



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.
BIRDSBORO KOSHER FARMS CORP.,
Respondent.

OSHRC DOCKET NOS. 16-1575, 16-1731

Appearances:

Kate S. O'Scannlain, Solicitor of Labor
Oscar L. Hampton, III, Regional Solicitor
Michael P. Doyle, Regional Counsel for OSHA
Judson H. Dean, Senior Trial Attorney
U.S. Department of Labor, Philadelphia, PA
For the Complainant

Joseph A. O'Keefe, Esq.
O'Keefe, Miller & Thielen, PC, Fleetwood, PA
For the Respondent

Before: Carol A. Baumerich, Administrative Law Judge

DECISION AND ORDER

Birdsboro Kosher Farms, Inc. (Birdsboro or Respondent) operates a poultry processing facility located at 1100 Lincoln Road, Birdsboro, PA. (Stip. 1.) Both it and a predecessor operating at the same location have a history of violating provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the OSH Act). This matter concerns an inspection of the facility by the Occupational Safety and Health Administration (OSHA) that began on March 2, 2016. This investigation led to the Secretary of Labor (Secretary) issuing three Citations to

Birdsboro on September 2, 2016.¹ These Citations, as amended, include alleged violations of the lockout/tagout (LOTO) standard. The Secretary alleges, in the alternative, that the LOTO violations should be characterized as willful, repeat or serious. The Citations also allege serious violations of standards related to floor holes, exits, noise exposure, and personal protective equipment (PPE).

Citation 1 includes three separate items and was issued on September 2, 2016, at the close of inspection number 1132233. On the same day, Citations 2 and 3, each with multiple separate items, were issued when inspection number 1131470 concluded.² Birdsboro filed timely notices of contest bringing the matters before the Occupational Safety and Health Review Commission (the Commission).³ The contest related to inspection number 1132233 was assigned Docket No. 16-1775 and the contest related to inspection number 1131470 was assigned Docket No. 16-1731.

These two dockets were consolidated before the hearing, which was held in Reading, Pennsylvania on April 16, 17, 18, 2018 and August 10, 2018. Both parties filed post-hearing briefs.

For the reasons discussed, these alleged violations are affirmed: from Docket No. 16-1775, Citation 1, Items 1a, 1b and 1c; and, from Docket No. 16-1731, Citation 2, Item 1; Instances (a)

¹ The Joint Pre-Hearing Statement had a typographical error about the date the Citations were issued. There is no dispute they were issued on September 2, 2016. (Tr. 7, 541, 559, 726; Compl. for Docket No. 16-1731 at Ex A; Compl. for Docket No. 16-1575 at Ex. A.)

² No Citation 1 was issued as part inspection 1131470. The first violation is denoted Citation 2, Item 1.

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

and (e) of Citation 2, Item 3b; Citation 2, Item 4; Citation 2, Items 5a, 5b and 5c; Citation 2, Item 7; and Citation 3, Item 2. Instance (d) of Citation 2, Item 3b from Docket No. 16-1731, is vacated.

Jurisdiction

Respondent has a principle place of business in Birdsboro, PA, where it employs over two hundred employees. (Tr. 477; Stip. 1.) It engages in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the OSH Act, 29 U.S.C. §§ 652(3), (5). (Stip. 4.) As such, it is an employer within the meaning of the OSH Act. (Stip. 3.) The Commission has jurisdiction over the parties and subject matter of this case. (Stip. 2.)

Factual Background

I. Current Management Employees

Birdsboro operates a large poultry processing facility at 1100 Lincoln Road in Birdsboro, Pennsylvania. It has over two-hundred and fifty employees working in several different areas. (Tr. 42-44, 477; Resp't Br. at 10.) It has approximately fifty different machines, some with multiple energy sources. (Tr. 44; Resp't Br. at 10.)

Solomon Wieder is the Director of Operations (Operations Director) and has always been involved in safety at the facility. (Tr. 167, 437; Resp't Br. at 11.) Before accepting his current position in January 2013, he served in a few other leadership roles at the facility, including part-owner and CEO, from 2009 until mid-2012. (Tr. 478-81, 494.) At the time of the Citation, his direct reports included Luisa Murray-Garcia, the Human Resources Manager (HR Manager). (Tr. 186.) Ms. Murray-Garcia worked for the company since 2013. (Tr. 187.) She is responsible for employee safety and health along with payroll, recruiting, hiring, and workers' compensation

claims. (Tr. 189-90, 239-40, 307.) The company had a high turnover and had difficulty keeping some positions filled. (Tr. 309-10.)

Carlos Urieta is Birdsboro's Superintendent. (Tr. 35.) He has been Superintendent for six years. *Id.* He worked in a few different capacities before becoming Superintendent. (Tr. 35-38.)

Pernell Reid is the facility's Maintenance Manager. (Tr. 747-48.) He started working for Birdsboro in 2015 in the maintenance department. (Tr. 748-49.) At the start of the OSHA investigation in 2016, Brandon Criswell led the maintenance department. (Tr. 50; Resp't Br. at 10.) After he left, Mr. Reid assumed his responsibilities and was eventually promoted to Maintenance Manager. (Tr. 50, 749-52; Resp't Br. at 14.) He reports to both Mr. Wieder and Mr. Urieta. (Tr. 194-95.) The maintenance department has between four and six employees. (Tr. 49.)

II. Corporate History

Birdsboro's facility has been operated as a poultry processing plant for several years, albeit with different ownership structures. (Tr. 478-84; Stip. 1.) In 2009, Mr. Wieder, his father, and another business partner purchased the business and named it "Mehadrin Kosher Poultry" (Mehadrin). (Tr. 479.) In 2010, a new company called MVP Kosher Foods, LLC (MVP) was formed and it purchased the business from Mehadrin. (Tr. 480.) Mr. Wieder continued to work at the facility as MVP's CEO and was on the Board of Directors. (Tr. 481.) He was essentially the top person at the facility. *Id.* He remained in this role from when the business was purchased by MVP until mid-2012. (Tr. 480-81.) For a few months after Mr. Weider's departure MVP continued to operate the plant without him. (Tr. 482.) Then, in late 2012, MVP ceased operations and the facility temporarily closed. (Tr. 482, 498.)

Another company, Birdsboro, purchased the business and resumed operations at the facility shortly thereafter in January 2013. (Tr. 482-84.) When the facility re-opened, Mr. Wieder returned to work at the facility, this time for Birdsboro as the Operations Director. (Tr. 437, 482-83.) Several other key employees of MVP, such as Mr. Urieta, also returned to work at the facility after Birdsboro resumed operations. (Tr. 39-41, 43, 483-85.)

III. History of Citations

Both Birdsboro and its predecessor, MVP, were cited for violations of the OSH Act. In February 2012, while Mr. Wieder was still CEO of the facility, OSHA commenced an investigation. (Tr. 481, 486, 494.) This investigation led to the issuance of citations to MVP in August 2012 (2012 Citations). These 2012 Citations included, among other things, three serious violations of the LOTO standard, 29 C.F.R. § 1910.147, and one serious violation of the standard concerned with occupational noise exposure, 29 C.F.R § 1910.95(c). (Tr. 487-92; Ex. C-54 at 6-8, 31.)

After Birdsboro took over the facility, Mr. Wieder, the Operations Director, reviewed the 2012 Citations to assess whether the violations had occurred and whether Birdsboro would be able to abate the violations. (Tr. 498.) After concluding it could comply, the company entered into a settlement agreement with OSHA on August 7, 2013 (the 2013 Settlement Agreement). (Tr. 498, 501; Ex. C-57.) Mr. Wieder also reviewed this 2013 Settlement Agreement, by which Birdsboro: (1) accepted the violations that had been issued to MVP, (2) agreed to pay \$10,000, and (3) agreed to take various abatement actions to address the violations. (Tr. 499; Ex. C-57.) Mr. Wieder was responsible for ensuring Birdsboro complied with the agreement. (Tr. 501.)

The Superintendent acknowledged that the management in place before 2013 was not concerned about safety. (Tr. 168-69; Resp't Br. at 11.) However, by the time of 2013 Settlement Agreement, Birdsboro had a dedicated health and safety manager, Steve Shifflet. (Tr. 188-89, 502.) He reported directly to Mr. Wieder and was hired to ensure compliance with OSHA and regulations issued by the United States Department of Agriculture (USDA). (Tr. 502-3.)

A few months after Birdsboro signed the 2013 Settlement Agreement, OSHA inspected the facility again. This inspection resulted in the issuance of several citations on June 10, 2014 (2014 Citations).⁴ (Ex. C-39.) The 2014 Citations included violations related to the same LOTO and hearing protection standards that were resolved by the 2013 Settlement Agreement. Specifically, the 2014 Citations included: (1) a repeat violation of 29 C.F.R. § 1910.147(c)(4)(i), for insufficient LOTO procedures; (2) a serious violation of 29 C.F.R. § 1910.147(c)(6)(i), for failing to conduct periodic inspections of the company's energy control procedure; (3) a serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A), for failing to appropriately train employees about energy isolation and control; and (4) a repeat violation of 29 C.F.R. § 1910.95(c)(1), for failing to have an effective hearing conservation program. *Id.* In all, the 2014 Citations included fourteen violations, six of which were characterized as repeat. *Id.*

Mr. Wieder reviewed the 2014 Citations when they were issued. (Tr. 509.) He then, on Birdsboro's behalf, executed two settlement agreements (2014 Settlement Agreements) to resolve the 2014 Citations (one relating to the safety violations, including the LOTO standard, and one relating to the violation for lacking an effective hearing conservation program). (Tr. 512-13; Exs.

⁴ The 2014 Citations were the result of two inspections. Inspection 951711 commenced on December 11, 2013 and ended May 27, 2014. (Ex. C-39.) Inspection 951714 commenced on the same day but ended earlier, on May 13, 2014. *Id.* The citations resulting from these two inspections were issued on June 10, 2014. *Id.*

C-44, 45.) In the 2014 Settlement Agreements, Respondent accepted the violations as issued, including the characterization of six of the violations as repeat, and agreed to pay \$40,360 in penalties.⁵ *Id.* Respondent also agreed to retain a consultant to develop and implement a written health and safety program and to establish a program of at least monthly inspections. *Id.*

Around the same time as when the 2014 Settlement Agreements were reached, the health and safety manager (Shifflet) left the Birdsboro facility. (Tr. 188-89, 515.) Mr. Wieder then assigned key aspects of Respondent's health and safety program to Ms. Murray-Garcia, the HR Manager. (Tr. 196.) He had to delegate safety responsibility. (Tr. 504.) It was not possible for him to do it himself along with his other responsibilities. (Tr. 503-4.)

Ms. Murray-Garcia's new safety and health responsibilities were in addition to continuing her human resources responsibilities, such as payroll and hiring. (Tr. 189-90, 239-40, 307.) When Mr. Wieder assigned the new duties to her, Ms. Murray-Garcia had been working for Birdsboro for about a year. (Tr. 187.) She had no professional health and safety experience and, when she began working for Birdsboro, she did not know she would end up with responsibilities related to this area. (Tr. 187-88, 517.) Before making this change, Mr. Wieder did not ask Ms. Murray-Garcia anything specific about safety and health, such as her understanding of LOTO requirements or hearing conservation. (Tr. 198-99.) Still, she was given responsibility for all safety orientations and a large part of what had been Mr. Shifflet's other responsibilities. (Tr. 189-90.)

Initially, Mr. Wieder planned to hire a full-time health and safety manager to replace Mr. Shifflet. (Tr. 192, 195, 516.) He recognized that Ms. Murray Garcia did not have professional or educational experience with health and safety. (Tr. 517.) And he acknowledged that he himself

⁵ This penalty amount is less than what was proposed by the Secretary initially. (Exs. C-44, C-45.)

was not an expert in safety. (Tr. 443.) However, Birdsboro had difficulty recruiting someone at the salary and benefit package it wanted to offer. (Tr. 196-97.) So, although having Ms. Murray-Garcia handle employee health and safety was initially planned as temporary, she was still responsible for this area, along with continuing to fulfill numerous other responsibilities, when OSHA commenced another inspection over a year later. (Tr. 192-93, 239-40, 516.)

Ms. Murray-Garcia received some assistance with employee safety and health compliance after Mr. Wieder complied with the 2014 Settlement Agreements by retaining an outside consultant, Lancaster Safety Consulting, Inc. (LSCI), to assist with health and safety at the facility for one year. (Tr. 190-3, 340-41, 515-16.) Jason Lancaster, LSCI's Vice President for Operations, and Sarah Rothrock, a Project Coordinator, tried to assist Birdsboro in abating the 2014 Citations and to develop a health and safety program for the company. (Tr. 215, 337.) Ms. Murray-Garcia was responsible for making sure LSCI complied with the agreement for services and she served as LSCI's point of contact at Birdsboro. (Tr. 201, 516; Resp't Br. at 12.)

LSCI's primary goal for the one-year contract was to ensure that Birdsboro properly abated the 2014 Citations. (Tr. 340, 404-5, 516.) It was not tasked with ensuring day to day compliance. *Id.* LSCI visited the site four times, discussed what actions Respondent needed to take to abate the violations, and provided a draft document titled Control of Hazardous Energy (the LOTO Plan) to Respondent in October 2015. (Tr. 206, 340, 342, 344; Ex. C-21.) The HR Manager reviewed the LOTO Plan and Mr. Wider provided input on its development. (Tr. 268-69, 445-46.) The LOTO Plan included steps to de-energize machines powered by a single plug. (Ex. C-21.) However, it needed to be supplemented with LOTO procedures for the specific machines at Birdsboro with more than one source of energy and would also need to be updated as the facility acquired additional electronic equipment. (Tr. 348; Ex. C-21.)

A few months after LSCI provided the LOTO Plan, on March 2, 2016, OSHA commenced two more inspections of the facility. (Tr. 439, 555.) Inspection number 1132233 resulted in one Citation alleging willful violations of the LOTO standard being issued on September 2, 2016. Inspection number 1131470 led to one serious Citation, with eight separate items, and one other-than-serious Citation with four separate items being issued on September 2, 2106.

IV. 2016 Citations

A. Withdrawn Items

Respondent timely contested the Citations. Several violations alleged are no longer in dispute. At the hearing, the Secretary withdrew Citation 1, Item 2, from the Citation issued after inspection number 1132233. He also withdrew these items from the Citations issued after inspection number 1131470: Citation 2, Item 3a; Instances (b) and (c) of Citation 2, Item 3b; Citation 2, Item 5d; and Citation 3, Items 1 and 4. (Tr. 725-26; Sec'y Br. at nn. 2, 8.) After the hearing, the Secretary withdrew these additional items, which were also from the Citations issued after inspection number 1131470: Citation 2, Items 2, 6, and 8, and Citation 3, Item 3. (Sec'y Br. at n. 8.)

B. Accepted Items

In its post-hearing brief, Respondent accepted Citation 2, Items 5a and 5b, which were part of the Citations issued as a result of inspection 1131470. (Resp't Br. at 20-21.)

C. Amended Items

Before the hearing, the Secretary moved to amend Citation 1, Items 1a, 1b, and 1c, to allege, in the alternative, that the violations should be characterized as repeat. The amendment was granted without objection. (Tr. 12-13.) At the hearing, the Secretary moved to amend Instance

(d) of Citation 2, Item 3(b), which initially alleged a violation of 29 C.F.R. § 1910.137(b)(5), to allege, in the alternative, a violation of 29 C.F.R. § 1910.137(b)(4). (Tr. 128.) Respondent did not object to that amendment either and it was also granted. (Tr. 131.)

D. Items to be Adjudicated

The remaining items still in dispute relate to the LOTO requirements, floor holes, exits, occupational noise exposure, and PPE. Specifically: Citation 1, Item 1a, which alleges a willful, repeat or serious violation of 29 C.F.R. § 1910.147(c)(4)(i); Citation 1, Item 1b, which alleges a willful repeat or serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A); Citation 1, Item 1c, which alleges a willful, repeat or serious violation of 29 C.F.R. § 1910.147(c)(6)(i); Citation 2, Item 1, which alleges a serious violation of 29 C.F.R. § 1910.23(a)(8); Instances (a), (d) and (e) of Citation 2, Item 3b, which allege serious violations of 29 C.F.R. § 1910.37(b)(5); Citation 2, Item 4, which alleges a serious violation of 29 C.F.R. § 1910.95(b)(1); Citation 2, Item 5c, which alleges a serious violation of 29 C.F.R. § 1910.95(i)(3); Citation 2, Item 7, which alleges a serious violation of 29 C.F.R. § 1910.132(a); and Citation 3, Item 2, which alleges an other than serious violation of 29 C.F.R. § 1910.95(m)(2)(ii)(E).

Discussion

As a preliminary matter, Respondent contends the Citations at issue were “brought in contravention to OSHA’s field operations manual.” (Resp’t Br. at 10.) OSHA provides guidance to its inspectors in the form of a “Field Operations Manual,” which is often referred to as the FOM. (Tr. 668.) The Commission has long held that FOM does not create rights or defenses. *FMC Corp.*, 5 BNA OSHC 1707, 1710 (No. 13155, 1977); *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2143 n. 8 (No. 89-2614, 1993) (FOM is a guide for OSHA personnel). Accordingly, even

if Respondent had evidence of a failure to comply with the FOM, such evidence would not alter its responsibility to comply with the OSH Act or relieve it from liability if it fails to do so.

While the FOM is not binding, the Secretary does have the burden of proving the violations alleged. The Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) its terms were violated; (3) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition; and (4) one or more employees had access to the cited condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

I. Citation 1, Willful Violations of the LOTO Standard (29 C.F.R. § 1910.147(c))

A. Citation 1, Item 1a – Failure to Have Machine Specific LOTO Procedures - 29

C.F.R. § 1910.147(c)(4)(i)

Citation 1, Item 1a, alleges that, in violation of 29 C.F.R. § 1910.147(c)(4)(i), Respondent failed to develop sufficient LOTO procedures for various equipment:

Employees performed servicing and maintenance operations on chicken processing and production equipment including but not limited to the AMFEC Mixer Model #510, the chamber machine ... and frank-o-matic and the employer had not developed machine specific lock out tag out procedures detailing the appropriate procedure to lock and tag the equipment out of service, thereby exposing employees to serious injury, on or about March 2, 2016.

At the hearing, the Secretary presented evidence regarding the lack of specific LOTO procedures for four machines: the chamber machine, the gizzard machine, the mixer machine, and the frank-o-matic.⁶

⁶ As issued, this Citation also refers to a “flutie machine.” The Secretary acknowledges he offered no evidence about such a machine. (Sec’y Br. at 16.)

1. Applicability and Violation

The LOTO standard covers the servicing and maintenance of machines in which the unexpected energization or start-up, or the release of stored energy could cause injury to employees. 29 C.F.R. § 1910.147(a)(1)(i). “Servicing and/or maintenance” includes “cleaning” machines. 29 C.F.R. § 1910.147(b). When an employee is required to service or maintain a machine with the potential to energize, start-up, or release stored energy without sufficient notice, an energy control program is required. *See Dayton Tire*, 23 BNA OSHC 1247, 1250 (No. 94-1374, 2010), *aff’d in pertinent part, vacated in part*, 671 F.3d 1249 (D.C. Cir. 2012). Energy control procedures must be “developed, documented and utilized for the control of potentially hazardous energy when employees are engaged” in activities such as service, maintenance, or cleaning. 29 C.F.R. § 1910.147(c)(4)(i).

Respondent does not contest the standard’s applicability and the record would not support such a position. (Resp’t Br. 10-11.) Employees engaged in routine cleaning, service, and maintenance activities for at least four specific machines (the chamber machine, the gizzard machine, the mixer machine, and the frank-o-matic). (Tr. 49-52, 57, 60-61, 63, 756-57, 759-61.) This work could result in injuries if the machines unexpectedly started up during these activities. (Tr. 52, 57, 64, 756-58, 761; Exs. C-4, C-5, C-6, C-7.)

Rather than contesting applicability, Respondent argues its LOTO program sufficiently addressed the four machines. (Resp’t Br. at 14.) The Secretary disagrees. He argues that Respondent’s program generically covered all machines and lacked enough detail to permit employees to appropriately lockout the four machines with more than one source of energy. (Sec’y Br. at 19-21.)

The cited standard requires LOTO procedures that specifically address how to control hazardous energy for each type of machine. 29 C.F.R. § 1910.147(c)(4). The procedures must be sufficiently specific to “enable an employee to lock out a machine safely.” *Drexel Chem. Co.*, 17 BNA OSHC 1908, 1913 (No. 94-1460, 1997). When employers have different types of machines, it is unlikely a single identical LOTO procedure will be effective for all machinery. *Id.* In particular, generic LOTO procedures are not permissible for machines with more than one source of energy.⁷ 29 C.F.R. § 1910.147(c)(4)(i); *Angelica Textile Servs., Inc.*, 27 BNA OSHC 1246, 1255 (No. 08-1774, 2018) (finding procedures inadequate when they failed to account for each energy source), *appeal docketed*, No. 18-2831 (2d Cir. Sept. 21, 2018).

As noted, as part of the resolution of the 2014 Citations for failing to comply with the LOTO standard, Birdsboro hired LSCI, who, among other things, developed materials about energy control, including the LOTO Plan. (Tr. 190-91, 208, 344; Exs. C-21, C-44, C-45.) This LOTO Plan provides background on the control of hazardous energy, including the text of the LOTO standard. (Ex. C-21.) It has a detailed standard procedure for single energy source/single

⁷ Only in narrow circumstances, when all of the following criteria are met, can an employer avoid documenting the required procedure for each particular machine:

- (1) The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which could endanger employees;
- (2) the machine or equipment has a single energy source which can be readily identified and isolated;
- (3) the isolation and locking out of that energy source will completely deenergize and deactivate the machine or equipment;
- (4) the machine or equipment is isolated from that energy source and locked out during servicing or maintenance;
- (5) a single lockout device will achieve a locked-out condition;
- (6) the lockout device is under the exclusive control of the authorized employee performing the servicing or maintenance;
- (7) the servicing or maintenance does not create hazards for other employees; and
- (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or reenergization of the machine or equipment during servicing or maintenance.

29 C.F.R. § 1910.147(c)(4)(i). The four machines relied on by the Secretary all had multiple energy sources, and therefore Respondent could not rely on this exemption. (Tr. 52, 57, 61, 756-58, 760.) Nor is there evidence that Respondent satisfied the rest of the criteria.

plug machines. *Id.* at 42. In other words, the LOTO Plan provides the steps on how to de-energize only those machines with one source of energy that can be controlled by removing a single plug. *Id.* The LOTO Plan notes that machines can have multiple energy sources but does not include LOTO procedures for such equipment. *Id.* at 7.

Respondent concedes its LOTO Plan lacks machine specific procedures for the four specific machines (the chamber machine, the gizzard machine, the mixer machine, and the frank-o-matic). (Resp't Br. at 14; Tr. 209-11, 450, 763.) Each of these machines had two sources of energy—electric and pneumatic. (Tr. 52, 57, 61, 756-58, 760.) While the LOTO Plan instructs employees on how to de-energize machines with a single energy source powered by a single plug, it does not address how to control the pneumatic sources of energy for the four machines at issue. (Tr. 450-51; Ex. 21.)

Respondent claims that although the LOTO Plan lacked this information, “LOTO machine specific procedures for the chamber machine, a frank o matic, a mixer, and a gizzard machine ... were developed separately for the USDA.” (Resp't Br. at 14.) But, it neither offered nor introduced any evidence of these or any other machine specific procedures.⁸ *See Capeway Roofing Sys. Inc.*, 20 BNA OSHC 1331, 1342-43 (No. 00-1968, 2003) (party would have provided the evidence had it been helpful), *aff'd*, 391 F.3d 56 (1st Cir. 2004). Mr. Reid, the current Maintenance Manager, acknowledged that the Birdsboro lacked machine specific procedures in 2016. (Tr. 763-64.) Although Mr. Wieder referred to a “plan for USDA,” he acknowledged that he had not seen

⁸ At one point, counsel, not a witness, mentioned a “USDA map,” but it was never marked as an exhibit and no witness explained what information the document contained or when any information contained therein was in effect at the facility. (Tr. 212.) *See CSA Equip. Co., LLC*, 27 BNA OSHC 1921, 1926, n.10 (No. 12-1287, 2019) (rejecting the argument that evidence at trial was not sufficiently “fleshed out”); *Regina Constr. Co.*, 15 BNA OSHC 1044, 1049 (No. 87-1309, 1991) (relying on the Secretary’s evidence when Respondent failed to rebut it by presenting a witness with direct knowledge).

“USDA documents” for the four machines the Secretary discussed as having multiple energy sources and they were not part of the LOTO Plan in place at the time of the Citation. (Tr. 443-44, 450.) Nor were any such procedures provided to LSCI. (Tr. 371, 412, 424-25.) Indeed, after March 2, 2016 (the date referenced in the Citation), Respondent had LSCI come back and create, for the first time, machine specific LOTO procedures.⁹ (Tr. 414-15, 453-54; Resp’t Br. at 15.) If Birdsboro had machine specific LOTO procedures, retaining LSCI to develop the procedures after the inspection started would not have been necessary.

Respondent also cites its Lockout/Tagout Periodic Inspection Forms as evidence of appropriate machine specific procedures. (Resp’t Br. at 14.) There were no inspection forms for the chamber machine, the mixer or the frank-o-matic. (Ex. C-19.) One form indicates that Mr. Criswell, the Maintenance Manager at the time, reviewed the energy control procedures for the gizzard machine with one employee on January 10, 2014.¹⁰ *Id.* at 1. This document indicates he reviewed the employee’s understanding of lockout procedures for that machine but provides no information as to what procedures the employee followed during the review to safely control hazardous energy. *Id.* At best, the form suggests that, two years before the 2016 OSHA inspection,

⁹ At one point in its brief, Respondent claims that the process of developing the machine specific procedures began in February before the inspection. (Resp’t Br. at 13.) However, it later clarifies that: “After the March 2016 inspection began [Birdsboro] contracted with its outside consultant to produce machine specific LOTO procedures for each machine on-site at [Birdsboro].” *Id.* at 15. While at one point, Mr. Lancaster indicated he thought the process started in February, after being shown March 2016 emails, he clarified he was “not sure” about his claim that the process started in February. (Tr. 354.) Ms. Murray-Garcia confirmed she paid LSCI to create machine-specific LOTO procedures *after* the OSHA inspection began on March 2, 2016. (Tr. 277.) In any event, no one indicated Birdsboro had such procedures as of the date alleged in the Citation.

¹⁰ LSCI provided Respondent with a “Lockout/Tagout Periodic Inspection Form” in late 2014. (Tr. 294-95.) The form referencing the gizzard machine predates Respondent’s receipt of the form by several months. (Ex. C-19 at 1.) The HR Manager tried to explain this discrepancy by indicating that the Maintenance Manager may have transferred his notes to the form after it was provided by LSCI. (Tr. 295.)

one employee showed Mr. Criswell how he locks out the gizzard machine. *Id.* There is no evidence the other twenty employees who might need to clean or maintain the machine understood how to safely lockout the machine to control hazardous energy. (Tr. 48-49; Resp't Br. at 10.) Nor is there evidence that the lockout procedure used for the gizzard machine, or the procedures for any of the other machines with multiple energy sources, was documented as of the date referenced in the Citation.¹¹ Thus, there is no evidence Respondent had machine specific procedures with enough information to permit employees to safely lockout machines with more than one energy source.

By not addressing all sources of energy for the four different machines, Respondent's LOTO program failed to provide enough information to permit employees to lock the machines out and protect themselves from unexpected energization. *See Drexel*, 17 BNA OSHC at 1913 (requiring that LOTO procedures inform the employee of the "[s]pecific procedural steps" necessary to perform the lockout process). Respondent violated the cited standard.

2. Exposure

Employees routinely engaged in service and maintenance activities on the four machines. The chamber machine vacuum seals product into packing by sucking the air out of the bag containing product and then sealing it. (Tr. 56, 756.) It was used at least weekly and sometimes

¹¹ Respondent also alleges it had machine manuals with lockout procedures. (Resp't Br. at 15.) No such manuals were introduced into the record and there is no evidence of what procedures any such manual contained. Mr. Reid, the current Maintenance Manager, said that "when" a machine comes with a manual, that document tells you how to lockout that machine. (Tr. 762-63.) He did not say Birdsboro had manuals for all of its machines or indicate employees were to refer to manuals to understand how to lockout machines. *Id.* Nor did he say that any manual contains all of the information required by the cited standard, such as authorizations, statements of the intended use of the procedure, explanations of who at Birdsboro has the responsibility for the use of lockout or tagout devices, or the requirement to verify the effectiveness of lockouts. *See* 29 C.F.R. § 1910.147(c)(4). Further, regardless of what manuals may have existed or what they might have said, Mr. Reid acknowledged that at the time of the Citation, there were no machine specific LOTO procedures for any machine at the facility. (Tr. 763-64.)

as often as once a day. (Tr. 57, 756.) Maintenance employees serviced and repaired the machine. *Id.* This sometimes required taking the machine apart. (Tr. 756-57.) If the chamber machine was not properly locked out, the machine's moving parts could injure an employee. (Tr. 57; Ex. C-5.)

The gizzard machine separates the gizzard from the rest of the animal. (Tr. 62-63, 759; Ex. C-7.) It had several different gears and had to be taken apart and cleaned at the end of every day it was used. (Tr. 63, 760.) The machine frequently broke down and had to be repaired. (Tr. 63, 761.) Like the chamber machine, the gizzard machine's moving chains and gears could cause injury if the machine was not properly locked out before cleaning or repairs commenced. (Tr. 63-64.)

The mixer machine was used once or twice a week and had to be cleaned after each use. (Tr. 49-50.) Maintenance workers occasionally serviced or repaired it. (Tr. 50.) The mixer's interior panels spin when in operation and it should be locked out for service or maintenance. (Tr. 51-52; Ex. C-4.) In February 2016, an employee put his hand in the mixer and was injured. (Tr. 414.)

The frank-o-matic was less frequently used than the other three machines. However, it was still operated at least once a month, and sometimes as often as once a week. (Tr. 60, 758-59.) It required cleaning after each use and sometimes had to be serviced or repaired. (Tr. 60-61, 759.) During these activities, the machine should be properly locked out. (Tr. 61; Ex. C-6.) The Secretary showed that employees were required to service or maintain machines with multiple energy sources and were exposed to the hazard of unexpected energization.

3. *Knowledge*

Respondent was previously cited for a lack of LOTO procedures. (Tr. 199-200, 207; Ex. C-39.) The 2014 Citations included a violation of the same LOTO provision at issue here, 29 C.F.R. § 1910.147(c)(4)(i), for failing to have machine specific LOTO procedures. (Ex. C-39 at 13.) That 2014 violation was itself characterized as repeat because the 2012 Citations included a serious violation for not having machine specific energy control procedures for all required equipment. (Exs. C-39 at 13; C-54 at 6.) As noted above, Respondent accepted the 2014 violation of 29 C.F.R. § 1910.147(c)(4)(i), including its repeat characterization. (Exs. C-39, C-44.)

Mr. Wieder, the Operations Director, was aware of both prior violations of 29 C.F.R. § 1910.147(c)(4)(i). (Tr. 498-99, 509.) In particular, he admitted that he closely looked at the 2012 and the 2014 Citations. *Id.* He understood that the LOTO standard requires machine specific procedures. *Id.* Ms. Murray-Garcia, the HR Manager handling safety, was similarly aware that the Birdsboro was cited for not having machine specific-LOTO procedures in 2014. (Tr. 199-200, 207-8; Resp't Br. at 12.)

After the 2014 Citations, Birdsboro took steps to develop a LOTO program. (Tr. 190-91; Ex. C-21.) LSCI provided it with information about the control of hazardous energy. *Id.* This information included a LOTO Plan LSCI described as a "first draft." (Tr. 344.) As the HR Manager acknowledges, the LOTO Plan LSCI provided in 2015 anticipated machine specific procedures being added to it. (Tr. 206-7.) Further, in over half a dozen emails sent over its one-year contract, LSCI repeatedly reminded the HR Manager of the need for machine specific LOTO procedures. (Tr. 219-20, 228-9, 231-39, 280, 407-10, 412-13, 424; Ex. C-46.) Despite these regular reminders, Respondent never developed the necessary machine specific procedures before

the date alleged in the Citation.¹² (Tr. 211, 280.) *See E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1562, 1566 (No. 94-1979, 2009) (finding actual knowledge when the employer failed to take reasonable and necessary steps to address the known hazard).

Respondent's actual knowledge that it was not in compliance with the cited standard satisfies the Secretary's burden of proving the violation alleged in Citation 1, Item 1a. *See Dayton*, 23 BNA OSHC at 1256 (finding actual knowledge of the failure to utilize LOTO procedures).

4. Characterization

The Secretary alleges the violation is willful, or, in the alternative, repeat or serious. (Tr. 7, 11.) A willful violation is one committed voluntarily with either an intentional disregard of, or plain indifference to the OSH Act's requirements. *See e.g., Bianchi Trison Corp.*, 409 F.3d 196, 208 (3d Cir. 2005). "[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). The motive for failing to comply with the OSH Act "need not be evil or malicious" for the violation to be characterized as willful. *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Dukane Precast, Inc.*, 785 F.3d 252, 255 (7th Cir. 2015) (employer's reckless behavior sufficient to characterize the violation as willful).

As noted, Mr. Wieder, the Operations Director, and Ms. Murray-Garcia, the HR Manager, were aware that the cited standard applied to Birdsboro's operations because of the 2014 Citations.

¹² After the inspection started, Respondent retained LSCI to create forty-two machine-specific procedures. (Tr. 414-15, 435, 454.)

Those citations included a repeat violation of the same standard cited in connection with this Item 1a, 29 C.F.R. § 1910.147(c)(4)(i). (Ex. C-39 at 14.) Just like the present matter, the 2014 violation also concerned Respondent's failure to develop machine specific LOTO procedures. *Id.* Mr. Wieder executed the 2014 Settlement Agreements resolving this violation. (Tr. 512; Ex. C-44.) *See Revoli Constr. Co., Inc.*, 19 BNA OSHC 1682, 1685-86 (No. 00-0315, 2001) (employer had heightened awareness of the standard because it was previously cited for violations of the same standard).

Even before the settlement of the 2014 Citations, Mr. Wieder knew the facility needed a LOTO program. In February 2012, when OSHA commenced an inspection of the facility, he was the CEO of MVP, the company that owned the facility. (Tr. 480, 486.) Although he was not working for MVP when the 2012 Citations were issued, he was aware of them and reviewed them when he returned to work at the facility for a subsequent owner in January 2013. (Tr. 482-83, 486.) He also reviewed and provided input on the agreement resolving the 2012 Citations. (Tr. 498-99.) That agreement (the 2013 Settlement Agreement) acknowledged Birdsboro's acceptance of a violation of 29 C.F.R. § 1910.147(c)(4)(i), which is the requirement to have sufficiently developed, documented, and utilized procedures for the control of hazardous energy, as well as its acceptance of two additional serious violations of other provisions of the LOTO standard. (Exs. C-54, C-57.) So, in 2013, Respondent resolved the 2012 Citations, including the LOTO violations, by accepting responsibility and paying a penalty and, in the following year, it resolved additional

LOTO violations by again accepting the violations and paying another penalty.¹³ (Exs. C-44, C-45, C-57.) By the time of the most recent inspection, Birdsboro was well aware of the necessity for written procedures that specifically address how to de-energize machines with multiple energy sources. *See MJP*, 19 BNA OSHC at 1648 (supervisor chargeable with knowledge of the requirement “based on their prior work experience, wherever that experience originates”); *Altor, Inc.*, 23 BNA OSHC 1458, 1467 (No. 99-0958, 2011) (citations of the same standard previously issued to other companies owned by the same individuals considered to show heightened awareness); *S. Scrap Materials, Co., Inc.*, 23 BNA OSHC 1596, 1619-20 (No. 94-3392, 2011) (settlement of prior citations of the same standard supported willful characterization), *aff’d*, 498 F. App’x 145 (3d Cir. 2012) (unpublished).

Because OSHA did not demand further abatement after Respondent provided information to the agency as part of the 2014 Settlement Agreement, Respondent argues it could reasonably infer it was fully compliant with the LOTO standard. (Resp’t Br. at 15.) Such an inference is wholly inappropriate here as both the HR Manager and the Operations Director, Mr. Wieder, knew Birdsboro needed to take additional steps to come into and remain in compliance. Indeed, one of the conditions of the 2014 Settlement Agreement was for Birdsboro to retain a consultant for at least one year to develop a written health and safety program. (Exs. C-44, C-45.) *See A. Schonbek & Co., Inc.*, 9 BNA OSHC 1189, 1190 (No. 76-3890, 1980) (upholding willful characterization

¹³ Respondent’s acceptance of the 2014 Citation would also justify characterizing this violation as repeat. *See D.M. Sabia Co.*, 90 F.3d 854, 856, 860 (3d Cir. 1996) (“A repeated violation requires no more than a second violation and does not require proof of “flaunting”); *Potlach Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979) (violation is repeated if the same employer was previously cited for a substantially similar violation and both violations resulted in substantially similar hazards). This matter could be appealed to either the D.C. Circuit or the Third Circuit. The Commission generally applies the law of the circuit where a case will likely be appealed. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

when the employer was aware of the general hazard even though past violation related to a different machine), *aff'd*, 646 F.2d 799 (2nd Cir. 1981).

Although Respondent complied with the requirement to retain a consultant to assist with coming into compliance and the development of a health and safety program, it failed to follow the consultant's advice. Ms. Murray-Garcia, the HR Manager overseeing safety, knew the general LOTO Plan lacked machine specific LOTO procedures. (Tr. 206-7, 223.) The document itself references the need for machine specific LOTO procedures. (Tr. 269-73; Ex. C-21 at 0239.) For example, it includes placeholders for "equipment specific LOTO procedures" and procedures for "New Equipment" to be added to the document.¹⁴ (Tr. 206-7; Ex. C-21 at 0236, 0239.) *See Active Oil Serv., Inc.*, 21 BNA OSHC 1092, 1098, 2004-09 (No. 00-0482, 2005) (finding heightened awareness based on a prior citation and the content of the employer's written safety program). The HR Manager reviewed these blank pages on which equipment specific information was to be added, as well as the rest of the LOTO Plan. (Tr. 268-71, 273.)

Further, LSCI specifically informed Respondent multiple times about the need for machine specific procedures to be developed.¹⁵ (Tr. 226-29, 231-35, 238-39, 276; Exs. C-46, C-49.) For example, LSCI told the HR Manager to have "machine LOTO procedures on file and up to date." (Tr. 238-39; Ex. C-46 at 1.) These written reminders, which the HR Manager acknowledges were supplemented with telephone conversations, preclude finding Respondent's failure to develop the

¹⁴ The LOTO Plan also contained the text of the cited standard. (Ex. C-21 at 0222.) This supports finding heightened awareness of the requirement. *See Lanzo Constr. Co.*, 20 BNA OSHC 1641, 1649 (No. 97-1821, 2004) (finding heightened awareness based in part on a safety manual which incorporated the cited standard), *aff'd*, 150 F. App'x 983 (11th Cir. 2005) (unpublished).

¹⁵ LSCI also conducted a safety compliance survey for Birdsboro in August 2015 which found that the facility lacked machine-specific procedures on how to control hazardous energy. (Tr. 283, 288-89; Ex. C-49.)

procedures on how to lockout and tagout machines with multiple energy sources was mere negligence.¹⁶ (Tr. 226, 233; Ex. C-46.) See *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1082 (No. 99-0018, 2013) (hiring outside consultant to monitor compliance “insufficient to negate willfulness” when the employer failed to enforce safety rules).

Respondent relies on *Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249 (D.C. Cir. 2012) as support for characterizing the violations as serious. (Resp’t Br. at 6-8.) In *Dayton*, like here, the employer was previously cited for violating the LOTO standard. 671 F.3d at 1255. After the citation, the employer failed to correct similar deficiencies at another location. *Id.* The Commission determined the violation was willful because the employer either knew the second facility was in violation of the LOTO standard or it was unwilling to investigate its compliance. *Id.* at 1255-56. The D.C. Circuit disagreed that this was enough to characterize the employer as being plainly indifferent to safety. *Id.*

Here, the evidence of willfulness is stronger. First, this matter involves citations issued to the same employer for violations of the same standard at the same facility.¹⁷ The present matter is more like the situation in *A.J. McNulty & Co.*, 283 F.3d 328 (D.C. Cir. 2002), than the one in *Dayton*. In *A.J. McNulty*, the employer had twice previously settled violations of the fall protection standard. 238 F.3d at 338. When cited for a third time, the D.C. Circuit found the violation willful

¹⁶ These facts also distinguish the present matter from *Gen. Motors Corp.*, 22 BNA OSHC 1019 (No. 91-2834E, 2007) (consolidated). In that matter, the employer was aware of the LOTO standard and its requirements, but the Secretary did not show that the employer knew its procedure was deficient. 22 BNA OSHC at 1043-44. In this matter, the Secretary showed Birdsboro knew about the LOTO standard and that it needed to have machine specific procedures for production equipment at this facility.

¹⁷ These prior citations for the same hazard at issue here could also be a basis for characterizing this violation as repeat. See *D.M. Sabia*, 90 F.3d at 856 (single prior violation sufficient to find a violation repeated); *Potlach Corp.*, 7 BNA OSHC at 1063.

because the employer was aware of the regulation, failed to comply with it, and lacked a good faith belief it was in compliance. *Id.* Similarly, at Birdsboro's facility, supervisors had actual knowledge of past citations for this same LOTO standard as well as other violations related to LOTO. In particular, Mr. Wieder, the Operations Director, acknowledged his involvement with the resolution of two prior citations for the same sub-section of the LOTO standard. (Tr. 498-99, 509.) *See Anderson Excavating & Wrecking Co.*, 17 BNA OSHC 1890, 1892-93, 1995-97 (No. 92-3684, 1997) (relying on employer's history of recent citations for violations of the same standard as part of willful determination), *aff'd*, 131 F.3d 1254 (8th Cir. 1998). The HR Manager responsible for safety, was also aware of the 2014 LOTO violations. (Tr. 199.) Knowledge from this past violation was supplemented with information from Ms. Rothrock of LSCI, who specifically, and repeatedly, reminded Birdsboro it needed to have machine procedures "on file and up to date." (Ex. C-46.) *See Thomas Indus. Coatings, Inc.*, 23 BNA OSHC 2082, 2092 (No. 06-1542, 2012) (finding violation willful because the employer was familiar with the requirements of the cited standard and could not have believed its arrangements were adequate).

Second, unlike *Dayton*, there is no need to guess whether Respondent knew machine specific procedures were required for this facility and that they did not have them. (Tr. 200, 208-9, 231, 238-40; Ex. C-21.) Respondent chose not to prepare machine specific procedures even after its consultant explained they were needed. (Ex. C-46.) It knew it needed a LOTO program which guided employees in how to control hazardous energy, knew its LOTO Plan was incomplete, and still failed to act until after an employee injury and another OSHA inspection. *See Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1111 (No. 11-2559, 2016) (violation willful when employer knew both the facts and legal requirements); *Hern Iron Works, Inc.*, 16 BNA OSHC

1206, 1214 (No. 89-433, 1993) (“A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions”).

Third, in this matter, Respondent’s conscious actions were part of an on-going failure to prioritize safety.¹⁸ See *A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1346 (D.C. Cir. 2002) (affirming a finding of plain indifference when the company ignored repeated general reports from a safety engineer). For example, the HR Manager acknowledged she had many responsibilities, particularly after Respondent chose not to replace its health and safety manager after Mr. Shifflet left in 2014. (Tr. 192, 516-17.) Mr. Shifflet had been a full-time employee tasked with oversight for environmental, health and safety. (Tr. 189.) Almost all of his responsibilities were shifted to Ms. Murray-Garcia, who already was a full-time employee overseeing the human resources department. (Tr. 189, 192.) She had no formal safety and health training or experience. (Tr. 453.) The only assistance she had at the facility was a part-time receptionist who was hired sometime in 2016. (Tr. 194-95.) The facility had a high turnover of employees and difficulty retaining employees for some positions, such as those in the Kill Room, because of the unpleasant nature of the work. (Tr. 309-10.) Preparing the documentation necessary to abate the 2014 Citations was not given “high priority.” (Tr. 240.) In light of her human resources tasks, Ms. Murray Garcia did not have enough time to address getting the abatement documentation to OSHA. (Tr. 233, 240.) Ms. Rothrock of LSCI expressed her belief

¹⁸ To support a willful characterization the Secretary need not establish both a conscious disregard of a known requirement and a plain indifference to safety. The test is whether the employer intentionally, knowingly, or voluntarily disregarded the requirements of the OSH Act, *or*, acted with “plain indifference to employee safety.” *Jim Boyd*, 26 BNA OSHC at 1111 (quoting *Kaspar*, 18 BNA OSHC at 2181). See also *Williams Enters., Inc.*, 13 BNA OSHC 1249, 1257 (No. 85-355, 1987) (to find a violation willful, there must be evidence that either (1) the employer knew of an applicable standard and disregarded it, or (2) the employer had such reckless disregard for employee safety the employer would not have cared that the conduct violated a standard).

that Ms. Murray-Garcia had many responsibilities besides safety, and this complicated the effort to bring the facility into compliance. (Tr. 416-19.) Indeed, Ms. Rothrock was “not surprised” when Ms. Murray-Garcia called in 2016 and requested additional services, including the development of the machine specific procedures Ms. Rothrock had repeatedly asked Respondent about. (Tr. 425-26.)

Whether these actions alone would be sufficient to sustain a willful characterization, is an unnecessary question. There is no need to guess how Respondent would have behaved if it was aware of the requirement. Respondent knew it needed machine specific procedures and yet it failed to develop them. *Compare Thomas Indus.*, 23 BNA OSHC at 2092 (finding violation willful when the employer was aware of the requirement and made a conscious decision not to comply), *with E. Smalis*, 22 BNA OSHC at 1577 (finding a violation willful when the employer would not have complied with standard “even had it known of its obligations”).

Respondent knew of the requirement, was reminded of what was necessary to come into compliance, and still failed to act. *See MJP*, 19 BNA OSHC at 1648 (stating that relevant considerations include prior history of violations and awareness of standard's requirements). The violation was willful.¹⁹

B. Citation 1, Item 1b –LOTO Training - 29 C.F.R. § 1910.147(c)(7)(i)(A)

Citation 1, Item 1b alleges a violation of 29 C.F.R. § 1910.147(c)(7)(i)(A), which requires training to ensure employees understand the purpose and function of the energy control program. Employees who lockout or tagout machines for maintenance are referred to as “authorized employees.” 29 C.F.R. § 1910.147(b). Such employees must receive training that includes the

¹⁹ As this Item was grouped with Items 1b and 1c for penalty purposes, the assessed penalty is discussed below.

methods and means necessary for energy isolation and control. 29 C.F.R. § 1910.147(c)(7)(i)(A). The Secretary alleges that Respondent did not adequately train employees performing servicing and maintenance on the chamber machine, the gizzard machine, the mixer machine, and the frank-o-matic as of March 2, 2016.²⁰ (Sec’y Br. at 36.)

1. Applicability and Violation

Besides having procedures in place to prevent unexpected energization, the LOTO standard also requires employers to train employees to ensure they understand and have sufficient skills to recognize applicable energy sources and isolate and control such energy as appropriate. 29 C.F.R. § 1910.147(c)(7)(i)(A). Of particular importance is the need to train the authorized employees who perform servicing or maintenance on energized machines. 29 C.F.R. §§ 1910.147(c)(7)(i)(A), 1910.147(b) (defining authorized employee). As discussed in connection with Citation 1, Item 1a, employees in the sanitation and maintenance departments routinely cleaned, serviced, and maintained machines with the potential to injure employees if they became energized during such activities. At least four of these machines had both electric and pneumatic sources of energy. (Tr. 52, 57, 61, 756, 758, 760.) While Respondent conducted “general awareness training,” the Secretary argues this training did not provide enough information for authorized employees to safely lockout machines with multiple energy sources.²¹ (Sec’y Br. at 37; Resp’t Br. at 11, 13.) The Secretary emphasizes that because Respondent’s LOTO Plan lacked machine specific

²⁰ The Citation also notes various other machines. However, as the Secretary acknowledges, the record only includes specific information about the lack of training for these four machines. (Sec’y Br. at 36.)

²¹ The Secretary does not argue that Respondent failed to appropriately train workers of the hazards of working around equipment that needs to be locked and tagged out. (Tr. 427.) His contention is focused on the sufficiency of the training for the authorized employees tasked with locking out equipment for service, cleaning, or maintenance. (Tr. 427-28.)

procedures, Respondent could not properly train employees on how to lockout all energy sources that powered the chamber machine, the gizzard machine, the mixer machine, and the frank-o-matic.²² (Sec’y Br. at 37.)

In response, Birdsboro does not allege it or LSCI provided training for authorized employees. (Resp’t Br. at 11-13.) Nor would the record support such a finding. The HR Manager provided what Respondent refers to as “safety orientations.” (Tr. 189; Resp’t Br. at 11.) In doing so, she relied on materials prepared by a former employee. (Tr. 190.) She lacked formal safety and health training or experience and could not answer questions on the topics referenced in the training materials independently. (Tr. 190, 453; Resp’t Br. at 11-12.) After what Respondent describes as a “large turnover,” it brought LSCI back in to conduct a LOTO “general awareness” training in February 2016. (Tr. 419-20, 427-30; Resp’t Br. at 13.) The training was not designed for “authorized employees,” i.e., those employees who lockout or tagout machines to perform servicing or maintenance. (Tr. 427-30.) It was a general overview rather than a training about how to lockout and tagout specific machinery with multiple energy sources.²³ (Tr. 424, 427-34.) Necessarily, employees could not be trained appropriately if such procedures did not exist. (Tr. 430-34; 552.) *See Drexel*, 17 BNA OSHC at 1913 (the purpose of having prescribed lockout procedures is “to guide an employee through the lockout process”). The Secretary showed the cited standard applies and was violated.

²² The Secretary also notes that Mr. Urieta, the Superintendent, did not know what machine specific LOTO procedures were when OSHA commenced the March 2016 inspection. (Tr. 65; Sec’y Br. at 32, Resp’t Br. at 10.) He had been in that role for four years at the time, including when the 2014 Citations, which included LOTO violations, were issued. (Tr. 40.)

²³ Ms. Rothrock explained there was a limited amount of time for the training. (Tr. 426, 431.) In addition to LOTO, LSCI also addressed the topics necessary to certify forklift users. (Tr. 431.)

2. Exposure

When an employee's job assignment includes equipment servicing or maintenance, and it is reasonably predictable that the employee will encounter the hazard of unexpected energization while performing such work, LOTO training is required. *Gen. Motors*, 22 BNA OSHC at 1022. As discussed, employees routinely cleaned, serviced and repaired the four machines with air and pneumatic energy sources. (Tr. 49-52, 57, 63-64, 756-57, 760-61.) Each time they were exposed to the possibility of the unexpected start-up of the machinery.

3. Knowledge

To establish knowledge, the Secretary does not need to show the employer was aware it was violating an OSHA standard. *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Showing the employer knew or should have known of the condition constituting the violation is sufficient. *Id.*

Here, there is no dispute Respondent had actual knowledge of the need for LOTO training. In 2014, it was cited for violating this same provision of the LOTO standard. (Ex. C-39 at 11.) The HR Manager was aware of the 2014 Citations, including that one component was the failure to provide LOTO training. (Tr. 199-200.) Respondent also resolved the 2012 Citations, which also included a violation of this same LOTO training standard, 29 C.F.R. § 1910.147(c)(7)(i). (Ex. C-54 at 8.) Mr. Wieder, the Operations Director, reviewed both the citations themselves as well as the 2013 Settlement Agreement resolving the violations. (Tr. 498-99.)

At the time of the inspection, Respondent was aware of both the standard and its applicability to its operations. The HR Manager knew the scope of the safety orientation she conducted, and that Birdsboro lacked machine specific LOTO procedures. Even if Respondent

lacked actual knowledge about the scope of LSCI's training, it could recognize it was not possible for the training to address how to lockout machines with multiple energy sources. Further, a simple inquiry of LSCI would have confirmed that the training was not designed for authorized employees who needed to perform lockouts. (Tr. 424,427-34.) This establishes knowledge of the violative condition. *See JPC, 22 BNA OSHC at 1861* (finding knowledge when the employer failed to take steps to discover the violative condition).

4. Characterization

The Secretary argues that the violation is willful, or, in the alternative repeat or serious. (Sec'y Br. at 40; Tr. 7, 11.) The undersigned finds that the violation is repeat. Respondent had actual knowledge that authorized employees needed specific training in how to de-energize machines. (Ex. C-39 at 11.) It knew the content of the safety orientations the HR Manager conducted and could have learned that LSCI's February 2016 training was not adequate for authorized employees. However, a willful characterization requires more than establishing knowledge of the violative condition. *Dayton, 671 F.3d at 1255* (rejecting the Commission's characterization of a LOTO violation as willful).

While this violation may not be willful, it is a repeat violation. As discussed, Respondent was previously cited for violating this same sub-section of the LOTO standard (29 C.F.R. § 1910.147(c)(7)(i)(A)) at this facility less than two years before. (Ex. C-39 at 11.) Like the instant matter, this prior violation concerned a failure to properly train about energy hazards employees may encounter when repairing and serving production equipment. *Id.* In resolving that citation, Respondent accepted the violation as issued. (Ex. C-44). Respondent fails to rebut the

Secretary's evidence that the 2014 violation was substantially similar to the present violation.²⁴ See *D.M. Sabia*, 90 F.3d at 860 (“A repeated violation requires no more than a second violation and does not require proof of “flaunting”); *Potlach Corp.*, 7 BNA OSHC at 1063 (violation is repeated if the same employer was previously cited for a substantially similar violation).

C. Citation 1, Item 1c –LOTO Inspections- 29 C.F.R. § 1910.147(c)(6)(i)

1. Applicability, Violation, and Exposure

Citation 1, Item 1c concerns the requirement to conduct periodic inspections of energy control procedures. At least annually, employers must inspect their energy control procedures to ensure they comply with the LOTO standard and that employees are following the procedures. 29 C.F.R. § 1910.147(c)(6)(i). The employer must complete a written certification indicating the inspections have occurred. 29 C.F.R. § 1910.147(c)(6)(ii). As explained above, there is no dispute that Respondent needed a compliant LOTO program because employees cleaning, maintaining, or servicing energized equipment could encounter the hazard of unexpected energization during such activities.

The Secretary alleges that Respondent failed to conduct periodic inspections of its LOTO procedures. (Sec’y Br. at 40-41.) Respondent concedes it did not inspect its energy control procedures. (Resp’t Br. at 14.) It argues the cited standard only requires an “annual” review, and so no inspection was necessary because the latest iteration of its LOTO Plan was less than a year old. *Id.*

²⁴ This Item is grouped with Items 1a and 1c for penalty purposes. The penalty to be assessed is discussed below.

Respondent misconstrues the cited standard as requiring only a review of the written procedures. Besides inspecting written procedures, employers must also assess whether employees are appropriately following a compliant LOTO procedure when they lockout or tagout machinery. 29 C.F.R. § 1910.147(c)(6)(i). For authorized employees, such as those who service or maintain energized equipment, the assessment must include a review with each authorized employee of his or her responsibilities under the company's lockout procedure.²⁵ 29 C.F.R. § 1910.147(c)(6)(i)(C).

Even accepting that Birdsboro reviewed the written LOTO Plan in October 2015, there is no evidence it conducted the type of inspection the cited standard requires for over a year before the date referenced in the Citation.²⁶ (Tr. 208; Ex. C-19.) Respondent does not argue it had no LOTO procedures before LSCI delivered the written LOTO Plan in October 2015. Nor does it allege its procedures changed when LSCI delivered the LOTO Plan in October 2015. Indeed, its Maintenance Manager, Mr. Criswell, certified he was conducting inspections on certain machines

²⁵ 29 C.F.R. § 1910.147(c)(6)(i)(C) specifies: "Where lockout is used for energy control, the periodic inspection shall include a review, between the inspector and each authorized employee, of that employee's responsibilities under the energy control procedure being inspected."

²⁶ The HR Manager indicated she reviewed the LOTO Plan but acknowledged her review was not very thorough. (Tr. 269.)

from January 10, 2014, through January 20, 2015. (Ex. C-19.) After that date, there is no evidence of any inspections until OSHA commenced its investigation in March 2016.²⁷ *Id.*

Further, the inspections that did occur were incomplete. On January 10, 2014, Mr. Criswell indicated he reviewed the LOTO procedures for the gizzard machine with one employee. (Ex. C-21.) There is no information about a similar review with the rest of the authorized employees. Nor is there evidence of any inspections of the LOTO procedures for the gizzard machine in 2015 or 2016. (Tr. 555-57; Ex. C-21.) Moreover, there is no evidence of any inspections for the chamber machine, the mixer, or the frank-o-matic at any time. *Id.* It appears that rather than reviewing all the procedures on all the machines with every employee tasked with maintaining or cleaning the machines, in 2014, Mr. Criswell inspected one employee locking out one type of machine each month. (Ex. C-21.) David Olah, the Area Director, explained that because LSCI ultimately concluded over forty machines needed machine specific procedures, the one machine/one employee a month approach would mean it would be years before Respondent inspected the procedures the maintenance and sanitation employees followed when locking out all the different types of production machinery.²⁸ (Tr. 556-57.) Thus, even crediting the evidence of

²⁷ As discussed above, Mr. Criswell left Birdsboro in 2016, after the start of the OSHA investigation. (Tr. 50; Resp't Br. at 10.), Mr. Reid began undertaking some of his responsibilities before being promoted to Maintenance Manager later that year. (Tr. 301, 749-52.) No documentation related to any inspections in the year before the date alleged in the Citation was introduced into the record. Mr. Reid explained he did not conduct any LOTO inspections before his promotion. (Tr. 754-55.) The HR Manager acknowledged that if there had been any LOTO Inspection Forms completed between January 20, 2015, and the start of the inspection in March 2016, she would have provided them to the Secretary. (Tr. 300-1.) Respondent declined to call Mr. Criswell to rebut the Secretary's evidence about the absence of inspections for at least one year. *Capeway*, 20 BNA OSHC at 1342-43.

²⁸ The maintenance department had four to six employees. (Tr. 49.) The sanitation department, which took care of cleaning the machines, had fourteen to eighteen employees. (Tr. 48-49.)

inspections in 2014, there is no evidence it covered all the machines or that any inspections occurred in the year before the date alleged in the Citation.²⁹

The Secretary showed Respondent had to inspect its employees' understanding of the LOTO procedures and failed to do so for at least one year. The standard was violated and employees cleaning, maintaining, or servicing energized equipment were exposed to the hazard of injuries from unexpected energizations.

2. Knowledge

Respondent makes no claim that it thought the inspections were being done. Rather, it contends they were unnecessary as of the date alleged in the Citation. (Resp't Br. at 14.) As found above, inspections were necessary under the cited standard. As Respondent had actual knowledge of this requirement, it has no basis to claim it did not know the inspections were not being done.

Respondent was previously cited for violating this same requirement in 2014. (Ex. C-39 at 12.) Both the Operations Director and the HR Manager were aware of the prior LOTO violations. (Tr. 199, 505, 512; Ex. C-44.) Mr. Wieder, Respondent's Operations Director, accepted this violation on Birdsboro's behalf in the 2014 Settlement Agreement. (Ex. C-44.)

In addition, LSCI provided OSHA with thirteen documents each titled "Lockout/Tagout Periodic Inspection Form." (Ex. C-19; Tr. 294-95.) The forms include the name of the machine, who conducted the inspection, the authorized employee with whom the energy control procedures

²⁹ The Secretary also argues that Respondent could not conduct appropriate inspections because it lacked machine specific procedures for lockouts—Respondent could not inspect the ability of employees to comply with procedures that did not exist. (Sec'y Br. at 41-42.)

were being reviewed, and the date.³⁰ (Ex. C-19.) Above the signature is a certification: “I hereby certify the periodic inspection for compliance with lockout/tagout standards on this machine/equipment have been satisfactory completed with the employee identified above.” (Ex. C-19 (mistakes in original).) LSCI provided Respondent with the forms and reminded the HR Manager, who had been delegated the responsibility for safety, to be sure the inspections occurred. (Tr. 228, 230-31, 238-39; Ex. C-46.) Thus, the forms themselves reference the requirement to inspect LOTO procedures and Respondent’s consultant reminded the HR Manager of the need for such inspections. (Exs. C-21, C-46.) Respondent knew of the cited standard and does not dispute that it knew no inspections occurred between January 20, 2015 and the start of the March 2016 inspection. (Ex. C-19; Tr. 293.)

3. Characterization

The Secretary argues the violation is willful, or, in the alternative repeat or serious. (Sec’y Br. at 43; Tr. 7, 11.) Respondent had actual knowledge of the need for LOTO inspections. (Exs. C-19, C-39 at 12.) It was previously cited for violating this same subpart of the LOTO standard (29 C.F.R. § 1910.147(c)(6)(i)) for failing to conduct periodic inspections of its LOTO procedures in 2014. (Ex. C-39 at 12.)

After accepting this serious violation in 2014, Respondent retained LSCI for assistance with learning how to comply with this requirement. (Tr. 515-15.) LSCI provided Respondent with a form checklist to guide supervisors in conducting inspections. (Tr. 238-9, Ex. C-19.) The

³⁰ Each inspection form in the record lists “Brandon Criswell” as the authorized inspector. (Tr. 297-98; Ex. C-19.) The forms appear to refer to seven different authorized employees but not all of the forms include a first and last name. *Id.* The HR Manager indicated that LSCI provided a blank version of the form in the latter half of 2014 as part of the LOTO Plan. (Tr. 228, 295-96.) When questioned why some of the forms are dated before LSCI was retained, the HR Manager said Mr. Criswell, may have transferred his notes from prior inspections to the forms after she instructed him to start using them. (Tr. 295.)

checklist guides a supervisor through the requirements to comply with the inspection called for by the cited standard. (Ex. C-19.) The Maintenance Manager, Mr. Criswell, signed several inspection forms certifying he reviewed the LOTO procedures with certain employees for a few machines. (Tr. 295-96; Ex. C-19.) However, these efforts quickly subsided and there is no evidence of any inspections for over a year before the date alleged in the instant Citation. *Id.*

Despite having numerous machines, some with multiple energy sources, there is no evidence of a single inspection of the LOTO procedures any employee used on any machine for over a year. Ms. Rothrock of LSCI repeatedly reminded the HR Manager, Ms. Murray-Garcia, of the ongoing obligation to continue to conduct the inspections. (Tr. 221-22, 227, 231; Ex. C-46 at 1.) In an email on September 29, 2015, near the end of the one-year contract between LSCI and Birdsboro, Ms. Rothrock pointedly explained to Ms. Murray-Garcia that failing to comply with the inspection and other requirements would place the company at risk for repeat or willful violations. *Id.* Still, Respondent failed to heed the warning and did not resume the inspections.³¹ (Ex. C-19.) As discussed above in connection with the characterization of Citation 1, Item 1a, Birdsboro failed to sufficiently prioritize safety.

The prior violation and provisions of its safety program gave Respondent a heightened awareness of the inspection requirement. *See Active Oil*, 21 BNA OSHC at 1098, 2004-09 (finding heightened awareness based on a previous citation and the content of the employer's written safety program); *Anderson*, 17 BNA OSHC at 1892-93 (finding heightened awareness because the provision was "essentially contained in one of the work rules in the company's safety plan");

³¹ As noted, the HR Manager had many responsibilities, and this limited the time available for her to focus on employee safety and health. (Tr. 239-40, 418.)

Lanzo, 20 BNA OSHC at 1649. Respondent knew of the requirement and its applicability to its operations.³² The record lacks any explanation for why it ceased conducting the required inspections after being made aware of the requirement as a result of the prior citation and LSCI. Its conscious disregard of a known requirement is willful. *Hern Iron*, 16 BNA OSHC at 1214.

D. Penalty for Citation 1, Items 1a, 1b, and 1c

Before turning to the penalty to be assessed, the undersigned notes that Respondent does not contend that any of the alleged violations are duplicative. Such an argument would fail because the abatement one of the violations alleged in Citation 1 would not, without further action, bring Respondent into compliance with the other requirements of 29 C.F.R. § 1910.147(c). *See Dayton Tire*, 23 BNA OSHC at 1267; *N.E. Precast LLC*, 26 BNA OSHC 2275, 2279 (No. 13-1169 & 13-1170, 2018) (violations with the same abatement may be duplicative), *aff'd*, 773 F. App'x 70 (2d Cir. 2019) (unpublished). Item 1a relates to the requirement to have appropriate LOTO procedures, Item 1b concerns the requirement to appropriately train authorized employees about energy control procedures, and Item 1c is about Respondent's failure to review, or inspect, employee's understanding of the company's LOTO procedures. (Tr. 552-53.) The abatement necessary for each of these violations is distinct. Having compliant written procedures, would not abate a failure to train about those procedures. Nor does having compliant written procedures satisfy the requirement to annually inspect whether authorized employees understand their role in conducting lockouts. *See Gen. Motors*, 22 BNA OSHC at 1024 (finding separate violations of subpart (c) of the LOTO standard were not duplicative because one related to the

³² The violation also meets the criteria for being characterized as repeat. *See D.M. Sabia*, 90 F.3d at 856, 860. Respondent has twice been made aware by OSHA of the need to conduct inspections to ensure that its employees understand their LOTO responsibilities. Yet, Respondent failed to correct the deficiencies. (Exs. C-39, C-44.)

failure to have an energy control program and the others related to the implementation of specific aspects of the program); *Dayton Tire*, 23 BNA OSHC at 1267 (violations alleging a failure to provide locks and a violation of the failure to train authorized employees were not duplicative because a single abatement could not cure both deficiencies); *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-475, 2007) (violations of two different standards related to the control of hazardous energy not duplicative).

Although the violations are not duplicative, the Secretary has grouped them for penalty purposes and proposes a single penalty of \$124,709 for Items 1a, 1b, and 1c. The undersigned finds it appropriate to group these three violations of the LOTO standard for penalty purposes.

When assessing penalties, the OSH Act requires consideration of the violation's gravity, Respondent's history of compliance, its size, and any good faith it has shown. 29 U.S.C. § 666(j). The violation's gravity is typically given the most weight. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

These violations could cause contusions, lacerations, and broken bones. (Tr. 635-41.) Employees routinely cleaned and serviced these machines, some on a daily basis, which increases the likelihood of an injury from an improperly locked out machine. (Tr. 636, 640.) Between fourteen and eighteen employees were responsible for cleaning machinery and another four to six had repair and maintenance responsibilities. (Tr. 48-49; Resp't Br. at 10.) Violations of the LOTO standard are generally considered to be of higher gravity because of the likely injury resulting from such violations. *Angelica*, 27 BNA OSHC at 1259 (noting the "high gravity nature of LOTO" violations); *Worldwide Mfg., Inc.*, 19 BNA OSHC 1023, 1024 (No. 97-1381, 2000), *aff'd*, 22 F. App'x 684 (8th Cir. 2001) (unpublished).

Respondent is a large employer with a history of violations. At the time of inspection, it employed approximately 270 to 280 employees. (Tr. 43, 305, 477; Resp't Br. at 10.) *See Burkes*, 21 BNA OSHC at 2142 n.10 (finding employer with over 220 employees to be a "large employer"). In terms of its compliance history, as discussed, a little over a year before the issuance of the present Citations, Respondent was cited for violating the LOTO standard. The 2014 Citation included: (1) a repeat violation of 29 C.F.R. § 1910.147(c)(4)(i), which is the same standard cited in this matter as part of Item 1a; (2) a serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A), which is the same standard cited as in Item 1b; and (3) a serious violation of 29 C.F.R. § 1910.147(c)(6)(i), which is the same standard cited in Item 1c. (Ex. C-39.) The 2014 Citation also included a violation of another provision of the LOTO standard as well as violations of several other standards. Later that same year Respondent received two more citations on December 25, 2014. (Ex. C-52.) Although these other citations did not include violations of the LOTO standard, they counsel against any penalty reduction for history. *See Revoli*, 19 BNA OSHC at 1687 (finding employer's long history of non-compliance "weighs heavily against it").

Finally, as to good faith, the violations of 29 C.F.R. §§ 1910.147(c)(4)(i), 1910.147(c)(6)(i) were willful and the violation of 29 C.F.R. § 1910.147(c)(7)(i)(A) was repeat. Respondent did make some effort at training workers and taking steps to address the deficiencies in its LOTO program. However, these meager efforts came after multiple citations and still fell well short of what the LOTO standard requires. No reduction for good faith is appropriate. *See Worldwide*, 19 BNA OSHC at 1024 (good faith penalty reduction not appropriate for an employer with a "history of prior violations" and where abatement measure came "too late").

"The purpose of a penalty is to achieve a safe workplace, and penalty assessments, if they are not to become simply another cost of doing business, are keyed to the amount an employer

appears to require before it will comply.” *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994). Respondent has reached two prior settlements with OSHA for LOTO violations. (Exs. C-39, C-44, C-54, C-57.) Still, it failed to come into compliance with applicable standards which protect against serious hazards in its workplace. A penalty of \$124,709 is assessed for Citation 1, Items 1a, 1b, and 1c.

II. Citation 2, Item 1, Serious Violation of 29 C.F.R. § 1910.23(a)(8) - Floor Holes

As amended, Citation 2 alleges three instances where Respondent violated 29 C.F.R. § 1910.23(a)(8).³³ This standard required the guarding of every floor hole into which employees can accidentally walk. *Id.* At the time of the alleged violation, a “Floor hole” was defined an opening in any floor “measuring less than 12 inches but more than 1 inch in its least dimension” and “through which materials but not persons may fall.” 29 C.F.R. § 1910.21(a)(1).

A. Instance (a)

Instance (a) of this citation item concerns an area in one of the Picking Rooms. (Tr. 75-76, Ex. C-11.) In the Picking Rooms, employees set the machines to pick the feathers off the animals after they are killed. (Tr. 38-39.) In Picking Room 2, there was a three-inch gap between a raised grate where certain employees worked and the regular floor. (Tr. 76-77; Ex. C-11.) There was no guarding for this floor hole. (Ex. C-11.) The Area Director explained that the gap could cause employees to trip but they could not fall through the hole. (Tr. 566.) The dimensions of the opening fit within the definition of “floor hole,” as it was greater than one inch but not more than

³³ After the Citation’s issuance, OSHA promulgated a revised final rule for fall protection applicable to general industry activities. 81 Fed. Reg. 82,494 (Nov. 18, 2016) (Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems)). This opinion relies on the regulatory language in effect when the Citation was issued.

twelve. (Tr. 77; Ex. C-11 at 2.) So, the Secretary established the standard's applicability and its violation.

The Secretary also established exposure and knowledge of the violative condition. Employees worked on top of the raised grate. (Tr. 75-77; Ex. C-11.) The Superintendent explained he was familiar with this area, including the grating. (Tr. 75-77.) He acknowledged being aware that the gap was open "most of the time." (Tr. 79.) *See Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) ("Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation"), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). Additionally, the condition was open and obvious making it easy to discover, as the Superintendent did. (Tr. 75-80; Ex. C-11.) *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996) (holding that "the conspicuous location, the readily observable nature of the violative condition, and the presence of Kokosing's crews in the area warrant a finding of constructive knowledge").

B. Instances (b) and (c)

1. Applicability

Instances (b) and (c) relate to conditions observed on or about July 6, 2016 in the "Northwest end of the Evisceration Room." The Evisceration Room is adjacent to the Picking Rooms discussed in connection with Instance (a). In the Evisceration Room, the liver and gizzard are separated, and the birds are inspected. (Tr. 41-42.) This room had two openings in the floor. One was an unguarded 10-inch opening between the end of a walkway and the start of the waste trough. (Ex. C-11, Tr. 96-97.) This is the basis for Instance (c). Near this opening, there was another 10-inch gap in the grating for another trough. This other gap is the basis for Instance (b).

(Ex. C-11 at 5a, Tr. 97.) The Area Director explained that employees could walk into either of these openings, but could not fall through them, so both openings are considered floor holes within the meaning of the cited standard. (Tr. 569.)

2. *Violation*

When there is a floor hole, employers have two options for guarding, a railing or a cover. 29 C.F.R. § 1910.23(a)(8). Specifically, the floor hole must be guarded with either:

(i) A standard railing with standard toeboard on all exposed sides, or (ii) A floor hole cover of standard strength and construction. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.

Id. Although there was a single chain near the trough referenced in Instances (b) and (c), the Secretary showed it was inadequate. To be considered a guardrail within the meaning of the standard, there would have to be two chains and a toeboard. (Tr. 571-72.) There was only one chain and there was no toeboard. (Ex. C-11 at 5a and 6a.) Further, the single chain did not block the opening at discussed in Instance (b) at all. *Id.* at 5a.

In its brief, Respondent argues the trough was “constantly attended.” (Resp’t Br. at 16.) However, for that to be relevant, the trough would have had to have a cover of standard strength and construction. 29 C.F.R. § 1910.23(a)(8)(ii). No one discussed the existence of such a cover, and none is visible in the photographs of the conditions. (Ex. C-11.) Further, while many employees worked in this area and some were charged with regularly cleaning the floor by pushing waste into the trough, there is no evidence that anyone was attending the opening to prevent workers from tripping. (Tr. 91.)

3. Exposure and Knowledge

Approximately fifty employees worked in this area, including some who cleaned waste into the trough throughout the day. (Tr. 91; Ex. C-11.) The area was always wet and occasionally slippery. (Tr. 93, Ex. C-11 at 5-6.) Both conditions were open and obvious and located in high traffic areas. (Tr. 90-91.) The conditions were either known or could have easily been discovered with reasonable diligence. *See Kokosing* 17 BNA OSHC at 1871; *Am. Airlines, Inc.*, 17 BNA OSHC 1552, 1555 (No. 93-1817, 1996) (consolidated) (finding knowledge in connection with violations of 29 C.F.R. § 1910.23 when conditions were in plain view and supervisory personnel were present).

C. Characterization and Penalty of Citation 2, Item 1, Instances (a), (b), and (c)

The Secretary argues this violation is serious and proposes a single penalty of \$5,880 for the three Instances. Respondent raises no arguments concerning the characterization or proposed penalty. (Resp't Br. at 16-17.) The Area Director explained that the openings created a trip and fall hazard that could result in broken bones, sprains, and strains. (Tr. 567, 571, 574.) Still, he considered it a low gravity violation. (Tr. 575-76; Ex. C-10.) He argued that no size or good faith reductions were appropriate as Respondent had over 250 employees and lacked a good overall safety program. (Tr. 575-77.) Finally, because of Respondent's history, he argued that the penalty that would otherwise be appropriate for the violation's gravity should be increased by 10%. (Tr. 577-78.)

The undersigned agrees that the violation's gravity does not warrant the maximum penalty. As for good faith, Respondent promptly addressed the violation but lacked an effective overall safety program. (Tr. 78-79.) Respondent's large size does not warrant a reduced penalty. (Tr. 477.) Finally, its history of violations makes some increase appropriate. *See Quality Stamping*,

16 BNA OSHC at 1929 (weighing the employer’s substantial history when calculating the penalty). The violations are serious. The Secretary’s proposed grouping of the three Instances with a single penalty of \$5,880 is appropriate. A penalty of \$5,880 is assessed for Citation 2, Item 1, Instances (a), (b), and (c).

III. Citation 2, Item 3b- Serious Violation of 29 C.F.R. § 1910.37(b)(5) – Exit Signage

Birdsboro’s facility consists of several different rooms and areas. In the Kill Room, employees hand live animals to rabbis for slaughtering. (Tr. 36-37, 150; Ex. C-17 at 1, 3, 7.) Adjacent to the Kill Room there are two Picking Rooms, where machines remove the feathers from the animals (in other words, the “product”). (Tr. 38-39.) After the Picking Rooms, the product enters the Evisceration Room where certain parts are removed, and the product is inspected. (Tr. 41-42.) The product moves to the Process Room for salting and chilling. (Tr. 42-43.) Some product is also sent to the Grind Room for additional processing. (Tr. 42-43, 49.)

Citation 2, Item 3b relates to alleged violations of 29 C.F.R. § 1910.37(b), for insufficient exit markings. If a door does not lead to an exit, it must be marked “not an exit” or otherwise explain what is behind the door.³⁴ 29 C.F.R. § 1910.37(b)(5). In addition, if the way to exit is not immediately apparent, signs must be posted along the exit access route to indicate both the direction of travel and the nearest exit. 29 C.F.R. § 1910.37(b)(4). The “line-of-sight to an exit must be clearly visible at all times.” *Id.*

³⁴ Specifically, the standard mandates that:

Each doorway or passage along an exit access that could be mistaken for an exit must be marked “Not an Exit” or similar designation, or be identified by a sign indicating its actual use (e.g., closet).

29 C.F.R. § 1910.37(b)(5).

A. Instances (a) and (e) – Violations of 29 C.F.R. § 1910.37(b)(5)

1. Instance (a)

Instance (a) alleges that the door connecting the Evisceration Room to Picking Room 2 should have indicated it was not an exit. There is no debate the door lacked a sign identifying it as leading to Picking Room 2 or otherwise indicate the door did not lead to an exit.³⁵ (Tr. 113; Ex. C-13 at 1, 4A.)

Besides this door, the room had three other doors. (Tr. 113-15.) One of these other doors, which was located on a different wall, had an exit sign above it. *Id.* Respondent alleges that the OSHA compliance officer (CO) investigating the facility purposely framed the photograph of the area to exclude the exit sign. (Resp't Br. at 17.) This claim is meritless. First, the exit sign is visible in one of the CO's photographs, just not all of them. (Ex. C-13 at 4A.) Moreover, the cited standard concerns whether doors along an exit route are clearly marked to indicate they are not an exit. (Tr. 706.) Thus, the existence of some exit signage does not mean there has been no violation of 29 C.F.R. § 1910.37(b)(5), which is concerned with doors not leading to exits.

This is not to say that the presence of the exit sign is irrelevant. Its presence shows that the door in question was along an exit route. (Sec'y Br. at 50.) Someone seeking to quickly exit along this route might come to this door and think it was an exit when it just leads to another interior

³⁵ At the start of the inspection, there was a solid door connecting these two rooms. (Tr. 112; Ex. C-13 at 1.) Sometime before the inspection ended, this solid door was replaced with heavy-duty acrylic curtains. (Tr. 118-22; Ex. C-13 at 4.)

room. (Tr. 583-84.) For this reason, the standard requires the doorway itself to be marked. (Tr. 583-84, 706.) The standard applies and was violated.³⁶

As for exposure, between fifty and sixty employees worked in this room every day. (Tr. 41-42, 63, 91; Ex. C-12.) The amount of equipment and other space limitations made the need for clear exit routes critical. (Tr. 708.)

Turning to knowledge, the Superintendent was familiar with this area of the facility. (Tr. 63, 112.) The condition was in plain view and the lack of signage was readily apparent. *See A.L. Baumgartner Constr.*, 16 BNA OSHC 1995, 1998 (No. 92-1002, 1994) (constructive knowledge established when cited condition is readily apparent). The Secretary met his burden.

2. *Instance (e)*

Instance (e) relates to a single door from the process room.³⁷ At one end of the process room, there is a single door close to a set of double doors. (Tr. 132; Ex. C-13 at 6.) Above the double doors, there is an illuminated exit sign. (Ex. C-13 at 6.) Adjacent to the double doors, a single door connected the process room to what was referred to as the ammonia or cooler room. (Tr. 132-34.) This adjacent room contained the compressor for the cooling system and did not lead to an exit. (Tr. 132-33.) There is no signage on the single door indicating either what was behind it or explaining it was not an exit. (Tr. 134; Ex. C-13 at 6.) The Area Director explained

³⁶ Respondent also argues, without support, that its facility complied with “Licenses and Inspections.” (Resp’t Br. at 18.) There is no record evidence of compliance with the requirements of any other regulatory authority. It is not clear what entity or regulations Respondent is attempting to refer to when it makes this claim. *Id.* So, there is no basis for assessing whether these regulations are equivalent to the cited standard. Even if the exit signage in the facility complied with some other requirement at some point in time, the Secretary established that it failed to comply with the cited standard as of the time alleged in the Citation.

³⁷ This location was also referred to as the packing area. (Tr. 127-28, 132.)

that an employee attempting to exit the area could be confused as to whether it could use the single door, as opposed to the adjacent double doors, to exit the building.³⁸ (Tr. 581.)

Employees worked in this area and thus were exposed to the hazard. (Ex. C-13 at 6.) The Superintendent was familiar with this area and Respondent could have discovered the lack of signage with reasonable diligence. (Tr. 100, 125.) *See A.L. Baumgartner*, 16 BNA OSHC at 1998 (constructive knowledge established when cited condition is readily apparent). The Secretary established the violation.

B. Instance (d)- Violation of 29 C.F.R. § 1910.37(b)(4)

Instance (d) concerns a set of double doors from the packing area to the Evisceration Room. These doors were not labeled. (Tr. 125; Ex. C-13 at 5.) Unlike the other Instances, which involved doors that did not lead to an exit, this allegation involved doors leading to a possible exit route. So, at the hearing, the Secretary moved to amend Instance (d) to allege, in the alternative, a violation of section (b)(4) of 29 C.F.R. § 1910.37, as opposed to section (b)(5) as was initially alleged in the Citation. (Tr. 131, 581.) Respondent did not object to the amendment and the request was granted. (Tr. 131.) Section (b)(4) provides:

If the direction of travel to the exit or exit discharge is not immediately apparent, signs must be posted along the exit access indicating the direction of travel to the nearest exit and exit discharge. Additionally, the line-of-sight to an exit must be clearly visible at all times.

29 C.F.R. § 1910.37(b)(4).

³⁸ Like Instance (a), having some exit information, while insufficient to vacate, is relevant to assessing the gravity of Instance (e).

The Superintendent indicated that the double doors shown in Ex. C-13 were one possible way to exit the building. (Tr. 126-27.) Neither he nor any other witness explained whether the double doors depicted in Exhibit C-13 represented the “nearest exit.” The Superintendent did explain, however, that the lit exit signs in the room made it immediately apparent how to exit this area. (Tr. 171-72; Ex. C-13 at 5.) This testimony was not sufficiently refuted.

The Secretary failed to show that the double doors needed to be labeled. Because they were a possible exit, the lack of labeling did not violate section (b)(5). Nor did the Secretary establish that they were the nearest way to exit the building or that the line of sight to the nearest exit was not clearly visible in violation of section (b)(4). Instance (d) is vacated.

C. Characterization and Penalty for Citation 2, Item 3(b), Instances (a) and (e)

Respondent does not challenge the characterization as serious. The record supports this characterization. The Area Director explained that marking doorways is important because a failure to do so harms safe egress in the event of an emergency. (Tr. 581, 708.) If an employee cannot quickly determine how to leave, they may enter a doorway that does not lead to an exit and become trapped. (Tr. 581.) Such a hazard is appropriately characterized as serious. *See Tree of Life Inc., d/b/a Gourmet Award Foods, N.E. Div.*, 19 BNA OSHC 1535, 1537 (No. 00-0433, 2001) (finding a violation related to egress serious rather than de minimis).

Initially, in the Citation, the Secretary proposed a single grouped penalty for of \$5,888 for Citation 2, Items 3(a) and 3(b). The Secretary subsequently withdrew Item 3(a), and two of the five Instances that were part of Item 3(b). This left Instances (a), (d), and (e) of Item 3(b). As discussed, only Instances (a) and (e) are affirmed.

The Secretary acknowledges the violation's gravity is not particularly high. (Tr. 584; Sec'y Br. at 51.) Respondent had some exit signage and directional markings. However, it also had a high turnover of its large workforce, which made appropriate exit signage important in a large multi-room facility. (Tr. 305, 419-20, 422, 426, 708.) New employees could be unfamiliar with which one of several doors connected to an exit or a dead end. (Tr. 708.) As for good faith, Respondent lacked a robust safety program and a further reduction for this factor is not appropriate. Likewise, Respondent has a history of violations and is a large company, so these factors do not warrant a further reduction in the penalty.

Given the withdrawals and the vacation of Instance (d), a lower penalty than what the Secretary proposes is appropriate. A \$2,000 penalty is assessed for Citation 2, Item 3(b), Instances (a) and (e).

IV. Violations of the Occupational Noise Exposure Standard (29 C.F.R. § 1910.95)

A. Citation 2, Item 4 – Serious Violation of 29 C.F.R. § 1910.95(b)(1) – Noise Control

1. Applicability and Violation

Item 4 relates to noise in the Picking Room. The cited standard requires administrative or engineering controls when noise exceeds specified action levels. 29 C.F.R. § 1910.95(b)(1). If these controls fail to reduce the noise below the action level, then PPE must be provided and used.³⁹ *Id.* The parties stipulated that cited standard applies and the record supports this. (Tr.

³⁹ Specifically, the standard requires that:

When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

29 C.F.R. § 1910.95(b)(1).

248-51.) In particular, the parties agree to the level of noise in the Picking Room exceeded the threshold above which action under 29 C.F.R. § 1910.95 is required. In March of 2016 the: (a) noise in one area of the Picking Room exceeded the permissible noise dose by 1,662%, (b) noise in a second area exceed the permissible noise dose by 2,225%, (c) noise in a third area exceeded the permissible noise dose by 640%, and (d) noise in a fourth area exceeded the permissible noise dose by 295%. (Tr. 250-51.)

Respondent acknowledged the accuracy of these measurements but disputed whether employees were actually exposed to this level of noise because it provided PPE, including earplugs and earmuffs. (Tr. 251.) For purposes of 29 C.F.R. § 1910.95, “employee noise exposures shall be computed ... without regard to any attenuation provided by the use of personal protective equipment.” 29 C.F.R. § 1910.95(c)(1); Occupational Noise Exposure; Hearing Conservation Amendment, 46 Fed. Reg. 4078, 4102) (Jan. 16, 1981) (employers must “provide audiometric testing for those employees exposed above the [action level] *without regard to the use of personal protective equipment*”) (emphasis added). Thus, it is the level of noise in a given area that triggers an employer’s responsibilities under the cited standard, not the level of noise employees are exposed to when they are wearing PPE.

Given that the noise was well above the action level, Respondent needed to implement feasible administrative or engineering controls to address the noise. 29 C.F.R. § 1910.95(b)(1). The Citation alleges that feasible abatement measures could include the “installation of barriers, baffles, sound-absorbing, or sound-damping materials to reduce employees’ exposure to occupational noise.” Respondent acknowledges that after the investigation commenced, it was able to implement feasible administrative and engineering controls to reduce the noise levels. (Resp’t Br. at 19-20.) After the date alleged in the Citation, it installed a wall and additional ceiling

material in the Picking Room, as well as double-sided acrylic curtains to reduce noise. (Tr. 82-83, 119-20, 519; Exs. C-11 at 4, C-13.) It also hired a contractor which advised the company about additional engineering controls it could use to reduce noise. (Resp't Br. at 19-20; Tr. 120, 522.) There is no evidence that any of these measures could not have been implemented before the date alleged in the Citation.⁴⁰

Despite its acceptance of the noise readings and the fact that there were feasible engineering controls that could have been adopted, Respondent argues that OSHA's acceptance of the abatement documents following the 2014 Citations precludes the present Citations. (Resp't Br. at 20.) First, the earlier violation refers to Kill Room, rather than Picking Rooms. (Ex. C-39 at 31-33.) Second, the standard cited in 2014 is 29 C.F.R. § 1910.95(c)(1), which requires a hearing conservation program. (Ex. C-39 at 31-33.) So, abating that violation would not mean that Respondent had implemented feasible engineering controls, or that it was in compliance with the standards cited as a result of the 2016 inspection (29 C.F.R. §§ 1910.95(b)(1), (g), (i)(3), (m)(2)(ii)(E)). *See Con Agra Flour Milling Co.*, 25 F.3d 653, 657 (8th Cir. 1994) (vacation of prior citation did not give employer reason to believe it would not be later cited for violating different regulations); *Kaspar*, 18 BNA OSHC at 2183 n.13 (OSHA may issue a citation for a condition that may have been previously observed but was not cited as a violation).

Third, while OSHA may have accepted the Respondent's abatement certificate, that does not provide immunity for future violations. *See Erie Coke Corp.*, 15 BNA OSHC 1561, 1568-69 (No. 88-0611, 1992) (Secretary not estopped from changing position after prior settlements of

⁴⁰ Subsequent remedial measures impact the assessment of the feasibility of abatement and the appropriate penalty. However, the actions do not mean there was no violation as of the date referenced in the Citation.

violations), *denying review in part, and affirming in part*, 998 F.2d 134 (3d Cir. 1993) (finding employer's cross-petition for review untimely). OSHA did not inspect the facility to test noise levels after receiving Respondent's abatement certification. Rather, OSHA accepted Respondent's certification that it appropriately abated the violations related to noise. Resolving those citations did not mean OSHA was approving Respondent's entire safety program or excuse the responsibility to continue to comply with the OSH Act. (Tr. 688-89.) *See Fluor Daniel*, 19 BNA OSHC 1529, 1533 (No. 96-1729, 2001) (consolidated) (rejecting estoppel claim based on past compliance inspections), *aff'd*, 295 F.3d 1232 (11th Cir. 2002).

The Secretary showed that the engineering controls Respondent had in place at the time of the inspection were inadequate. After being cited for failing to have a hearing conservation program in 2014, Respondent installed some new motors, which it hoped would reduce the noise. (Tr. 518-19.) However, it failed to conduct testing to determine if the actions it took impacted the level of noise. (Tr. 520; Ex. 39 at 31-34.) Mr. Wieder, the Operations Director, admitted he "dropped the ball" in terms of assessing whether the steps taken had an impact on the level of noise. (Tr. 521.) Testing conducted by OSHA in 2016 showed the new motors had no significant impact on the noise. (Tr. 250.) Respondent failed to utilize feasible administrative or engineering controls as required.⁴¹

⁴¹ Respondent also argued that after the 2014 Citations it required employees to wear more PPE to protect hearing. (Resp't Br. at 19.) Because the standard requires the implementation of feasible engineering controls before reliance on PPE, Respondent's work rule requiring the wearing of earplug and earmuffs does not abate the violation.

2. Exposure

Many employees worked in the Picking Room and were exposed to the noise. Employees in four different areas of the Picking Room wore dosimeters to assess the level of noise in the room. While these employees were provided with PPE and required to use it, the standard requires employers to first implement feasible engineering controls before relying on PPE.⁴² 29 C.F.R. § 1910.95(b)(1) (specifying that if administrative and engineering controls fail to reduce the sound levels sufficiently, then PPE shall be provided). *See Anchor Hocking Corp.*, 3 BNA OSHC 1389, 1391 (No. 3783, 1975) (Cleary, Comm’r, concluding that 29 C.F.R. § 1910.95(b)(1) requires feasible administrative or engineering controls whenever employees are subjected to sound levels exceeding those specified in the standard).

3. Knowledge

As for knowledge, the HR Manager and the Operations Director, Mr. Wieder, both acknowledged that as of the time alleged in the Citation, they were aware that the noise levels were high enough to trigger the requirement to conduct annual audiograms. (Tr. 309, 518.) The 2014 Citations included a violation for failing to administer an effective hearing conservation program as required by 29 C.F.R. § 1910.95(c)(1). (Ex. C-39 at 30.) The violation alleged exposure to noise over 22 decibels higher than the action level set out in the standard. *Id.* Respondent accepted this violation, including the repeat characterization as part of the 2014 Settlements. (Ex. C-39 at 30-31; C-45.)

Mr. Wieder was aware of both this 2014 Citation, as well as an earlier one issued to MVP in 2012, that also involved a serious violation of 29 C.F.R. § 1910.95(c)(1). (Ex. C-54 at 31-32.)

⁴² The presence and use of PPE are relevant to the violation’s gravity.

The 2012 Citation discussed three employees on the picking line all being exposed to noise well above the action level. *Id.*

Even without this history of noise violations, the level of noise was readily apparent. *See Cont'l Elec. Co.*, 13 BNA OSHC 2153, 2155 (No. 83-921, 1989) (high noise levels would have indicated to a reasonably diligent employer that exposure might exceed action levels). The area had four picking machines and the parties agreed that noise readings were substantially above the action level. (Ex. C-11; Tr. 143, 248-49.)

4. Characterization and Penalty

Respondent does not dispute the violation's characterization as serious. The record supports this characterization. Four employees were monitored, and the level of noise in the areas where they worked greatly exceeded the standard. (Tr. 250-51; Ex. C-10.) The high levels of noise could cause hearing loss. (Tr. 587.)

In terms of the penalty amount, the Secretary proposes \$12,471. This amount is appropriate for the violation's gravity, Respondent's large size, its history of violations, including ones related to noise, and its inadequate safety program. (Tr. 727-29; Ex. C-10.) The availability of PPE somewhat mitigates the violation's gravity. Respondent also took action to address the noise both during the investigation and after the Citation was issued. However, Respondent was previously cited for noise-related violations, and this history warrants a higher penalty. So, a penalty of \$12,471 is assessed for Citation 2, Item 4.

B. Citation 2, Items 5a, 5b, and 5c

1. Items 5a and 5b– 29 C.F.R. § 1910.95(g) –Audiology Testing Program

Respondent accepted responsibility for Citation 2, Items 5a and b in its brief. (Resp't Br. 20-21.) Item 5a relates to a violation of 29 C.F.R. § 1910.95(g)(7)(i) for failing to compare annual audiograms to the baseline audiograms. Item 5b relates to a violation of 29 C.F.R. § 1910.95(g)(8)(ii)(B), which requires that employees already using hearing protectors must be refitted and retrained in the use of hearing protectors as well as being provided with hearing protectors offering greater attenuation if necessary.

The record supports affirming the violations. Employers covered by the occupational noise standard must establish and maintain an audiometric testing program. 29 C.F.R. § 1910.95(g); *Trinity Indus. Inc.*, 15 BNA OSHC 1579, 1590 (No. 88-1547, 1992) (“an employer's obligation to conduct monitoring is mandatory once a threshold noise level is reached”), *rev'd on other grounds*, 16 F.3d 1149 (11th Cir. 1994). The program must include several elements, including evaluation of audiograms and re-fitting employees with hearing protection under certain circumstances. 29 C.F.R. §§ 1910.95(g)(1)(7), 1910.95(g)(8)(ii)(B). At the hearing, the parties stipulated that the cited standard applies to the cited conditions. (Tr. 251.) Respondent does not dispute that its employees were subject to noise and covered by the cited standard.

In terms of Citation 2, Item 5a, the Operations Director, Mr. Wieder, admitted the consultant retained to conduct the audiological testing was not comparing the test results to baseline audiograms. (Tr. 524.) Nor was Birdsboro itself doing this. (Tr. 315.) As for Citation 2, Item 5b, the HR Manager acknowledged that Respondent was not refitting employees hearing

protection based on the results of any audiograms. (Tr. 317-18.) Respondent does not deny it knew or could have known of the violations.

Both violations were appropriately characterized as serious, given the connection to the potential for hearing loss. (Ex. C-10.) *See Reich v. Trinity Indus.*, 16 F.3d 1149, 1150 (11th Cir. 1994) (“Noise at the work place is a serious health problem”). For penalty purposes, the Secretary proposes a single penalty for Items 5a, 5b, and 5c.

2. Citation 2, Item 5c – 29 C.F.R. § 1910.95(i)(3) – Hearing Protection

The noise standard requires employers to give employees: “the opportunity to select their hearing protectors from a variety of suitable hearing protectors provided by the employer.” 29 C.F.R. § 1910.95(i)(3). Respondent required employees to wear earplugs and earmuffs in the Picking Room to address the level of noise in the facility.⁴³ (Tr. 321, 588.) However, it only provided one type of earplug and one type of earmuff. (Tr. 138, 320-21; Ex. C-15.) Employees could not choose their hearing protectors “from a variety” of hearing protectors, they had to wear the two items provided. (Tr. 321.) The standard requires options to ensure proper fit. (Tr. 587-89.) Respondent failed to provide the opportunity to select hearing protection as the cited standard requires.⁴⁴

The HR Manager knew employees were required to wear the earplugs and earmuffs. (Tr. 321.) And she knew, prior to the inspection, that Birdsboro only offered one type of earplug and one type of earmuff. *Id.* As for exposure, multiple employees worked in the Picking Room, and

⁴³ As noted above, it is undisputed that the level of noise in the Picking Room was well above the level at which action is required. (Tr. 251.)

⁴⁴ Respondent also argues that it provided appropriate initial training about noise. (Resp’t Br. at 22.) Such training does not excuse the failure to provide the choice of hearing protection. 29 C.F.R. § 1910.95(i)(3).

Respondent acknowledged the noise levels were well above the level at which action is required. (Tr. 251.)

Like the other noise-related violations, the Secretary established that this violation is serious. There is a potential for hearing loss when noise levels exceed the limits the cited standard sets. Such hearing loss would be permanent. Respondent failed to have multiple components of a compliant program for occupational noise exposure.⁴⁵

3. Penalty for Citation 2, Items 5a, 5b, and 5c

In terms of penalty, the Secretary proposes a single penalty of \$12,471 for Items 5a, 5b, and 5c. The violations have a high gravity. The noise levels were well above the action levels in several different areas of the facility where many employees worked. Respondent took some steps towards hearing conservation. (Tr. 315-17, 524-25; Ex. C-10.) The single grouped penalty addresses the good faith shown by these actions.⁴⁶ Reductions for size or history are not appropriate for the same reasons discussed in connection with the other affirmed violations. So, Citation 2, Items 5a, 5b, and 5c are affirmed as serious and a single grouped penalty of \$12,471 is assessed for these violations.

⁴⁵ The Secretary groups this item with items 5a and 5b for penalty purposes. The penalty to be assessed is discussed below.

⁴⁶ When the Citation was issued, Citation 2, Items 5a, 5b, 5c, and 5d were grouped for penalty purposes. The Secretary declined to lower his proposed penalty after withdrawing Item 5d. (Sec'y Br. at 58-59.) The undersigned agrees that given the high gravity of the remaining violations, \$12,471 is the appropriate penalty amount.

C. Citation 3, Item 2 – 29 C.F.R. § 1910.95(m)(2)(ii)(E) – Keeping Records of Audiometric Testing

The final noise-related alleged violation relates to the requirement to maintain records of audiometric tests. Specifically, the cited standard requires employers to maintain records of employees' most recent noise exposure assessment.⁴⁷ 29 C.F.R. § 1910.95(m)(2)(ii). Respondent conducted audiometric testing and maintained some records about this testing. (Tr. 315, 608, Ex. C-26.) However, the level of noise in the area where the employee works was not included in the records. (Tr. 607; Ex. C-26.) Respondent does not disagree, but argues it was reviewing and retaining the reports provided to it by an outside consultant. (Resp't Br. at 24.)

Having records of audiometric testing does not preclude finding a violation. The Secretary showed the records were incomplete because they did not include the level of noise in the area of the site where the employee worked. (Tr. 607-8; Ex. C-26.) Including such information allows an employer to see if there have been shifts in the hearing of individuals working in noisier areas of the facility. *Id.* The records showed the results of hearing tests, but not noise levels in the workplace. *Id.*

As for knowledge, there is no contention that Respondent knew the records were missing the information required by the cited standard. (Sec'y Br. at 64.) Nor does the Secretary dispute that the HR Manager reviewed the records before filing them. (Tr. 315, 318.) However, she had a limited background in health and safety. (Tr. 187, 190, 198.) When she took on these responsibilities after the former health and safety manager left, she was not asked how much she

⁴⁷ The cited standard states: "(i) The employer shall retain all employee test records obtained pursuant to paragraph (g) of this section. (ii) This record shall include ... (E) Employee's most recent noise exposure assessment." 29 C.F.R. § 1910.95(m)(2)(ii)(E).

understood about hearing conservation. (Tr. 198.) Still, she was tasked with the responsibility for this and the other safety responsibilities. (Tr. 195-96.)

Despite her limited background, the HR Manager was aware of noise issues at the facility. As noted above, Respondent was previously cited for noise-related violations in 2014. (Ex. C-39 at 30-31.) Although the 2014 Citations did not relate to subpart (m), they did make Respondent aware of the need for a hearing conservation program and informed it that action needed to be taken.⁴⁸ Further, had the HR Manager or anyone else engaged in a reasonably diligent review of the records, they would have discovered that the summary reports were missing required information. *See JPC Grp. Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009) (finding knowledge when the employer failed to take steps to discover the violative condition).

As discussed, the facility had areas with extremely high levels of noise. Many employees worked in these areas, triggering the need for an effective hearing conservation program. The records being kept were insufficient to allow Respondent to effectively assess the impact of its noise control measures. (Tr. 607-8.)

The Secretary characterizes the violation as other-than-serious and proposes no penalty. The record does not show a potential for serious harm from this violation alone. (Ex. C-10 at 14-15.) Respondent was conducting the required testing and maintaining the summary reports provided to it by an outside consultant in good faith. (Tr. 315, 318.) When learning that the reports did not have all the information required by the cited standard, it retained a new consultant. (Tr.

⁴⁸ Mr. Wieder, the Operations Director, was also aware of the standard's applicability through his involvement with the 2012 Citations, which discussed noise well above action levels on the picking line. *See MJP*, 19 BNA OSHC at 1648 (supervisor chargeable with knowledge of the requirement "based on their prior work experience, wherever that experience originates").

524-25.) The record supports the other-than-serious characterization. No penalty is assessed for this violation.

V. Citation 2, Item 7 – 29 C.F.R. § 1910.132(a) – PPE

Respondent does not dispute that PPE was necessary and that it needed to provide it to employees. (Resp't Br. at 23.) *See Voegele Co. Inc. v. OSHRC.*, 625 F.2d 1075, 1078 (3d Cir. 1980) (PPE required when a reasonable person recognizes a hazard warranting its use). When PPE is necessary, it must be “used and maintained in a sanitary and reliable condition.” 29 C.F.R. § 1910.132(a). The Secretary alleges two Instances of violations of this standard.

A. Instance (a)

Employees were provided with PPE and were using it at the facility. (Ex. C-17; Tr. 150-55.) The PPE included reusable smocks as well as disposable aprons and plastic sleeves. (Tr. 152-53, 257.) The Secretary argues that this PPE was not being maintained in a sanitary condition.⁴⁹ (Sec'y Br. at 60-61.) Employees were not cleaning or removing disposable PPE before entering the cafeteria and no rules required this. (Ex. C-17 at 13; Tr. 157, 259-61.) Nor was there a system to ensure new PPE would be put on after employees finished in the cafeteria. (Tr. 253-54.)

Employees working in the Kill Room had the potential to be exposed to animal blood, fecal matter, and bacteria, such as *Campylobacter*. (Tr. 325-26.) At the time of the inspection, there was no monitor to ensure sleeves, gloves, hairnets, and aprons would be disposed of before employees entered the cafeteria. (Tr. 253-54.) Likewise, although employees wore protective smocks there was no system to ensure that these were left outside of the cafeteria or cleaned before

⁴⁹ The Citation alleges: “These items of protective equipment were not maintained in a sanitary condition, nor completely removed or cleaned during breaks, and were worn into areas where employees were consuming food.”

an employee entered or exited the cafeteria. (Tr. 158-59.) During the inspection, employees were photographed in the cafeteria still wearing PPE including hairnets, plastic sleeves, and earmuffs. (Tr. 157-59, 259-60; Ex. C-17 at 13.) The HR Manager acknowledged being aware of employees sometimes entering the cafeteria without removing PPE. (Tr. 261-62.)

Respondent argues its Superintendent was not aware of “someone suffering an illness from exposure in the plant.” (Resp’t Br. 23.) Proof of an illness or injury is unnecessary to prove a violation of 29 C.F.R. § 1910.132(a). *See e.g., Arcadian Corp.*, 20 BNA OSHC 2001, 2009 (No. 93-0628, 2004) (goal of the OSH Act is to prevent the first accident); *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871, 874 (3d Cir. 1979) (“the statute is violated when a recognized hazard is maintained, whether or not an injury occurs”). The Secretary satisfied his burden by showing a reasonable employer would know there was a need for PPE and also knew, or was capable of knowing, it was not being “used and maintained in a sanitary and reliable condition.”⁵⁰ 29 C.F.R. § 1910.132(a); *Tube-Lok Prods.*, 9 BNA OSHC 1369, 1372 (No. 16200, 1981) (PPE required when a reasonable person familiar with the circumstances would recognize the need for it). Here, Respondent does not deny PPE was necessary and knew employees wore PPE into the cafeteria. Nonetheless, it failed to take corrective action as of the date alleged in the Citation. The Secretary met his burden and the violation is affirmed.

⁵⁰ The HR Manager was informed an employee was hospitalized possibly because of something he or she contracted while working at Birdsboro. (Tr. 327.)

B. Instance (b)

While Instance (a) concerned whether the PPE was maintained in a sanitary condition, Instance (b) concerns the reliability of the PPE employees used in the Kill Room, Picking Line, and Evisceration Room. The Citation alleges:

employees involved with poultry killing and processing were not provided with, and did not maintain or use personal protective equipment [in] a reliable and intact condition. ... These items were not resilient enough to withstand the work environment and to protect employees and their clothing.

Exhibit C-17 shows an employee's exposed skin visible through the torn PPE in the Kill Room. (Ex. C-17 at 7A.; Tr. 153-54.) Respondent argues it was the "employee's choice" as to how they wore the PPE provided to them. (Resp't Br. at 23.)

The cited standard does not permit such discretion on the part of employees. When PPE is necessary, 29 C.F.R. § 1910.132(a) requires the employer to ensure it is "used, and maintained in a sanitary and reliable condition." *The Budd Co.*, 1 BNA OSHC 1548, 1550 (No. 199, 1974) (consolidated), *aff'd*, 513 F.2d 201 (3d Cir. 1975). Respondent does not claim employee misconduct led to the torn PPE. It does not allege it had a rule against purposely tearing PPE or that it instructed employees of the risks associated with doing so. According to the Superintendent, Birdsboro provided items that employees could use to avoid having exposed skin, but there was not a rule for their skin to be covered.⁵¹ (Tr. 155-56.) Respondent did not instruct employees to replace PPE if it stopped serving as a reliable protective barrier. It allowed them to wear ripped PPE. (Tr. 155-56; Ex. C-17 at 7-8.)

⁵¹ Before becoming Superintendent, Mr. Urieta worked as an hourly employee and then the supervisor of the Kill Room. (Tr. 38-39, 165.)

The standard requires more than just the provision of PPE, employers must also ensure it is maintained in a sanitary and reliable condition. *See Otis Elevator v. Marshall*, 581 F.2d 1056, 1058 (2d Cir. 1978) (affirming a violation of 29 C.F.R. § 1910.132(a) and stating, “Leaving the decision to the discretion of the employee is not sufficient compliance with the regulation”); *Erie Coke*, 15 BNA OSHC at 1563 (requiring employer to provide PPE).

As stated, it is not disputed that employees working in these areas were exposed to hazardous conditions and that Respondent was aware of this. (Tr. 325-26; Ex. C-17.) The Superintendent knew employees sometimes wore torn PPE. (Tr. 154-56.) Employees are required to take animals from containers and prepare them to be killed. (Tr. 605-6.) The live chickens have sharp claws and beaks that can scratch open exposed skin. *Id.* The HR Manager was aware that this work potentially exposed employees to animal blood and fecal matter. (Tr. 328.) Exposed skin could become infected with animal feces or bacteria, and such infections could lead to serious illness. (Tr. 604.)

Respondent argues that its Superintendent was unaware of anyone suffering illness as a result of being exposed to something at its facility. (Tr. 154-55.) However, the HR Manager knew of one employee who suffered from the symptoms consistent with exposure to the *Campylobacter* bacteria. (Tr. 326-27.) Even if that worker’s illness was unrelated to bacterial exposure at Birdsboro’s facility, the Secretary still showed employees were exposed to hazardous conditions if their PPE was not maintained in a sanitary and reliable manner.

C. Characterization and Penalty

The Secretary argues that the violation was appropriately characterized as serious and proposes a penalty of \$11,758 for both Instances. (Sec’y Br. at 63.) While Respondent disputes

the merits of Citation 2, Item 7, it does not raise any specific argument as to the serious characterization or the penalty amount. (Resp't Br. at 23.) The Area Director explained the hazards of the workplace and how employees could be seriously injured from inappropriate PPE. (Tr. 603-6.) Among other risks, exposure to bacteria in the workplace could cause infection serious enough to require hospitalization. (Tr. 606.) The record supports the serious characterization.

In terms of the penalty amount, the Secretary argues that the violation was of moderate gravity. (Sec'y Br. at 63.) As noted above, the conditions at the facility created the possibility of exposure to cuts from handling the animals and exposed skin could become infected, including by campylobacter. (Tr. 605.) While Respondent provided PPE, the Secretary showed it did not comply with the cited standard's requirement to ensure its use and maintenance in a reliable and sanitary condition. Because work in the Kill Room involved animal feces, blood, and an odor, Respondent had some difficulty retaining employees in those positions. (Tr. 309-10.) So, it rotated employees in and out of the Kill Room. *Id.* Thus, a number of different employees were exposed to hazards from the failure to comply with the cited standard. *See J. A. Jones*, 15 BNA OSHC at 2214 (assessing the violation's gravity includes consideration of the number of employees exposed). Respondent has a history of violations, warranting an increase in the penalty amount. And, as discussed with the other violations, no reduction for size is appropriate. So, the Secretary's proposed penalty of \$11,758 is appropriate and is assessed for Citation 2, Item 7, Instances (a) and (b).

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Citation 1,
 - a. Item 1a, alleging a willful, repeat or serious violation of 29 C.F.R. § 1910.147(c)(4)(i), is AFFIRMED as Willful;
 - b. Item 1b, alleging a willful, repeat or serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A) is AFFIRMED as Repeat,
 - c. Item 1c, alleging a willful, repeat or serious violation of 29 C.F.R. § 1910.147(c)(6)(i) is AFFIRMED as Willful,

and a single penalty of \$124,709 is ASSESSED.
2. Citation 2, Item 1, alleging a serious violation of 29 C.F.R. § 1910.23(a)(8) is AFFIRMED as Serious and a penalty of \$5,880 is ASSESSED.
3. Instances (a) and (e) of Citation 2, Item 3b, each alleging serious violations of 29 C.F.R. § 1910.37(b)(5) are AFFIRMED as Serious and a penalty of \$2,000 is ASSESSED.
4. Instance (d) of Citation 2, Item 3(b), alleging a serious violation of 29 C.F.R. § 1910.37(b)(5), or in the alternative 29 C.F.R. § 1910.37(b)(4), is VACATED.
5. Citation 2, Item 4, alleging a serious violation of 29 C.F.R. § 1910.95(b)(1), is AFFIRMED as Serious and a penalty of \$12,471 is ASSESSED.
6. Citation 2,
 - a. Item 5a, alleging a serious violation of 29 C.F.R. § 1910.95(g)(7)(i), is AFFIRMED as Serious,
 - b. Item 5b, alleging a serious violation of 29 C.F.R. § 1910.95(g)(8)(ii)(B), is AFFIRMED as Serious,
 - c. Item 5c, alleging a serious violation of 29 C.F.R. § 1910.95(i)(3), is AFFIRMED as Serious,

and a single penalty of \$12,471 is ASSESSED.

7. Citation 2, Item 7, alleging a serious violation of 29 C.F.R. § 1910.132(a), is AFFIRMED as Serious, and a penalty of \$11,758 is ASSESSED.
8. Citation 3, Item 2, alleging an other-than-serious violation of 29 C.F.R. § 1910.95(m)(2)(ii)(E), is AFFIRMED as Other-Than-Serious, and no penalty is assessed.

SO ORDERED.

/s/ _____
Judge Carol A. Baumerich
U.S. Occupational Safety and Health Review Commission

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