of the violations. (Tr. 1337-38, 1341-43.)

§ 1910.95(g); *Trinity Indus.*, 16 F.3d at 1151. The audiometric testing program must include a baseline audiogram and then annual audiograms thereafter for all such employees. *Id.*

Respondent concedes that no audiograms were obtained in 2013 but disputes the accuracy of the results showing exposure above the action level. Specifically, Respondent argues that the Secretary must individually monitor employees and cannot use the test results from one employee to say another was exposed to noise above the action level. (Resp't Br. at 65-67.) Respondent also argues even if there was a violation, the Secretary did not establish it was willful. *Id.* at 67-68.

For the reasons discussed below, Citation 1, Items 1, 2, and 3 are affirmed as serious and the proposed penalties are assessed.

a) Item 1 – Failure to Obtain Annual Audiogram for FA

The Citation alleges Respondent violated the standard because "[a]nnual audiograms were not provided between October 2012 and December 2014, or approximately 26 months" for an employee "exposed to the equivalent of an average sound level of 88.6 dBA, which is 1.04 times the Action Level of 85 dBA." The Secretary explained that Item 1 relates to the employee who was not individually monitored—FA. (Sec'y Br. at 44.) According to the Secretary, another employee (FG) performed the same work that FA typically does, so the results from the monitor worn by FG are representative of what an employee working in the assembly area experiences. *Id.*

(1) Applicability & Exposure

The cited standard's applicability depends on whether employees are exposed to noise at or above the action level. On the day of the sampling, FG worked in the assembly area for the

entire shift.[48] (Tr. 1157-58.) His dosimeter recorded noise from 7:59 am to 6:00 pm. (Tr. 1192; Gov. Ex. 220). By 2:40 pm, FG was exposed to noise over the action level; and, by the end of the shift, his dose was well above it. (Tr. 1193-94; Gov. Ex. 220.)

Respondent contests the accuracy of these results, not whether such results trigger the requirements of 29 C.F.R. § 1910.95(g). (Resp't Br. 66-67.) Relying on its expert (Driscoll), Respondent asserts that Orach failed to calibrate the dosimeter correctly and improperly included noise exposure that occurred during the employee's lunch. *Id.*

(a) Calibration

Each dosimeter had an annual calibration performed at OSHA's Cincinnati Technical Center. (Tr. 1165, 1176, 1182-83; Gov. Ex. 214.) In addition, Orach re-calibrated the dosimeters before and after their use at the Facility. (Tr. 1161, 1189-90.) Orach, who had previously been to the Facility, believed that the level of noise at the Facility could make it difficult to ensure an accurate calibration if it was done at that location. (Tr. 1161.) So, he calibrated each dosimeter at OSHA's Allentown Area Office on Friday, December 12, 2014, using equipment with up to date calibration. (Tr. 1165, 1168, 1176-77, 1222, 1239; Gov. Ex. 214.) Orach determined that the dosimeters were functioning properly and recorded the results from his calibration. (Tr. 1162-63, 1221-22, 1238-39; Gov. Ex. 219, 220, 257.) After completing the calibration, Orach stored the dosimeters in their foam insulated cases. (Tr. 1182-83.) In Orach's experience, the office where the dosimeters were stored after the calibration is

[48] Employees in the assembly area cut and formed metal and then finished the products using hand held hammers and the Rivet Machines. (Tr. 1130, 1243-46.) The assembly table where employees worked by hand was eight to ten feet long and four feet wide. (Tr. 799-800, 1136-37.)

not subject to extreme temperature or humidity. (Tr. 1183.) On the day of the testing, he transported the dosimeters in their case in the passenger compartment of a car. (Tr. 1184.) When he arrived at the Facility, Orach conducted a spot check to confirm the accuracy of the calibration. (Tr. 1183.)

At the end of the workers' shift, Orach placed the dosimeters in standby mode and then recorded the results. (Tr. 1187.) The dosimeters were placed back in the case, transported again in the passenger compartment of the car and returned to Orach's office. (Tr. 1187-88.) The following day, Orach performed a post-calibration for each dosimeter. (Tr. 1188-89.) The results were nearly identical to the initial calibration, confirming that the dosimeters functioned properly during the monitoring. (Tr. 1189-1190; Gov. Ex. 219, 220, 225, 257.)

Lindell explained that the precise timing of calibration is not critical. (Tr. 2311-12; Gov. Ex. 225 at 4-5.) He also explained that the need for a quiet environment may make calibration at a worksite impossible. (Gov. Ex. 225 at 5.) The documented test results support the conclusion that the calibration was appropriate and that the dosimeters were functioning properly when Orach used them. *Id.* at 5, 8. Therefore, consistent with Lindell's expert opinion, the undersigned finds that Orach's calibration of the dosimeter did not affect the accuracy of the results such that they cannot be relied upon to show exposure above the action level.

(b) Inclusion of lunchtime noise exposure

The appropriateness of including lunch time noise exposure is a fact-specific determination. Orach said he left the dosimeters running during the lunch break if the employee remained in the work area. (Tr. 1193.) He did this because the employee remained exposed to workplace noise in such situations. *Id.* The undersigned finds that Orach properly included the lunchtime exposure since it revealed what the worker typically experienced at the Facility as

opposed to at an off-site location. In any event, as Lindell explained, and Driscoll conceded, even if one were to assume that FG was not exposed to any noise during his lunch, his results still would show exposure above the action level, so even if it was error to include the lunchtime noise exposure, this did not affect the finding of exposure above the action level. (Tr. 1194, 2327, 2272; Gov. Ex. 225 at 7-8.)

(c) Representativeness of the Noise Sample

OSHA's noise sampling protocols permit establishing similar exposure groups (SEGs). If a group of workers has the same general exposure profile, each individual need not be sampled. (Tr. 2334-35.) The samples from one individual can be considered representative of the group. Here, the Secretary argues that the results from the monitor worn by FG can be used to support finding that Respondent failed to obtain an audiogram for a different employee who was not individually monitored (FA). The Secretary contends that because FA and FG work in similar positions the results from FG's monitor are representative of the noise exposure FA experienced.

FA normally worked in the assembly area doing the same type of work as FG. (Tr. 1156-57, 1997-98.) Orach and the CO both observed FA working in the same area close to each other. (Tr. 1136-38, 1157-58; Gov. Ex. 66, 68.) And, Mr. Lloyd and the former plant manager also confirmed that FA regularly worked in the assembly area. (Tr. 1156-57, 1679, 1751-52.) Workers in the assembly area all work at the same table in close proximity to each other. (Tr. 2236.) They all make the same types of parts. Driscoll suggested that FA and FG could have different noise exposure. But, there is no evidence that FA and FG actually had notably different positions, nor is there a reasonable basis to find that their actual exposure differed. *See Gulf,* 14 BNA OSHC at 1972 (finding that hypothetical problems did not invalidate results).

Lindell explained that FG's noise sampling results accurately represent the noise levels to which any employee working in that job position would be exposed. (Gov. Ex. 225 at 8.) Along with the dosimeter results, Orach also took several "spot" measurements throughout the day in the area. (Gov. Exs. 225 at 8, 220.) All three samples also showed exposure over the action level. (Tr. 2338.) While on a day to day basis there could be some variability in the noise exposure of individual employees, Lindell concluded that it was highly unlikely that this variability would be enough to reduce exposure below the action level. (Gov. Ex. 225 at 9.) Further, three prior rounds of testing also found that workers in the assembly area were exposed to noise at or above the action level. (Tr. 1208-13; Gov. Exs. 132, 111, 144.) These facts make it reasonable to consider FG, FA, and other workers in the assembly area to be a similar exposure group.

(2) Violation

Given the acceptance of the noise sampling results showing exposure over the action level, Respondent was required to obtain an annual audiogram for FA. However, Respondent failed to do so in 2013.[49] (Tr. 1148, 1197-98.) FA worked for Respondent during this entire period and should have undergone annual audiograms as required by 29 C.F.R. § 1910.95(g)(6).[50]

[49] A few weeks after the November 2014 inspection, Respondent obtained audiograms for employees working in the assembly area. (Tr. 1152.) However, this was over a year beyond the deadline.

[50] The undersigned also notes that the initial requirement to obtain annual audiograms was triggered by the past noise surveys because they identified exposure over the action level for workers in the assembly area. Respondent does not allege that any of these prior surveys were flawed. Nor does it point to any significant changes in operations that would have caused it to believe that noise levels had been reduced below the action level.

(3) Knowledge

Mr. Lloyd recognized that the assembly area was the noisiest part of the Facility. (Tr. 1270, 1676.) In 2008, Orach came to the Facility and notified Mr. Lloyd about employee exposure to noise above the action level. Orach provided a means to reduce the noise level. (Tr. 1269-70.) He also showed Mr. Lloyd the noise levels on a sound meter. (Tr. 1270.) Mr. Lloyd did not take the recommended step of placing rubber on the table and told Orach he liked the noise. *Id*. Moreover, because of OSHA's two prior noise surveys, as well as a third independent survey conducted in 2009, Respondent had actual knowledge that employees in the assembly area were exposed to noise levels at or above the action level.[51] (Tr. 1519-20; Gov. Ex. 126, 146.)

During the investigation, Mr. Lloyd told Orach that there was no audiometric testing done in 2013, and he did not provide any records of it. (Tr. 1198.) At the hearing, Mr. Lloyd denied knowing that the audiograms were not conducted but admitted that he took no steps to make sure annual audiometric testing was completed. (Tr. 1655-56.) Particularly considering the length of time that passed, even if Mr. Lloyd lacked personal knowledge, an employer could

[51] Respondent also specifically agreed to conduct audiometric testing as part of the 2005 Settlement Agreement:

> [a]s part of its ongoing abatement obligations, Respondent will further ensure: that the entire facility is in compliance with 29 C.F.R. § 1910.95 ("Occupational Noise Exposure"), including but not limited to compliance with paragraphs (d) ("Monitoring"), (g) ("Audiometric testing program"), and (k) ("Training Program") … .

(Gov. Ex. 139 at 10). The 2008 citations were similarly resolved with a Settlement Agreement that included specific responsibility to "submit written documentation of all annual audiometric testing for the next three years and training records as well as all baseline testing." (Gov. Ex. 157 at 7.)

discover the violation by exercising reasonable diligence.[52] *See Hamilton Fixture,* 16 BNA OSHC at 1089; *L&L Painting Co., Inc.*, 23 BNA OSHC 1986, 1994 (No. 05-0055, 2012) (concluding that employer would have known about employee exposure if it had conducted the required monitoring).

(4) Characterization

Respondent was cited twice before for violating 29 C.F.R. § 1910.95. Mr. Lloyd signed settlements in 2006 and 2009 that included specified commitments to conduct audiometric testing. (Gov. Exs. 139, 157.) The Secretary argues that Respondent purposefully violated audiogram requirements in 2013 because it valued cost savings more than safety. (Sec'y Br. at 54.)

Mr. Lloyd delegated the responsibility for obtaining the annual audiograms to DS, who was his plant manager until OSHA issued the citations. DS acknowledged that he tried to arrange for the audiograms but indicated that after Mr. Lloyd raised concerns about the price, he turned the matter over to another employee to handle. (Tr. 1768-69.) DS thought that the other employee may have discussed the price of the testing further with the provider, but was unsure of what occurred. (Tr. 1769.) This is more suggestive of negligence than a willful failure to comply.

The Secretary points out that DS had little experience in health and safety matters and Mr. Lloyd took no steps to follow up on whether DS or anyone else actually arranged the annual audiograms. (Tr. 1655-57, 1661, 1746.) Although this failure to follow up and appropriately delegate is concerning, the Secretary failed to establish that there was a conscious decision to

[52] The former plant manager (DS) also had actual knowledge that there were no audiograms obtained in 2013. (Tr. 1152, 1767.)

forego the testing in conscious disregard of the standard as opposed to forgetting to obtain the audiograms because of carelessness.

Similarly, while the Secretary put forth evidence suggestive of a lack of commitment to following the Act, he failed to meet the high bar for plain indifference. Respondent obtained audiograms in 2012 and again after the commencement of the 2014 investigation. (Tr. 1147-48, 1152.) *See Dayton Tire,* 671 F.3d at 1255 (finding that some effort at compliance was sufficient to rebut a willfulness characterization). Respondent obtained the audiograms promptly after the inspection before the Secretary issued the citation. *See Access Equip*., 18 BNA OSHC at 1728 (considering the employer's response to the violation when evaluating willfulness).

While not willful, the violation is serious. Noise at the workplace is a serious health problem, and periodic audiometric testing makes it possible to determine hearing loss resulting from noise in the workplace. *Trinity,* 16 F.3d at 1150-51. Orach explained that the violation could lead to a permanent hearing loss. (Tr. 1218-19.)

(5) Penalty Amount

The Secretary proposed a penalty of $70,000 but because the violation is affirmed as serious the maximum penalty is $7,000. 29 U.S.C. § 666(j). This is the third time Respondent has been cited for violating OSHA's noise standard thereby making any credit for good faith, history, or size inappropriate. (Gov. Ex. 139, 157.) It should have been well aware of the requirements and in failing to obtain the annual audiogram violated both the standard as well as its past agreement with OSHA. Accordingly, a penalty of $7,000 for this violation is appropriate.

b) Item 2 – Failure to Obtain Annual Audiogram for FTM

Citation 1, Item 2 relates to the same standard as Item 1 but concerns the exposure of a different employee, FTM.[53] There is no dispute that Respondent failed to obtain an audiogram for FTM (or anyone else) in 2013. Respondent only contends that the data relied on to establish the applicability of the cited standard may be inaccurate. (Resp't Br. at 66-67.)

(1) Applicability & Exposure

Orach monitored FTM from 8:0l am to 6:05 pm, except for a 49-minute lunch break when FTM left the Facility.[54] (Gov. Ex. 225 at 11.) Applying three different calculation methods all showed an exposure above the action level for FTM. *Id.* As discussed above, the undersigned finds that Orach's calibration of the instruments did not undermine the accuracy of the results. *Id.* at 4-5, 12. Because FTM was exposed to noise above the action level, 29 C.F.R. § 1910.95(g) required Respondent to obtain an annual audiogram for him.

(2) Violation & Knowledge

FTM worked for Respondent continuously at least since 2008. (Tr. 1221.) Respondent did not conduct any audiometric testing from October 2012 until December 2014. (Tr. 1148, 1152, 1767.)

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[53] Specifically, the Citation alleges Respondent violated the standard because: "[a]nnual audiograms were not provided between October 2012 and December 2014, or approximately 26 months" for an employee "exposed to the equivalent of an average sound level of 86.1 dBA, which is 1.02 times the reduced action level of 84.1 dBA."

[54] Driscoll suggested that there was a discrepancy in the amount of time Orach monitored FTM. Orach's explanation that the time gap resulted from him pausing the device is credited. (Tr. 1227.) Further, because no noise exposure was assumed for this time period, any error only suggested a lower exposure than the one actually received. (Gov. Ex. 225.)

As discussed above, Respondent had actual knowledge that employees in the assembly area were exposed to noise levels at or above the action level. Respondent was cited twice before for violating the noise standard and specifically agreed to conduct audiometric testing. (Gov. Exs. 139, 157 at 7-8.) The former plant manager (DS) knew no audiograms were completed. (Tr. 1151-52, 1767, 1907-8.) Mr. Lloyd denied personal knowledge but took no steps to make sure the annual audiometric testing occurred. (Tr. 1655-56.) Respondent missed the annual deadline for testing by many months. A reasonably diligent employer could have discovered the violation. *See Hamilton Fixture*, 16 BNA OSHC at 1089.

(3) Characterization & Penalty Amount

For the same reasons discussed above in connection with Item 1, the undersigned finds that the Secretary failed to establish that the violation was willful. The Secretary did not establish that there was a conscious decision not to obtain the annual audiograms or put forth enough evidence to support a finding of plain indifference with respect to hearing conservation.

Still, the violation is serious. *See Trinity*, 16 F.3d at 1150-51, 1155 (discussing the importance of 29 C.F.R. § 1910.95 and upholding a violation as willful). Orach explained how exposure to noise levels experienced in the assembly area could lead to hearing loss and the need for annual monitoring. (Tr. 1218-19.) Respondent has repeatedly been cited for violating this standard and should have been well aware of its requirements. After considering Respondent's size, the undersigned finds that the violation's gravity, along with the other penalty factors, make giving credit for size inappropriate. Respondent's significant history and lack of a good faith effort to comply support a penalty of $7,000 for this violation.

c) Item 3 – Failure to Obtain Annual Audiogram for RG

Item 3 alleges Respondent violated the standard because "[a]nnual audiograms were not provided between October 2012 and December 2014, or approximately 26 months" for an employee "exposed to the equivalent of an average sound level of 87 dBA, which is 1.04 times the reduced action level of 83.3 dBA." Consistent with Items 1 and 2, Respondent concedes that there was no audiogram done 2013 for RG (or any other employee). (Resp't Br. at 66-67.) Still, it argues that Item 3 should be vacated due to the methodology employed to conduct the noise survey. *Id.*

(1) Applicability & Exposure

Orach monitored RG from 7:54 am to 6:01 pm on the day of the testing. (Gov. Ex. 225 at 13.) His analysis found exposure above the action level. (Gov. Ex. 198.) Likewise, Lindell analyzed the data using multiple methods and concluded that RG was exposed to noise above the action level. (Gov. Ex. 225 at 13.) Consistent with the discussion of Items 1 and 2, the undersigned finds that Orach's calibration of the instruments did not undermine the accuracy of these results. *Id.* at 4-5, 13-14. Nor did Orach's decision to continue monitoring RG during lunch have an impact on the results. *Id.* at 13. RG spent the lunch break at the Facility and was still exposed to noise there. (Tr. 1399, 2329.) In any event, even if one were to assume he experienced silence during lunch, the results would still exceed the action level. (Gov. Ex. 225 at 13.) Because RG was exposed to noise above the action level, 29 C.F.R. § 1910.95(g) required Respondent to obtain an annual audiogram for him.

(2) Violation & Knowledge

Respondent did not conduct any audiometric testing from October 2012 until December 2014. (Tr. 1148, 1152, 1767.) RG worked for Respondent during that entire time period. (Tr.

1245.) The failure to obtain any audiogram over this 26-month period violated the 29 C.F.R. § 1910.95(g)(6).

As indicated above, OSHA cited Respondent twice before for violating the noise standard. Pursuant to the 2009 Settlement Agreement, Respondent specifically agreed to conduct audiometric testing. (Gov. Exs. 139, 157.) Although Mr. Lloyd denied personal knowledge that the audiograms were not conducted, he took no steps to make sure the annual audiometric testing was completed. (Tr. 1655-56.) Even if Mr. Lloyd lacked knowledge, DS knew audiometric testing was not completed, and a reasonable, diligent employer could have discovered the violation. (Tr. 1151-52, 1767.) *See Hamilton Fixture*, 16 BNA OSHC at 1089.

(3) Characterization & Penalty Amount

As with Items 1 and 2, the undersigned finds that the Secretary failed to establish that the violation was willful. There is insufficient evidence of a conscious decision not to obtain the annual audiograms or plain indifference to the Act's requirements.

The violation, however, is serious. RG was exposed to noise above the action level and should have been monitored for hearing loss. (Gov. Ex. 225 at 13.) Respondent has repeatedly been cited for violating this standard and was well informed about the requirements. (Gov. Exs. 139, 148, 157.) This significant history and lack of a good faith effort to comply support a penalty of $7,000 for this violation. Like the items previously discussed, the undersigned considered Respondent's size but finds that the violation's gravity and the other penalty factors preclude a reduction for size.

2. Citation 1, Item 4b – Willful Failure to Provide Annual Noise Related Training

Citation 1, Item 4b alleges a willful failure to comply with 29 C.F.R. § 1910.95(k)(2) for failure to conduct annual training for three employees exposed to noise above the action level.[55] (Tr. 1250.) Noise surveys in 2005, 2008, 2009, and 2014 identified noise exposure at or above the action level for employees in the assembly area. (Tr. 1257-58, 1271, 1532; Gov. Exs. 126, 145, 146.) Whenever employees are exposed to noise above the action level, employers must have a hearing conservation program that includes annual training for effected employees. 29 C.F.R. § 1910.95(k)(2). Similar to its arguments concerning Items 1, 2 and 3, Respondent acknowledges that repeat annual training did not occur. (Resp't Br. 70-71.) Respondent, however, challenges the accuracy of 2014 test results and argues that even if there was a violation, it was not willful. *Id.*

a) Applicability & Exposure

Like the three previous noise surveys, the one conducted by Orach in 2014 showed that workers in the assembly area were exposed to noise levels at or above the action level. (Gov. Ex. 225.) For the reasons discussed above, Respondent's challenges to how the instruments were calibrated are rejected. *Id.* at 4-5. Similarly, the undersigned finds that Orach's case by case decision on whether to include sound exposure occurring during the lunch break was

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[55] The cited standard provides:

> The training program shall be repeated annually for each employee included in the hearing conservation program. Information provided in the training program shall be updated to be consistent with changes in protective equipment and work processes.

29 C.F.R. § 1910.95(k)(2).

appropriate.[56] Likewise, the undersigned finds that because of the similarity of the typical work responsibilities and the other reasons set forth above, FG's noise sampling results accurately represent the noise levels to which any employee working in that job position would be exposed, including FA.[57] *Id.* at 8.

FA, FTM, and RG all worked for Respondent for several years. (Tr. 793, 1221, 1245, 1997.) The Secretary established that they were exposed to noise at or above the action level, triggering the requirement for annual training under 29 C.F.R. § 1910.95(k)(2). (Tr. 1249-51.) While Respondent conducted the training in 2012, there was no subsequent training until after the November 2014 inspection. (Tr. 1251-52, 1402.) The Secretary presented ample evidence in the form of multiple noise surveys showing that employees were exposed to noise above the action level and therefore Respondent needed to provide annual training required by 29 C.F.R. § 1910.95(k)(2).

b) Knowledge

Due to the prior testing and citations, Respondent had actual knowledge that employees in the assembly area were exposed to noise levels at or above the action level.[58] (Gov. Exs. 126,

[56] In any event, the decision on whether to include lunchtime noise exposure did not impact the overall results. (Gov. Ex. 225 at 7-8, 13.)

[57] Further, even if only the results of FTM and RG were utilized the Secretary still would have established that employees working in the assembly area were exposed to noise levels at or above the action level and should have annual training. (Gov. Ex. 225.)

[58] In 2005, Respondent was cited for violating 29 C.F.R. § 1910.95(k)(1), which requires initial training for employees exposed to noise above the action level. (Gov. Ex. 225 at 14-15.) In 2008, it was cited for violating 29 C.F.R. § 1910.95(k)(2), the same subsection at issue here. RG and FTM were both doing the same job in 2008 as they were at the time of the 2014 inspection. (Tr. 1271.) The 2005 and 2008 citations were resolved through settlement agreements. (Gov. Exs. 139, 157.)

145, 146.) Respondent also entered into two separate agreements with OSHA that explicitly detailed the requirement to conduct annual training. (Tr. 1534-35; Gov. Exs. 148, 200.) Mr. Lloyd denied personal knowledge that the training was not conducted in 2013. But, he conceded that he did not get involved with training and took no steps to ensure that the company was in compliance. (Tr. 1151-52, 1653, 1767, 1880.) Particularly considering the length of time that passed before Respondent conducted the training, the violation should have been discovered by a reasonably diligent employer. *See Hamilton Fixture*, 16 BNA OSHC at 1089.

c) Characterization

To be willful, a violation must be committed with intentional disregard of the requirements of the Act or the employer must be plainly indifferent to employee safety. *MJP*, 19 BNA OSHC at 1647. Respondent was cited twice before for violating 29 C.F.R. § 1910.95(k). (Gov. Exs. 126, 145, 146, 200.) After its second citation, Respondent conducted some hearing conservation training in 2012. Still, it failed to conduct the required annual re-training until after the inspection that led to this citation.

The Secretary suggests, but does not establish, that the 2013 training was purposely foregone. Mr. Lloyd delegated the responsibility for the noise training to DS and relied solely on him for compliance. (Tr. 1653, 1660, 1664; Gov. Ex. 200 at 4.) Although DS indicated that he discussed the need for audiometric testing with Mr. Lloyd, the record does not indicate whether DS discussed the need for noise training with Mr. Lloyd. (Tr. 1152.) Thus, there is insufficient evidence to conclude that there was a conscious decision to intentionally disregard the training requirement. As with the failure to conduct annual audiograms, Respondent's failure to complete the required training appears to be more the result of negligence than willfulness.

Additionally, the Secretary failed to prove plain indifference. Respondent conducted the required training in 2012 and again after the inspection in 2014 (before any the Secretary issued any citations). Though this is not sufficient, it indicates some effort to comply with the standard, making a finding of plain indifference inappropriate. *See Dayton Tire,* 671 F.3d 1255; *Access Equip*., 18 BNA OSHC at 1728 (considering response to the violation when evaluating willfulness).

d) Penalty Amount

The Secretary proposed a penalty of $70,000, but because the violation is affirmed as serious instead of willful, the maximum penalty is $7,000. 29 U.S.C. § 666(j). Lindell explained that training is vital for employees exposed to noise above the action level because not taking the appropriate precautions can lead to a loss permanent of hearing. (Gov. Ex. 225 at 14-15.) Employees were exposed to noise daily without being trained how to minimize the risk to their hearing. (Gov. Ex. 200 at 2.) The undersigned finds that the violation's gravity combined with Respondent's history of violations and lack of good faith supports a penalty of $7,000, with no credit given for size. Although Mr. Lloyd had every reason to know of the annual noise training standard, he delegated the responsibility to an employee without ensuring that the required testing was completed.

3. Citation 2, Item 3 – Failure to Conduct Compliant Noise Monitoring

Citation 2, Item 3 alleges that Respondent violated 29 C.F.R. § 1910.95(d)(1)(i) by failing to conduct noise monitoring in a compliant manner because it did not review or analyze

any monitoring results.[59] Respondent asserts that it had a sufficient program and suggests that the Citation is inappropriate because it previously provided OSHA with information about its monitoring program. (Resp't Br. at 74.)

a) Applicability & Exposure

The cited standard requires employers to conduct noise monitoring in a manner designed to identify individuals exposed to noise above the action level so that they may be included in the hearing conservation program. 29 C.F.R. § 1910.95(d)(1)(i). As discussed above, the 2014 noise survey, as well as three prior ones, identified noise levels at the Facility above the action level. (Gov. Ex. 111, 126, 144, 225.) This triggered the need for a hearing conservation program with regular noise monitoring. *Id*.

b) Violation

There was no evidence that anyone at the Facility was trained to use a sound meter. (Tr. 1267-68, 1762.) The former plant manager, DS, who was charged with conducting the monitoring, was not trained how to use the sound meter, nor did Respondent have an instruction manual. *Id.* Moreover, DS was not trained to understand the results. *Id.* He was not aware of the threshold requirements that indicate noise is above the action level. *Id.*

The records of the required monitoring Respondent provided list noise level readings that are inconsistent with the past noise surveys conducted by OSHA and Respondent's own

[59] The cited standard provides: "[t]he sampling strategy shall be designed to identify employees for inclusion in the hearing conservation program and to enable the proper selection of hearing protection." 29 C.F.R. § 1910.95(d)(1)(i).

consultant in 2009.[60] (Gov. Exs. 111, 225.) Respondent's records show most of the noise level readings as being below 65 decibels, which is within the range for average speech, not a machine shop. (Tr. 1264; Gov. Ex. 256.) These results are incompatible with Orach's experience at the Facility as well as Mr. Lloyd's own descriptions about noise at the Facility. (Tr. 1270.) Other than noting the results, no one took any action to review the findings to identify individuals for inclusion in the hearing conservation program or even assess basic accuracy. (Tr. 1264-65, 1764.)

Respondent notes that it submitted documentation regarding its monitoring program to OSHA in March 2008 as part of the agreed upon abatement for past violations of the noise standard.[61] (Resp't Br. at 74.) Respondent seems to suggest that this triggered some kind of estoppel against finding that its program violated 29 C.F.R. § 1910.95(d)(1)(i).[62] *Id.*

As noted above, OSHA cited Respondent for violating the noise standard in 2005. Thereafter, Respondent entered into the 2006 Settlement Agreement, which required various abatement measures, including submitting compliance information to OSHA. (Gov. Ex. 139 at 10.) In March 2008, Respondent sent a short one-page letter to OSHA about its compliance efforts. (Gov. Ex. 231.) OSHA responded that the information was incomplete and requested further details about Respondent's compliance efforts including information related hearing

[60] The 2009 noise survey showed that noise levels were 80 or more decibels in most areas of the Facility. (Gov. Ex. 111.)

[61] Respondent's Brief refers to exhibits R-11 and R-13. (Resp't Br. at 39, 74.) Although an Exhibit 13 was referred to during the hearing, neither party moved for its admission. (Tr. 1549, 1859.) Respondent may have been referring to exhibits listed on its Pre-Hearing Statement, but it does not appear that the documents designated R-11 and R-13 were admitted to the record.

[62] Respondent does not allege that the citation was untimely, and would have no basis for such an assertion as the violation was present on the day of the inspection and the citation was issued with six months of the inspection date. 29 USC § 658(c).

conservation. (Gov. Ex. 149.) When Respondent failed to respond to this letter, the agency inspected the Facility. (*Id.*; Tr. 1525.) This led to additional citations, including violations of the noise standard (but not subsection (d)), which were eventually resolved by the 2009 Settlement Agreement. (Tr. 1530-33, 1536; Gov. Ex. 148, 157.) The 2009 Settlement Agreement did not specifically require submission of information related to Respondent's noise monitoring program. It does not appear that anything was submitted. (Gov. Ex. 157.)

Neither Respondent's submission of some information in 2008, nor the 2009 Settlement Agreement precludes the Secretary from citing Respondent for violations of the noise standard discovered as a result of its 2014 inspection. *See, e.g., Kaspar*, 18 BNA OSHC at 2182-83 (history of citation-less inspections did not preclude finding a violation). OSHA never informed Respondent that its program was compliant. *See Fluor Daniel,* 295 F.3d at 1238. In fact, as Ms. Kulp explained, OSHA was concerned about whether Respondent would comply with the Act and so, as part of the 2009 Settlement Agreement, it specifically required Respondent to retain an independent consultant for two years to address and make recommendations about Respondent's compliance with OSHA standards, including the noise standard. (Tr. 1536; Gov. Ex. 157 at 8.)

Accordingly, the undersigned finds that Respondent failed to conduct noise monitoring in a manner designed to identify individuals exposed to noise above the action level because it did not review the noise monitoring results to determine its accuracy or take appropriate action.

c) Knowledge

The former plant manager, DS, knew that no one was reviewing the monitoring results.[63] He explained that he feared Mr. Lloyd's reaction to his conducting the monitoring, let alone

[63] Respondent does not allege that DS, or any other employee, engaged in misconduct in connection with the noise standard violations. *Cf. Pa. Power & Light Co. v. OSHRC*, 737 F.2d

discussing the results with him. (Tr. 1763-64, 1767.) Further, Mr. Lloyd himself acknowledged that he took no steps to ensure compliance with the monitoring requirements. (Tr. 1653, 1655-56.)

d) Characterization & Penalty Amount

The Citation characterizes this violation as other-than-serious and proposes no penalty. The Secretary did not argue the classification or lack of penalty. (Sec'y Br. at 56-58.) The undersigned finds that there was insufficient evidence of that "death or serious physical harm" could result from the violation, making a serious characterization inappropriate. 29 U.S.C. § 666(k). As such, the violation is affirmed as other-than-serious and no penalty is assessed.

4. Citation 2, Item 4 – Failure to Calibrate Instruments Used in the Monitoring Program

a) Applicability, Exposure & Violation

Citation 2, Item 4, alleges that Respondent violated 29 C.F.R § 1910.95(d)(2)(ii) because it failed to calibrate the instrument used for noise monitoring.[64] As indicated above, at least three employees in the assembly area were exposed at, or above, the action level triggering the

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350 (3d Cir. 1984) (discussing the special circumstance where knowledge is raised *only* by proof of misconduct). Here, the Secretary established both DS's actual knowledge as well as a basis for constructive knowledge. *See ConocoPhillips Bayway Refinery v. Secretary,* 654 F.3d 472, 479-80 (3d Cir. 2011); *W. World Inc.,* 24 BNA OSHC 2116, 2128 (No. 07-0144, 2014), *aff'd*, F.App'x 188 (3d Cir. 2015) (unpublished) (affirming judge's finding of actual and constructive knowledge even though the judge does not discuss *PP&L*); *Jersey Steel*, 16 BNA OSHC 1162, 1164 (No. 90-1307, 1993) (finding that the Secretary did not have to show the violations were foreseeable), *aff'd without opinion*, 19 F.3d 643 (3d Cir. 1994). Nor does the undersigned find that any employee misconduct claim could stand because there is no evidence DS violated any workplace rule. Although Respondent had a written hearing conservation plan, it was incomplete and there was no evidence of enforcement.

[64] The cited standard requires: "[i]nstruments used to measure employee noise exposure shall be calibrated to ensure measurement accuracy." 29 C.F.R. § 1910.95(d)(2)(i).

noise monitoring requirements. 29 C.F.R § 1910.95(d). (Gov. Ex. 225.) Mr. Lloyd indicated that the sound meter used for noise monitoring was calibrated only when received. (Tr. 1266.) DS, who was charged with conducting the monitoring, neither calibrated it himself nor sent it out for calibration. *Id.* Without calibration, Respondent had no way to ensure the monitoring's accuracy. (Tr. 1266-68.) And without accurate monitoring, Respondent could not identify employees who should be included in its hearing conservation program 29 C.F.R. § 1910.95(d) requires.

Respondent asserts, without support, that the company submitted documentation of the results of the instruments it used as part of its abatement effort.[65] (Resp't Br. at 74.) Even assuming this was established, it does not address whether Respondent violated 29 C.F.R § 1910.95(d)(2)(ii), which concerns instrument calibration.

b) Knowledge

Both Mr. Lloyd and DS knew that the sound meter was not being calibrated. (Tr. 1266.) Further, during the 2008 inspection, Orach specifically raised possible issues with the calibration of Respondent's sound meter. *Id.* Orach offered to provide compliance assistance, but was rebuffed. *Id.*

[65] As discussed above, Respondent submitted to OSHA a letter dated March 5, 2008. (Gov. Ex. 231.) The letter does not address calibration of instruments or Respondent's noise monitoring program. *Id.* OSHA let Respondent know that its response was inadequate and the 2009 Settlement Agreement included the requirement that Respondent retain an independent consultant to review the company's compliance and make recommendations for further compliance. (Gov. Exs. 149, 157 at 8.) Kulp explained that this was included to try to ensure future compliance and make sure that the company was taking steps to bring itself into compliance. (Tr. 1535.) Respondent points to no evidence suggesting that OSHA considered its noise monitoring program compliant.

c) Characterization & Penalty Amount

As with Item 3, the Citation characterizes this violation as other-than-serious and proposes no penalty. The undersigned finds that there was insufficient evidence of that "death or serious physical harm" could result from the violation, making a serious characterization inappropriate. 29 U.S.C. § 666(k). The Secretary did not propose a monetary penalty and the record does not suggest that one is necessary. Accordingly, the violation is affirmed as other-than-serious and no penalty is assessed.

C. Violation of Hazard Communication Standard

Citation 1, Item 5 alleges that Respondent willfully failed to provide information and training about hazardous chemicals as required by 29 C.F.R. § 1910.1200(h)(1).[66] Respondent contests the standard's applicability, the existence of a violation, the exposure of any employee and, if a violation was established, its characterization as willful. (Resp't Br. at 72-74.)

1. Applicability

The hazard communication, or hazcom, standard requires employers to provide information about the identities and hazards of chemicals used in the workplace. 29 C.F.R. § 1910.1200(a). It applies to "any chemical which is known to be present in the workplace in

[66] The cited standard requires employers to:

> provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

29 C.F.R. § 1910.1200(h)(1).

such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." 29 C.F.R. § 1910.1200(b)(2). The standard broadly defines "chemical" as "any substance or mixture of substances," and a "hazardous chemical" as "any chemical which is classified as a physical hazard or a health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified." 29 C.F.R. § 1910.1200(c). An employee need not be actually or purposely exposed to a chemical to trigger the standard's requirements. *Id.*

Exposure for purposes of the hazcom standard includes any route of entry (e.g., inhalation, ingestion, skin contact or absorption) and potential, or the possibility of accidental, exposure is sufficient. *Id*. Employees used silver spray paint daily. (Tr. 71-72, 1076-78.) When applying the spray paint, employees typically did so for 30-45 minutes and used one to two cans of the paint. *Id.* The material safety data sheet ("MSDS") for the spray paint shows that it was both a physical hazard because of its flammability and a health hazard due to inhalation risks.[67] (Gov. Ex. 221.)

Respondent alleges that this evidence of exposure is insufficient for the following two reasons. First, the Secretary is relying on JE's use of the spray paint and he was terminated more than six months before the Citation's issuance. Second, the consumer product exception contained in 29 C.F.R. § 1910.1200(b)(6)(ix) applies. (Resp't Br. at 72-73.) As for the first argument, employees used spray paint during the inspection. (Tr. 1281-82.) Respondent does not deny that even after it fired JE, employees continue to use spray paint regularly. Indeed, MS and the maintenance supervisor both testified that they used it. (Tr. 1077-78, 1278.) The

[67] Orach discussed why he believed the spray paint was hazardous and indicated that the manufacturer and distributor confirmed that the spray paint was flammable. (Tr. 1276-77.)

Citation is not limited to any individual employee and the Secretary established that the spray paint was being used within six months of when he issued the Citation. *See* 29 USC § 658(c).

Moving to the consumer product exception argument, the hazcom standard does not apply to consumer products if the employer can show that employees use the product the same way ordinary consumers use it, i.e.:

> it is used in the workplace for the purpose intended by the chemical manufacturer or importer of the product, and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended.

29 C.F.R. § 1910.1200(b)(6)(ix). This exception requires the employer to establish three elements. First, it must show that the spray paint falls within the definition of either a consumer product under the Consumer Product Safety Act, 15 U.S.C. § 2502(a)(5), or a hazardous substance under the Federal Hazardous Substances Act, 15 U.S.C § 1261, *et seq*. *Id.* Second, the employer must establish the spray paint was used in the same manner as a normal consumer would use it. *Id.* Finally, the employer must show that employees' exposure is of the same duration and frequency as the normal consumer. *Id. See Safeway Store No. 914,* 16 BNA OSHC 1504, 1511 (No. 91-373, 1993).

Respondent did not present specific evidence showing the use of spray paint uses falls within the definition of "consumer product" or "hazardous substance." However, a former employee testified that the spray paint was of a type one could purchase at a retail store and the Secretary concedes that it is "likely" that the product falls within the definition of consumer product. (Sec'y Br. at 60, discussing 15 U.S.C. § 2502(a).) As for its use at the Facility, Respondent presented no evidence that using spray paint on hot welds or on parts manufactured at a plant and intended for sale is within the purpose intended by the manufacturer. (Tr. 1278-79.) Additionally, Respondent did not offer evidence showing that the duration and frequency of

employee exposure were no greater than that expected for consumers. Instead, it asks the undersigned to speculate that the use of a can or more of spray paint a day is typical. (Resp't Br. at 73.)

The Commission examined the use of spray paint in *Atlantic Battery Co*., 16 BNA OSHC 2131 (No. 90-1747, 1994). It found that the routine, frequent use of spray paint went beyond typical consumer use. 16 BNA OSHC at 2176. MS explained that he used spray paint daily for a total of about five hours per week. (Tr. 1077-78.) Other employees indicated they routinely used one or more cans at a time. (Tr. 1278-79.) Orach observed the use of the spray paint on hot materials and noted the pace at which it was applied. (Tr. 1281-82.) Respondent appears to have recognized the employees' use of the spray paint differed from typical consumer use as it included spray paint on the list of hazardous chemicals used in the workplace and provided an MSDS for it to employees.[68] (Gov. Ex. 221.) Accordingly, the consumer product exception is inapplicable and the cited standard applies.

2. **Violation**

The cited standard requires employers to provide effective information and training. 29 C.F.R. § 1910.1200(h)(1). Respondent had a written hazcom program. (Gov. Ex. 221.) Two former employees testified, however, that they received no training about the hazcom standard, the company's program, or MSDS. Simply having documentation is not enough to satisfy the standard. The information given must be effective and employees must be trained. *ARA Living*

[68] The Citation also refers to the use of WD-40 at the Facility. However, the Secretary does not rely on the use of this substance as a basis for supporting the violation in his brief. (Sec'y Br. at 59-62.) Because the use of the spray paint is a sufficient to trigger the requirements of the cited standard, the undersigned need not reach whether the use of WD-40 provides another basis for affirming the violation.

Ctrs. of Tex., Inc., 15 BNA OSHC 1417, 1418 (No. 89-1894, 1991) (finding that labeling, information, and training requirements impose separate responsibilities and training must go beyond merely telling employees there is a written program).

Respondent argues that the spray paint was of a type that was widely available and suggests that employees intuitively knew how to avoid any hazard. (Resp't Br. at 73.) These arguments go to the gravity of the violation, not whether it was violated. When asked whether he knew that inhaling spray paint could cause injury, one former employee indicated that it was "common sense." (Tr. 1103.) But, he was not asked whether he knew how to avoid inhalation or whether he knew about the flammability of the substance and how to avoid ignition. (Tr. 1274, 1281-82.) Further, there is no evidence about what the other employees who used the spray paint understood about the hazards related to the product. The MSDS includes risks that might not be readily apparent or be considered "common sense" for use of the product in a non-commercial facility. Additionally, the risks may not be applicable to the way in which Respondent required employees to use this product in the normal course of business. (Gov. Ex. 221.)

3. **Exposure**

The Secretary presented evidence indicating that two current and two former employees used spray paint. (Tr. 71-72, 1076-77, 1461.) As noted above, Orach observed employees using spray paint on the day of the inspection. (Tr. 1282.)

4. **Knowledge**

In 2005, OSHA cited Respondent for failing to provide the required hazcom training for proper spray paint use. (Tr. 1280; Gov. Ex. 137.) Thus, Respondent not only knew that employees were using spray paint, but they also knew that such use necessitated training and

education.[69] *See Am. Airlines,* 17 BNA OSHC at 1555 (finding knowledge based on the hazcom program coupled with the plain view nature of the violation). Respondent had a written hazcom program that designated "The President of Lloyd Industries" as the person responsible for training employees on the MSDS information for the chemicals they used. (Gov. Ex. 221.) Mr. Lloyd, however, acknowledged that he did not get involved with training and there is no indication that he tasked any other employee with performing the training or otherwise ensuring that it occurred. (Tr. 1279, 1880.) Respondent has its own hazcom program, codified in writing, effectively detailing its training policies, which makes the lack of training readily apparent and discoverable.[70] (Gov. Ex. 221.)

5. **Characterization & Penalty Amount**

Respondent was cited for violating 29 C.F.R. § 1910.1200(h) in 2005. It entered into the 2006 Settlement Agreement in which it promised to provide the information and training required by 29 C.F.R. § 1910.1200(h). (Gov. Ex. 139.) While this past violation gives Respondent a heightened awareness of the standard's requirements, the Secretary did not show that anyone was "actually aware" that the company was not in compliance. *See Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999).

Moreover, with respect to this violation the record contains insufficient evidence that the Respondent had a state of mind such that it would not have cared if it was informed of the non-compliance. *See Eric K. Ho,* 20 BNA OSHC 1361, 1378 (No. 89-1645, 2003) (stating, in

[69] In its brief, Respondent does not challenge its knowledge of this violative condition.

[70] FF acknowledged that he did not receive any hazcom training. (Tr. 1462.) He was described as a maintenance man, although he appeared to have significant responsibilities and at least one former employee thought he was a supervisor. (Tr. 53, 150, 1051, 1426.) The Secretary does not rely on his actual knowledge about the lack of training to establish a violation.

connection with a general duty clause violation, that evidence of state of mind for purposes of willfulness characterization must relate to the cited condition).[71] Respondent had some elements of a hazcom program, including an MSDS sheet for spray paint. Although employees were not trained as required, they did have some access to information about the hazards faced from chemicals used in the workplace. Respondent's efforts at compliance with other aspects of the hazcom standard, while insufficient to defeat the violation, support the conclusion that the violation was not willful. *See Dayton Tire,* 671 F.3d at 1255 (finding that the employer's effort at compliance rebutted a finding of willfulness).

The violation is, however, serious. Orach explained that while death was not likely, the manner in which the employees used spray paint raised concerns about ignition. Still, Orach viewed the violation's overall gravity as low. (Gov. Ex. 201.) The relatively low gravity of the violation must be viewed in the context of Respondent's significant history, which includes a past violation of the same standard. *See Quality Stamping,* 16 BNA OSHC at 1929 (finding that significant history can diminish gravity's relative importance). Similar to the items previously discussed, the undersigned considered Respondent's size, but finds that the other penalty factors outweigh that factor. Accordingly, the undersigned finds that $3,500 is an appropriate penalty amount.

[71] *E. Smalis Painting Co*., 22 BNA OSHC 1553 (No. 94-1979, 2009) overruled the portion of the *Ho* decision that precluded per employee citation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

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

1. Citation 1, Item 3a, which was issued as a result of Inspection No. 1008085 and alleges a serious a serious violation of 29 C.F.R. § 1910.219(b)(1), is AFFIRMED and is grouped with Citation 1, Items 3b, 3c and 3d for penalty purposes. A single $5,000 penalty is assessed for the affirmed portions of Citation 1, Items 3a, 3b, 3c and 3d;
2. Citation 1, Item 3b, which was issued as a result of Inspection No. 1008085 and alleges a serious a serious violation of 29 C.F.R. § 1910.219(d)(1), is AFFIRMED with respect to Instances (a), (b), (c), and (d), and VACATED with respect to Instance (e);
3. Citation 1, Item 3c, which was issued as a result of Inspection No. 1008085 and alleges a serious a serious violation of 29 C.F.R. § 1910.219(e)(1)(i), is AFFIRMED;
4. Citation 1, Item 3d, which was issued as a result of Inspection No. 1008085 and alleges a serious a serious violation of 29 C.F.R. § 1910.219(e)(3)(i), is AFFIRMED with respect to Instances (a), (b), and (c), and VACATED with respect to Instance (d);

5. Citation 1, Item 4, which was issued as a result of Inspection No. 1008085 and alleges a serious a serious violation of 29 C.F.R. § 1910.305(b)(1)(ii), is AFFIRMED, and a penalty of $5,000 is assessed;
6. Citation 2, Item 1, which was issued as a result of Inspection No. 1008085 and alleges a willful violation of § 5(a)(1) of the Act, is VACATED;
7. Citation 2, Item 2, which was issued as a result of Inspection No. 1008085 and alleges a willful violation of 29 C.F.R. § 1910.212(a)(3)(ii), is AFFIRMED as WILLFUL and a $70,000 penalty is assessed;
8. Citation 2, Item 3, which was issued as a result of Inspection No. 1008085 and alleges a willful violation of 29 C.F.R. § 1910.212(a)(3)(ii), is AFFIRMED as WILLFUL and a $70,000 penalty is assessed;
9. Citation 2, Item 4, which was issued as a result of Inspection No. 1008085 and alleges a willful violation of 29 C.F.R. § 1910.212(a)(3)(ii), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;
10. Citation 2, Item 5, which was issued as a result of Inspection No. 1008085 and alleges a willful violation of 29 C.F.R. § 1910.212(a)(3)(ii), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;
11. Citation 2, Item 6, which was issued as a result of Inspection No. 1008085 and alleges a willful violation of 29 C.F.R. § 1910.212(a)(3)(ii), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;
12. Citation 2, Item 7, which was issued as a result of Inspection No. 1008085 and alleges a willful violation of 29 C.F.R. § 1910.212(a)(3)(ii), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;

13. Citation 1, Item 1, which was issued as a result of Inspection No. 1009661 and alleges a willful violation of 29 C.F.R. § 1910.95(g)(6), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;
14. Citation 1, Item 2, which was issued as a result of Inspection No. 1009661 and alleges a willful violation of 29 C.F.R. § 1910.95(g)(6), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;
15. Citation 1, Item 3, which was issued as a result of Inspection No. 1009661 and alleges a willful violation of 29 C.F.R. § 1910.95(g)(6), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;
16. Citation 1, Item 4b, which was issued as a result of Inspection No. 1009661 and alleges a willful violation of 29 C.F.R. § 1910.95(k)(2), is AFFIRMED as SERIOUS and a $7,000 penalty is assessed;
17. Citation 1, Item 5, which was issued as a result of Inspection No. 1009661 and alleges a willful violation of 29 C.F.R. § 1910.1200(h)(1), is AFFIRMED as SERIOUS and a $3,500 penalty is assessed
18. Citation 2, Item 3, which was issued as a result of Inspection No. 1009661 and alleges an other-than-serious violation of 29 C.F.R. § 1910.95(d), is AFFIRMED as other-than-serious and no penalty is assessed; and

19. Citation 2, Item 4, which was issued as a result of Inspection No. 1009661 and alleges an other-than-serious violation of 29 C.F.R. § 1910.95(d), is AFFIRMED as other-than-serious and no penalty is assessed.

SO ORDERED.

/s/

Keith E. Bell

Judge, OSHRC

Dated: June 19, 2017

Washington, D.C.