



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.

U.S. POSTAL SERVICE, d/b/a Lehigh
Valley Processing & Distribution Center,

Respondent.

AMERICAN POSTAL WORKERS UNION,
AFL-CIO,

Authorized Employee Representative.

OSHRC DOCKET No. 17-0419

DECISION AND ORDER

APPEARANCES:

For the Complainant:

Jennifer L. Bluer, Esq.
U.S. Department of Labor
Philadelphia, Pennsylvania

For the Respondent:

Mark J. Manta, Esq.
United States Postal Service
Philadelphia, Pennsylvania

For the Authorized Employee Representative

Jason R. Veny, Esq.
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Washington, D.C.

BEFORE: William S. Coleman
Administrative Law Judge

I. INTRODUCTION

The United States Postal Service (USPS) operates a mail processing facility in Lehigh Valley, Pennsylvania, called the “Lehigh Valley Processing & Distribution Center” (Center). A sprawling multi-component machine called an APPS (standing for “Automated Package Processing System”) occupies about 75% of the Center’s floorspace. (T. 25).

On October 15, 2016, one of the many conveyor belts on the APPS broke and required repair. Employees doing the repairs were trained and experienced in controlling hazardous energy during such repairs by applying USPS’s APPS-specific procedures for the control of hazardous energy.

The APPS is configured with multiple energy isolating devices (EIDs) that control electricity. USPS instructed employees performing the repair to lock out an EID that de-energized only the conveyor lane on which the broken conveyor belt was located. Doing this made it possible for all other components of the APPS to run and to process mail while repair work was ongoing.

Under optimal circumstances the repair would have been completed in about six to twelve hours, but the repair was not completed until five days after the breakdown. (T. 96, 227, 247, 549). The repair effort was slowed mainly because of problems in getting necessary parts. But also complicating the repair effort was the resistance of some maintenance employees to management’s instruction to lock out an EID that enabled the APPS to continue to process mail during the repair. Those employees had expressed the view that USPS’s APPS-specific energy control procedures specified locking out a different EID—one that would have effectively rendered the APPS nonoperational during repair work. Management decided otherwise, and so the repair was completed by locking out the EID that management had directed.

After the repair was completed, someone complained to the Occupational Safety and Health Administration (OSHA) about management’s instruction on the EID to lock out during the

repair. OSHA then conducted an inspection and investigation that resulted in OSHA issuing to USPS a one-item citation alleging that during the repair USPS had violated OSHA's "control of hazardous energy (lockout/tagout)" (LOTO) standard, codified at 29 C.F.R. § 1910.147. The citation characterized the LOTO violation as having been "willful" and proposed a penalty of \$99,630.

The gist of the alleged LOTO violation is that USPS instructed employees to lock out an EID other than the EID that the APPS-specific LOTO procedures specified to be locked out for the repair of the broken conveyor belt.

USPS timely contested the citation and proposed penalty, bringing the matter before the independent Occupational Safety and Health Review Commission (Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (Act). The Secretary of Labor (Secretary) thereafter filed his complaint pursuant to Commission Rule 34(a) in which he realleged the citation and the proposed penalty as originally issued. 29 C.F.R. § 2200.34(a). In addition to characterizing the violation as "willful" within the meaning of section 17(a) of the Act, the complaint alleged further that the violation was also "serious" within the meaning of section 17(k), in that there was a substantial probability that death or serious physical harm could have resulted from the violative conditions or practices. 29 U.S.C. §§ 666(a) & (k). (Complaint ¶ 6).

The American Postal Workers Union, AFL-CIO (APWU), elected party status in the Commission proceedings as an Authorized Employee Representative pursuant to Commission Rule 20(a). 29 C.F.R. § 2200.20(a) (2017). By order of the Commission's Chief Judge dated June 16, 2017, APWU's party status in this proceeding was formally recognized.

The matter was thereafter assigned to the undersigned administrative law judge, and an evidentiary hearing was conducted in Allentown, Pennsylvania, on June 5 & 6, 2018. Post-hearing briefing was completed on October 19, 2018. (APWU opted not to file a post hearing brief.)

The principal issues presented, and the decisions thereon, are as follows:

- Did the Secretary prove by a preponderance of the evidence that USPS instructed employees to lock out an EID other than the EID that the APPS-specific LOTO procedures instructed to be locked out, in violation of § 1910.147(d)(2)?

Decision: Yes.

- Did the Secretary prove by a preponderance of the evidence that the violation was willful?

Decision: No.

- Did the Secretary prove by a preponderance of the evidence that the established violative condition created a substantial probability that death or serious physical harm could result, so that the violation was “serious” within the meaning of section 17(k) of the Act?

Decision: No.

- What is the appropriate penalty for the proven other-than-serious violation of the LOTO standard?

Decision: The maximum allowable penalty is assessed.

For the reasons described below, a penalty of \$12,675 is assessed for the proven other-than-serious violation of 29 C.F.R. § 1910.147(d)(2).

II. FINDINGS OF FACT

Except where the following findings indicate the absence or insufficiency of evidence to prove a matter of fact, the following facts were established by at least a preponderance of the evidence:

1. The United States Postal Service (USPS) employs employees in processing U.S. Mail at its Lehigh Valley Processing & Distribution Center (Center) located in Lehigh Valley, Pennsylvania.

*Automated Package Processing System (APPS)*¹

2. The Center is outfitted with an Automated Package Processing System (APPS) for processing and sorting mail. The APPS at the Center is one of 74 such machines that USPS operates throughout the nation. (Ex. R-30 at 1).

3. The APPS unloads mail items (letters, magazines, and parcels) onto an input conveyor, organizes the items into a single layer on a conveyor (a process called “singulating”), photographs each item, and sorts each item. (*Id.*).

4. Some of the 74 APPS that USPS operates nationally are “dual-sided,” but the APPS at the Center is single-sided. (Ex. R-30 at 1–2). Dual-sided APPS machine are capable of processing mail when one side is shut down. (Ex. C-10 at 16; Ex. R-30 at 35).

The Three Subsystems of an APPS Machine

5. APPS machines have three subsystems, each of which is modular and scalable to meet a particular facility’s capacity needs and floor configuration. (Ex. R-30 at 1 & 3). Those three subsystems are: (a) the Feed, Singulation and Distribution Subsystem (FSD Subsystem), (b) the Induction Subsystem (IND Subsystem), and (c) the Sorter Subsystem. (The broken belt that was repaired in October 2016 was located in the IND Subsystem.) The illustration of the APPS on

¹ The following glossary of certain acronyms used in this decision is provided for reference:

- IND-MCC: Main Control Cabinet for Induction Subsystem
- IND-DCC-3: Distributed Control Cabinet for induction lane no. 3
- Belt I-3-2: Belt no. 2 of induction lane no. 3
- MPE: Mail Processing Equipment mechanic

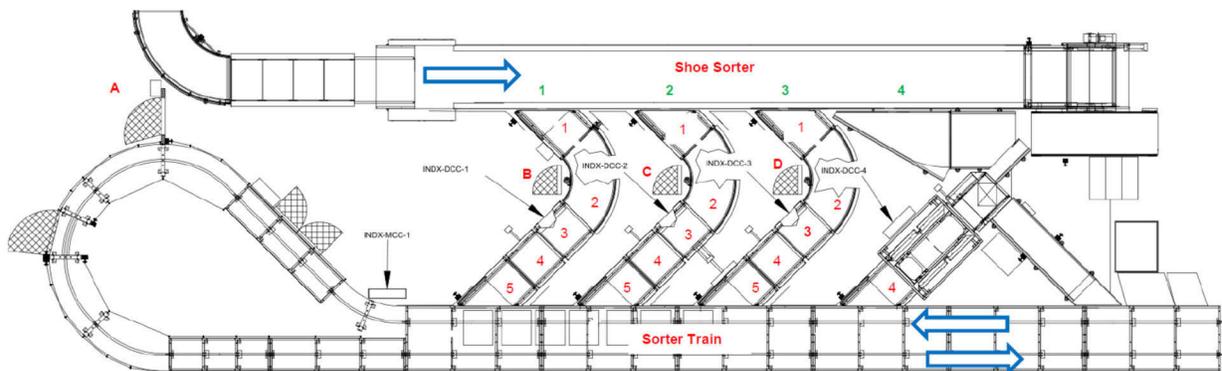
page 2 of Exhibit R-30 (labelled Figure 2) is a complete depiction of all three subsystems of a single-sided APPS machine such as the one at the Center.

6. *Feed, Singulation and Distribution Subsystem (FSD Subsystem)*. The FSD Subsystem consists of belts and roller conveyors that are arrayed in a series to (1) unload mail onto the receiving conveyor, (2) “singulate” and weigh individual mail items, (3) capture a photographic image of each item, and (4) transfer each item to the IND Subsystem. When any conveyor in the FSD Subsystem becomes inoperable, the entire FSD Subsystem is rendered inoperable. For a single-sided APPS such as the APPS at the Center, if the FSD Subsystem were to be inoperable, the APPS would not be capable of processing mail. (Ex. R-30 at 2-3, 34).

7. *Induction Subsystem (IND Subsystem)*. A diagram of the IND Subsystem that also reflects its relation to the two other subsystems is in footnote 2.²

a. The sole components of the IND Subsystem are four induction lanes (sometimes called “induct lanes”)—three “automated” induction lanes and one “semi-automated” induction lane. The induction lanes convey mail items from the FSD Subsystem to the Sorter Subsystem. A

² The diagram below (Ex. R-30 at 8) reflects a bird’s-eye view of the induction area and its spatial relation to the shoe sorter (which is part of the FSD Subsystem) and the sorter train (which is part of the Sorter Subsystem). The large arrows superimposed on the shoe sorter and the sorter train indicate the direction that mail items flow.



conveyor known as the “shoe sorter” (a conveyor in the FSD Subsystem) transfers mail items onto the induction lanes, which in turn transfer the items to the “sorter train” (a conveyor in the Sorter Subsystem).

b. The three automated induction lanes are arranged adjacent and parallel to one another. (Ex. R-30 at 8). Each automated induction lane consists of five conveyor belts, numbered 1 through 5 in the order of mail flow. The top surface of the conveyor belts is elevated about 66 inches (5.5 feet) above floor level. (T. 48, 551).

c. Belt number 2 of an automated induction lane is curved to make a ninety-degree turn and is described in a maintenance manual as the “induction curve conveyor.” (Ex. C-46 at 1). Belt 2 on induction lane 3 is the belt that broke and required repair at the Center in October 2016 (identified hereafter as conveyor belt “I-3-2” for “induction lane 3, belt 2”).

d. Belt number 1 of an automated induction lane is immediately adjacent to the shoe sorter (a conveyor in the FSD Subsystem), and Belt 5 is immediately adjacent to the sorter train (a conveyor in the Sorter Subsystem). (Ex. C-1; Ex. R-30 at 8). Belts 1 and 5 are described as “45 degree” conveyor belts because that is the angle at which each meets the conveyors of the adjoining subsystems. Belts 1 and 5 are also sometimes referred to as the “outside” belts because they bookend the “inside” belts (belts 2, 3 and 4) and adjoin conveyor belts located in the other two subsystems.

8. *Sorter Subsystem.* The main components of the Sorter Subsystem are (1) a conveyor called the sorter train, and (2) multiple output chutes. The sorter train conveys mail items to various output chutes, which discharge the items into a variety of container types for subsequent delivery. (Ex. R-30 at 2).

IND Subsystem’s Interlocked Maintenance Access Gates

9. Employees needing to work on an induction lane can only get to it by opening and

passing through one or more interlocked “Maintenance Access Gates” (“access gates” or “gates”). (Ex. R-30 at 9). In the diagram in footnote 2 *supra*, the four access gates are designated with the letters A, B, C and D. (Ex. R-30 at 9). The cross-hatched quarter circles in the diagram reflect the swing radius of each gate. (T. 53-54, 463). The region between gate A and induction lane 4 is known as the “induction area” and is regarded as a “maintenance only” area to be accessed only by highly trained maintenance employees who are known as Mail Processing Equipment mechanics (MPEs). (Ex. R-30 at 9; T. 24, 52).

10. When an access gate is opened while the IND Subsystem is operating, an interlock feature will cause all the conveyor belts on the induction lane that is immediately beyond the gate to stop. (Ex. R-30 at 9). This interlock feature prevents employees from making inadvertent contact with an induction lane’s moving belts. (*See id.*, noting that the interlock feature “would prevent an inattentive employee from wandering up to the conveyor and reaching on top of the lane where moving belts are present”).

11. Each access gate is about four feet high. (*See* Ex. C-8; T. 56-57, 59). Before opening a gate, an MPE is supposed to depress a white-colored button that is located near the gate entrance. Depressing the white button causes the induction lane that is beyond the gate to clear itself of any mail items on that induction lane and then to bring all the conveyor belts of that induction lane to a halt. So, for example, depressing the white button at the entrance to gate A will cause all mail items on induction lane 1 to be moved off the lane’s five conveyor belts and then all five belts would come to a halt. Opening gates B, C and D have the same effect on the belts in induction lanes 2, 3 and 4 respectively. (Ex. R-30 at 9). When an induction lane is cleared of mail and its belts come to a standstill, the white-colored button then illuminates, which signals to the MPE that it is then permissible to open the gate and pass through. Typically, after an MPE passes through a

gate, the gate is kept open, and the induction lane beyond it remains at a standstill for so long as the MPE remains on the opposite side of the gate entrance. (T. 112-13, 116-17, 277-79).

12. An induction lane that has been brought to a standstill in the manner described in the preceding paragraph can be returned to operation by an MPE closing the gate and then depressing a green-colored “reset” button that is located on the same switchbox as the white-colored button for that gate. Depressing the reset button after the gate is closed causes the conveyor belts on the induction lane associated with that button to resume processing mail.

13. The interlock feature for the gates can be bypassed by an MPE passing through a gate, closing the gate behind her, then reaching back over the top of the now closed gate (through an opening between the top of the gate and the underside of the elevated induction lane belt 2), and then depressing the reset button. This method of bypassing the interlock is depicted in the photograph at Exhibit C-9. (T. 231). Bypassing the interlock in this manner will cause the conveyor belts for the induction lane on the exit side of the closed gate to resume operating and processing mail. So, for example, depressing the reset buttons associated with gates A and B after those gates have been closed behind an MPE who has passed through those gates will cause the conveyor belts of induction lanes 1 and 2 to resume processing mail. (T. 259).

14. To rebuild belt I-3-2, MPEs had to pass through gates A, B, and C to get to induction lane 3. For induction lanes 1 and 2 to process mail while MPEs rebuilt belt I-3-2, the MPEs had to close gates A and B behind them and then bypass the interlock feature by pressing the reset button while standing on the opposite side of the closed gate and reaching over the top of closed gate in the manner depicted in Exhibit C-9. (T. 81-82, 109-12, 116-17, 120, 257-59, 277-79). MPEs are generally prohibited from bypassing the interlock feature in this manner. (T. 116-17, 136, 230-32, 255, 502, 601; Ex. R-30 at 11-12). USPS’s voluminous maintenance manual for the

APPS (MS-202, *see infra* ¶ 32), instructs MPEs that the reset button “should not be pressed until maintenance personnel leaves that area and closes the access [gate],” and that when the reset button is pressed “all personnel should be clear of the area.” (Ex. R-30 at 12).

15. In the repair and rebuild of belt I-3-2, the MPEs did their work while positioned on the floor area that is between induction lanes 2 and 3 as depicted in the diagram in footnote 2. In that space, the distance between the inner radius of curved belt I-3-2 and the outer radius of curved belt I-2-2 is about three feet. (T. 478). The distance from belt I-3-2 to the shoe sorter is about 3.5 feet, and the distance from belt I-3-2 to the sorter train is about 4.5 feet. (T. 551).

Control of Electricity to the APPS and its Subsystems

16. The APPS receives power via a single 480-volt (AC) power drop to the Sorter Main Control Cabinet (“SMCC”). (T. 36-37, 39; Ex. C-10 at 6; Ex. R-30 at 3).

17. The SMCC is the main power source for the entire APPS and distributes electricity to each of its three subsystems. If power is shut off at the SMCC, the entire APPS is de-energized. (T. 36-37; Ex. C-10 at 1, 5).

18. The SMCC is outfitted with an energy isolating device (EID) that is capable of being locked out. When in the off position, this EID de-energizes all three subsystems of the APPS. (Ex. C-10 at 8). The Center’s APPS cannot process mail when the SMCC is de-energized.

19. The SMCC delivers electricity to the FSD Subsystem by delivering it to the FSD System’s Main Control Cabinet (FSD-MCC). The FSD-MCC is outfitted with an EID that is capable of being locked out. When in the off position, this EID de-energizes the entire FSD Subsystem. The Center’s APPS cannot process mail with the FSD Subsystem de-energized. (Ex. C-10 at 16).

20. The SMCC delivers electricity to the IND Subsystem by delivering it to the IND System’s Main Control Cabinet (IND-MCC). The IND-MCC is outfitted with an EID that is

capable of being locked out. When in the off position, this EID de-energizes the entire IND Subsystem. When electricity to the IND-MCC is disconnected, the entire IND Subsystem is de-energized. The Center's APPS cannot process mail with the IND Subsystem de-energized. (Tr. 40; Ex. C-10 at 34).

21. Unlike the FSD Subsystem and the IND Subsystem, the Sorter Subsystem does not have a dedicated Main Control Cabinet. Rather, the SMCC delivers electricity directly to the Sorter Subsystem.

22. Both the FSD-MCC and the IND-MCC distribute the 480 volts AC of power received from the SMCC to their respective subsystem components by delivering the electricity to multiple Distributed Control Cabinets (DCCs) within their respective subsystems.

23. The FSD-MCC delivers 480 volts AC to eight FSD Distributed Control Cabinets (FSD-DCCs) that are identified as FSD-DCC-1 through FSD-DCC-8. (Ex. C-10 at 16; Ex. R-30 at 7). Each of the eight FSD-DCCs distributes power to a specific group of conveyors in the FSD Subsystem. Consequently, some adjacent conveyor belts in the FSD Subsystem receive power through different FSD-DCCs. (Ex. C-10 at 16; Ex. R-30 at 7, 34). Each FSD-DCC is equipped with an EID that is capable of being locked out and that when in the off position de-energizes the component of the FSD Subsystem to which that particular FSD-DCC supplies electricity. (Ex. R-30 at 7).

24. The IND-MCC delivers the 480 volts AC that it receives from the SMCC to four Induction Distributed Control Cabinets (IND-DCCs) that are identified as IND-DCC-1 through IND-DCC-4. (Ex. C-10 at 34). Each induction lane has a dedicated DCC, which is located underneath belt 3 of each induction lane as indicated in the diagram in footnote 2. Induction lane 1 receives power through IND-DCC-1, induction lane 2 receives power through IND-DCC-2, and

so forth. (Ex. C-1; Ex. R-30 at 3-4; T. 36-37, 40, 66-67, 75). Each IND-DCC is equipped with an EID that is capable of being locked out. When the EID for an induction lane's IND-DCC is in the off position, 480 volts AC remains at the top of the IND-DCC enclosure but is removed from the induction lane itself (except for a residual 24 volts, which is deemed a non-hazardous level under USPS's hazardous energy control procedure). (T. 62-64; Ex. C-10 at 2). When the EID for an automated induction lane's IND-DCC is in the off position, electricity cannot be distributed to any of the five motors that drive the lane's five conveyor belts (each of the five belts being driven by a separate motor). (Ex. R-30 at 3-4, 14). Consequently, when an induction lane's IND-DCC is de-energized, all five belts in that induction lane are de-energized. (Ex. R-30 at 7-8; T. 512).

25. When an induction lane's IND-DCC is de-energized, other induction lanes that are not de-energized at their respective IND-DCCs can continue to process mail. (Ex. R-30).

Hazardous Energy Control Procedures (LOTO)

26. USPS has developed a written APPS-specific hazardous energy control procedure that applies to every APPS that it operates in the field. This written procedure is in the form of a USPS "Maintenance Management Order" (MMO) that was prepared and issued by USPS's headquarters for Maintenance Operations located in Norman, Oklahoma. The APPS-specific energy control procedure that was in effect in October 2016 is titled "Equipment Specific Energy Control Procedure: Automated Package Processing System — Single and Dual (APPS)," dated June 22, 2015 and designated "MMO-037-15." There had been prior iterations of the APPS-specific energy control procedure that bore different MMO designations. (T. 139, 490-91).

27. USPS developed MMO-037-15, as well as its prior iterations, to meet the requirements of OSHA's LOTO standard. (Ex. C-10 at 1).

28. MMOs like MMO-037-15 contain mandatory instructions that all of USPS's MPEs are required to follow. (Ex. C-10; T. 171-72, 123-24, 216, 235).

29. MMO-037-15 has a total of 57 pages (some intentionally blank). The first three pages set forth basic provisions, with the third page being the signature page for the USPS official who approved the MMO. The remaining 54 pages of the MMO are made up of eight “attachments,” each of which pertains to discrete components and functions of an APPS. (Ex. C-10 at 3).

30. Section 1.0 of the MMO declares its “General Principle” to be as follows:

Under OSHA’s Standard on Control of Hazardous Energy (Lockout/Tagout), 29 CFR 1910.147, before service or maintenance is performed on machines or equipment, the machines or equipment must be turned off, disconnected from all energy sources, and then have an energy isolating device, lock, and identification tag applied, unless an exception exists as identified in Section 3.0 Exceptions to Lockout.

The United States Postal Service requires the application of a locking device and personal identification tag for each technician working on the machine or equipment.

The discussion below explains when this general principle is to be implemented with equipment in Postal facilities.

(Ex. C-10 at 1). Immediately following this statement of “general principle,” section 2.0 of the MMO states its applicability to servicing and maintenance operations, providing in its entirety as follows:

Equipment must be locked out for all maintenance or servicing activities any time the unexpected startup, application of power or release of stored energy could injure someone or could damage the equipment. This includes all preventive, corrective, breakdowns, or maintenance activities occurring during the run-tour; work such as cleaning, lubricating, and component replacement is included. In addition, employees must also lockout as required by maintenance documentation, local policy, or supervisor direction.

The MMO’s section 3.0 is captioned “Exceptions to Lockout.” This section includes the following paragraph (bold typeface in original):

Some machines have modular assemblies that are designed for separate subassembly de-energization and isolation, to enable

performance of service or maintenance activities. Provided there is no exposure to injury from unexpected startup, application of power, or release of stored energy, portions of the machine, such as, the ink jet printer and computer may remain powered to prevent clogs and loss of run data respectively.

31. Attachments one through five of the MMO address hazardous energy control procedures. (T. 369; Ex. C-10 at 1). Attachment 1 addresses the procedure for de-energization of the entire APPS machine, which occurs at the SMCC. (Ex. C-10 at 3, 5-14). Attachments 2, 4 and 5 each address the procedure for de-energization of each of the three subsystems. (T. 369, 460). (T. 369; Ex. C-10 at 3, 15-24, 33-48). Attachment 3 addresses procedures for de-energization of the DCC for the unloader (which is part of the FSD Subsystem and receives electricity directly from the FSD-MCC). (Ex. C-10 at 25-32; Ex. R-30 at 34-35). Attachment 3 is the only attachment that is dedicated to describing energy control procedures solely for one of the DCCs. (Ex. C-10 at 3, 25-32; T. 491). (Attachments 6, 7, and 8 are supporting documents that are not pertinent to the issues presented here. [T. 369; Ex. C-10 at 3, 49, 51, and 53].)

32. MPEs, in addition to relying on MMO-037-15 for LOTO procedures, rely also on USPS's maintenance manual for the APPS, which is titled "Maintenance Series Handbook MS-202" (MS-202). (T. 123, 149, 155-56, 238-39, 296-98). MS-202 is in six volumes and is thousands of pages long. (T. 157, 314). Its table of contents contains roughly 3000 separate headings. (Ex. C-42).

33. The energy control procedures set forth in attachments 1 through 5 of MMO-037-15 contain multiple references to MS-202. (Ex. C-10 at 8, 9, 10, 12, 20, 28, 43, 44). For example, in detailing the shutdown procedure for the entire APPS by de-energizing the SMCC, Attachment 2 of MMO-037-15 states: "For detailed steps to properly shut down the APPS system refer to MS-202, Volume A, Section 3.5." (Ex. C-10 at 8).

34. MS-202 contains specific instructions regarding how to repair or replace particular parts, as well as listing the parts needed for the repair, and sometimes it identifies which EID to lock out before performing a particular repair or maintenance activity. (T. 155-56, 238-39; e.g., Ex. C-45 [sec. 5.8.6.1, ¶1]; Ex. C-46 [sec. 5.8.12.1, ¶1]; Ex. R-30 at 26 [sec. 4.9.1.2, ¶1], at 30-31 [sec. 4.9.3.5.4, ¶¶10 & 21], at 32 [sec. 5.8.5.5, ¶1], at 33 [sec. 5.8.5.6, ¶1]).

35. MS-202 contains specific instructions on performing some of the tasks that had to be done to rebuild belt I-3-2. MS-202 identifies the IND-MCC to be locked out for some those tasks, such as the removal of certain guards, removal of the wheel and shaft, and removal of the pressure rollers. (T. 165-72, 238-43, 296-98; Ex. C-45 at 1; Ex. C-46 at 1-2, 12, 25; Ex. R-30 at 23-24, 30-31). MS-202 generally does not set forth specific procedural steps for de-energizing and locking out an EID. But MS-202 sets forth the following “Warning” immediately before it identifies a particular EID to be locked out:

WARNING

Refer to local lockout procedures to properly shutdown and lockout this machine before performing the following task.

(Ex. R-30 at 21, 23, 24, 26, 29–33; Ex. C-45 at 1 & 3; Ex. C-46 at 3, 6, 7, 9, 12, 14, 17, 19, 22, 24, 25).

36. The Center had no local procedures that augmented the lockout procedures set forth in MMO-037-15 or MS-202. (T. 150, 156, 171, 503-04). The Center’s management had not developed or trained MPEs on any formal local LOTO procedure specifying the lock out of an IND-DCC for the repair of an automated induction lane’s “inside” belt (belts 2, 3 or 4). (*Id.*).

37. MS-202 describes some minor service and maintenance activities, such as photo-eye alignment, that are completed by locking out an IND-DCC. (T. 142-43, 288-89, 301, 595-98; Ex. R-30 at 26).

38. MMO-037-15, as augmented by MS-202, sets forth the complete approved APPS-specific LOTO procedures that applied to the Center’s APPS in October 2016. (T. 123, 138-39, 294-99, 309-312, 335-36, 350-51, 503-04).

39. Attachment 4 to MMO-037-15 is titled “Isolation of the Induction Main Control Cabinet – IND-MCC-X.” (Ex. C-10 at 33). (The “X” designation pertains only to dual-sided APPS machines—the “X” is a placeholder for the number “1” or “2” to reflect one of the two sides.) Attachment 4 is the only attachment that addresses de-energization of the IND Subsystem or any components of that subsystem, including each induction lane’s dedicated IND-DCC. (T. 138-140, 152-53, 236, 310-12). Attachment 4 does not contain any specific LOTO procedures directed to any of the four IND-DCCs. (T. 295, 310-12, 501; Ex. C-10). The introductory and prefatory paragraphs of Attachment 4 provide as follows (formatting and bold typeface in original):

The following procedure has been developed specifically for locking out the Induction Main Control Cabinet – IND-MCC-X when performing corrective or preventive maintenance. Each facility will use this procedure. ...

WARNING

Failure to comply with lockout procedure may result in injury or death to personnel and/or damage to equipment.

NOTE

Employees must adhere to the policies of the Electrical Work Program (EWP), which includes Energy Control Procedures (ECP). Failure to properly observe ECP will result in appropriate action.

[* * * * *]

MACHINES OR EQUIPMENT UTILIZING THIS PROCEDURE:

APPS Induction Main Control Cabinet – IND-MCC-X

[End Page 1, and Begin Page 2 of Attachment 4]

The APPS is designed with multiple maintenance accessible disconnect switches to facilitate certain limited repairs without locking out the entire APPS machine. There are numerous disconnect switches located on Distributed Control Cabinets (DCCs) in the Feed and Induction sections of the APPS. It is not recommended to isolate power at the DCCs because there are belts in close proximity to each other that are controlled by separate DCC enclosures. This would necessitate the use of multiple locks to prevent motion of adjacent belts or assemblies. It is recommended that the Main Control Cabinet (MCC) enclosures be used as isolation points for conveyor repairs. The Induct Main Control Cabinet (IND-MCC-X) for Induction repairs and the Feed, Singulation & Distribution Main Control Cabinet (FSD-MCC-X) for FSD repairs for each side of the APPS. [sic]³

NOTE

Isolation of an IND-MCC-X will prevent the ability to process mail on that side of an APPS. The opposite side of a Dual Sided APPS can only process mail if a Single Sided sort plan has been written for the opposite side of the APPS.

The IND-MCC-X supplies 480 VAC to all IND-DCC-X enclosures (IND-DCC-X 1 through 4) for that side of the machine. Opening the disconnect on this enclosure will remove 480 VAC from the conveyors of the Induction section of the machine, preventing motion of all conveyors in the Induction section in order to facilitate belt, bearing, or roller replacement.

WARNING

Repairs may not be performed on the 45 degree induction conveyor belts adjacent to the Shoe Sorter unless the FSD section has also been isolated to prevent belt motion. Repairs to the 45 degree belt adjacent to the cross belt Sorter may only be performed while the entire APPS is locked out.

After stating one additional “warning” and one additional “caution” not relevant to the issues here, Attachment 4 has a paragraph captioned “Purpose” that states in its entirety as follows: “To prevent

³ The “sic” connotes the final sentence being a sentence fragment. It may be that the final two sentences of this paragraph were intended to be written as a single sentence, with a colon instead of a period at the end of the first sentence, in the following manner: “It is recommended that the Main Control Cabinet (MCC) enclosures be used as isolation points for conveyor repairs: the Induct Main Control Cabinet (IND-MCC-X) for Induction repairs and the Feed, Singulation & Distribution Main Control Cabinet (FSD-MCC-X) for FSD repairs for each side of the APPS.” (See Thompson testimony at T. 513-14).

mechanical motion of conveyors within the Induct system and remove the potential hazard of 480 VAC at conveyor drive motors in order to facilitate repairs or replacement without powering down the entire APPS.”

Training and Historical Application of APPS LOTO Procedures

40. MPEs attend an approximate five-week training course on the repair and maintenance of the APPS, which is conducted at USPS’s national training center in Norman, Oklahoma. (T. 181). MPEs are trained that for major service and maintenance of any induction lane belts, the IND-MCC should be de-energized. (T. 143, 224-25, 233, 239-40, 289-91, 294-95, 592-93 310-12, 600).

41. Prior to the rebuild of belt I-3-2 in October 2016, none of the MPEs at the Center had been trained to lock out only the IND-DCC for the repair of an “inside” belt on an automated induction lane. MPEs understood MS-037-15 to specify that the IND-MCC be locked out for conveyor repairs and for belt, bearing, and roller replacement (all of which had to be done to repair belt I-3-2). (T. 118, 144, 225, 233, 239-240, 289-91, 294-95, 310-12).

42. Prior to the rebuild of belt I-3-2, MPEs at the Center had not locked out an IND-DCC to control hazardous energy during the repair of an induction lane’s “inside” belts. (T. 225, 296).

43. In October 2016, the maintenance supervisors for at least two of the three shifts had not received formal training on the APPS, and they generally deferred to the knowledge and experience of the MPEs they supervised in implementing the LOTO procedures for the APPS. (T. 330, 340, 347, 354-55).

44. The Center’s maintenance manager (Kevin Pfanders), who at one time had been employed as an MPE, recognized that it was not normal operating procedure for MPEs to work on an induction lane while other induction lanes were running except for “minor, typical repairs that we perform every day” such as adjusting a photo cell and “adjusting things like that.” (T. 562-63).

Belt I-3-2 Breakdown and Repair

45. Belt I-3-2 broke at about 4:00 p.m. on Saturday, October 15, 2016. The break occurred during the work shift known as “Tour 3,” whose hours are from about 2:00 p.m. to 10:30 p.m. The repair required a substantial mechanical rebuild of the entire mechanism, which entailed rebuilding the rollers, bearings, drive shaft, wheel and pulleys that powered the broken belt. (T. 93, 96-98, 118-19, 144, 147, 227, 290-91, 350; Ex. C-16; Ex. R-31 at Bates 332). Some tasks in performing the rebuild required that three MPEs be working hands-on at the same time in the floor space between induction lanes 2 and 3. (T. 100). The MPEs regarded the rebuild to be a “big job.” (T. 147, 227, 290-91, 350). Operating the APPS without induction lane 3 in service reduced the APPS’s production volume between 25% to 33%. (T. 333-34).

46. From the time that belt I-3-2 broke to the time that the repair was completed, the APPS was powered down completely during the following preventive maintenance periods, (known as “PM windows”): from 2:30 a.m. to 10:30 a.m. (8 hours) on Sunday, October 16; from 1:00 a.m. to 8:15 a.m. (7.25 hours) on Monday, October 17; from 3:45 a.m. to 7:30 a.m. (3.75 hours) on Tuesday, October 18; from 3:45 a.m. to 9:15 a.m. (5.5 hours) on Wednesday, October 19; and beginning at 3:15 a.m. on Thursday, October 20, which is the day the repair was completed. (Ex. R-10; T. 552-54). (No evidence was presented on the time of day on October 20 that the repair was completed or when the APPS resumed operating with all induction lanes operable.)

47. Upon being informed on the evening of Saturday, October 15, that belt I-3-2 required repair, the Center’s acting plant manager, Jeffrey Hotchkiss, directed that the repair be completed when the APPS would be shut down during a regularly scheduled 8-hour PM window from 2:30 a.m. to 10:30 a.m. on Sunday, October 16. (T. 419-22, 555; Ex. R-13 at Bates 332; Ex. C-16). The repair was not completed during that PM window on Sunday morning, however, because of replacement part problems. (T. 129, 202, 550). The parts problem persisted beyond Sunday, and

the repair remained incomplete through the 7.25-hour PM window on Monday morning and the 3.75-hour PM window on Tuesday morning. (T. 549-50).

48. Soon after the conveyor broke on Saturday, October 15, induction lane 3 was de-energized and locked out at the IND-DCC-3, and two or three Tour 3 MPEs began to strip it down as the other induction lanes continued to operate and the APPS continued to run and process mail. (T. 342-43, 555, 561). The supervisor of maintenance operations for Tour 3 did not perceive this approach to have been contrary to the APPS-specific LOTO procedures, although she does not regard herself as expert on those procedures. (T. 330-31, 338-40). None of the Tour 3 MPEs doing the work voiced any objection or concern about working on induction lane 3 while the other induction lanes continued to process mail. (T. 342-43, 555). (The record does not indicate who on Tour 3 decided to lock out the IND-DCC-3 or how that decision was made.)

49. Around 10:00 p.m. on October 15, Tour 1 MPEs began to arrive for their shift (hours about 10:30 p.m. to 6:30 a.m.). (T. 131, 564). One of the Tour 1 MPEs, Mr. Christopher Day, told his supervisor (Mr. Kevin Kibodeaux, the Supervisor of Maintenance Operations for Tour 1) that he believed it was inappropriate to work on an induction lane while the APPS was running. (T. 569).

50. By an email sent at 10:39 p.m. on Saturday October 15, Mr. Kibodeaux informed the Center's maintenance manager, Kevin Pfanders, that Mr. Day believed "that working on an induct station while the machine is running is an OSHA violation." (T. 560, 567). Pfanders later instructed Kibodeaux to complete the rebuild during the 8-hour PM window on Sunday morning, October 16. (T. 555-56, 569-70).

51. From 2:30 a.m. on Sunday, October 16, through 7:30 a.m. on Tuesday, October 18, (a total of 53 hours) no repair work on belt I-3-2 was done outside the PM windows or otherwise

when the APPS was running. (T. 578-79).

52. The rebuild of belt I-3-2 remained unfinished when the day shift (Tour 2) MPEs started to work on Tuesday, October 18, at around 7:30 a.m. The Center's maintenance manager (Pfanders) instructed the Supervisor of Maintenance Operations for Tour 2, Joe Basso, to direct MPEs on Tour 2 to perform the rebuild with only the IND-DCC-3 locked out and with the APPS continuing to process mail. (T. 292-93).

53. Mr. Ron Jacobs, Jr., has worked as an MPE for USPS for over 20 years and is employed at the Center on the day shift. (T. 221-22). Mr. Wayne Greenzweig has worked as an MPE for USPS for over 10 years and is also employed at the Center on the day shift. (T. 284-85). At the start of Jacobs' and Greenzweig's workday on Tuesday, October 18, their supervisor (Joe Basso) directed them to work on the rebuild of the belt I-3-2 with only induction lane 3 locked out (at the IND-DCC-3) and with the APPS continuing to operate and process mail. (T. 228, 291-92). Both Jacobs and Greenzweig told Basso that they believed repairing belt I-3-2 after locking out only the IND-DCC-3 was contrary to procedures. (T. 229, 291-95). Basso then informed them that if they refused to work on the repair as directed, then he would have to "send them home" as he had been instructed to do by his supervisor, the Center's maintenance manager (Pfanders). (T. 229, 292). To be "sent home" means the employee would not receive pay for that day and could be subject to disciplinary action. (T. 229). Jacobs complied with the order and he spent the day working directly on belt I-3-2 with only the IND-DCC-3 locked out and while the APPS continued to operate and process mail. (T. 229, 243). Greenzweig requested permission to work in an alternative location where he believed a hazard did not exist, and his request was granted. (T. 293).

54. After deciding to comply with his supervisor's order, MPE Jacobs spoke by telephone that same day with the MPE Christopher Day, who also serves as an officer in the Lehigh Valley

Area Local of the APWU. Jacobs told Day about Basso's order to repair belt I-3-2 with only the IND-DCC-3 locked out. (T. 120-22, 245).

55. After speaking with Jacobs, Day telephoned the Center's maintenance manager, Kevin Pfanders, and told Pfanders of Jacobs' concerns and expressed the view that established procedures required that the IND-MCC be locked out during the rebuild of belt I-3-2. (T. 177, 208). Day asked Pfanders "to stop the project immediately," but Pfanders told Day that he would not do so. (T. 126).

56. At some point, the record does not indicate when or how, the acting plant manager, Mr. Jeffrey Hotchkiss, became aware that some MPEs were concerned that repairing belt I-3-2 by locking out IND-DCC-3 while the APPS continued to run violated the APPS-specific LOTO procedure. (T. 423-25). On Tuesday, October 18 (the same day that Day and Pfanders spoke by phone), Hotchkiss sought guidance on the issue by speaking on the telephone with Mr. Michael Thompson. Mr. Thompson is a Maintenance Management Specialist based at USPS's Maintenance Technical Support Center (MTSC) in Norman, Oklahoma. Hotchkiss contacted Thompson because he regarded Thompson to be USPS's foremost authority on the APPS, and Thompson had assisted him before. Hotchkiss had confidence in Thompson's knowledge and expertise on the APPS, testifying that when "it comes to an APPS problem or issue" "there's nothing that I do without talking to" Thompson. (T. 424-25).

57. After Hotchkiss described the situation and his objective of having the APPS continue to process mail while belt I-3-2 was being repaired, Thompson advised Hotchkiss that it was safe to lock out the IND-DCC-3 during the rebuild of belt I-3-2 and for the APPS to continue to process mail while repairs were done. (T. 425-26; Ex. R-30 at 18-19).

58. When Thompson advised Hotchkiss, Thompson did not make any independent

determination that locking out the IND-DCC-3 for the repair conformed to MMO-037-15. (T. 505). Rather, Thompson voiced a technical conclusion that MPEs working on belt I-3-2 with only the IND-DCC-3 locked out and the APPS continuing to process mail would not be exposed to any hazardous energy or any struck-by or caught-in hazards by virtue of the APPS continuing to process mail. (T. 505). Thompson did not make any determination or inquiry into whether doing so would conform with established procedures in MMO-037-15. As Thompson stated in a formal report that he prepared for the hearing in this Commission proceeding, he “did not find issue with local policy allowing for this repair using the method described.” (Ex. R-30 at 19).

59. In the course of his telephone conversation with Hotchkiss, Thompson made no determination that the regulatory exception to the requirement of 29 C.F.R. § 1910.147(c)(4)(i) that LOTO procedures be in written form applied to the procedure that Hotchkiss sought his views on—locking out only the IND-DCC-3 for the repair of belt I-3-2.

60. After his telephone conversation with Thompson, Hotchkiss told his staff that it was permissible for the APPS to continue to process mail during the repair of belt I-3-2, and he directed that the repairs proceed in that manner. (T. 427). Hotchkiss’s directive is documented in an email that he sent at 5:00 p.m. on Tuesday, October 18, to three officials at the Center: the Maintenance Manager (Pfinders), the Manager of Maintenance Operations (Lori Myers [T. 346]), and the Safety Specialist (Denise Edmonds [T. 539]). The email stated in part: “Team, I’ve reached out to Mike Thompson of MTSC for the APPS induct question. We have followed the proper procedures to allow work on the induct line with the machine running. The induct line is completely powered off which complies with EWP.” (Ex. R. 13 at Bates 365). (“EWP” stands for Electrical Work Plan. [See Ex. C-10 at 5].)

61. Hotchkiss had not been trained on the APPS, had never done maintenance work, and

did not regard himself to be a “maintenance person.” (T. 430-31). Hotchkiss trusted Thompson, whom he believed was “the one person in the country that knows [the APPS] better than anybody,” to give him accurate guidance on the question he posed to Thompson. (T. 430). Hotchkiss relied on Thompson’s guidance in instructing his staff to rebuild belt I-3-2 while the APPS was running with only the IND-DCC-3 locked out. (T. 425-26). Beyond his telephone consultation with Thompson, Hotchkiss did not conduct (or direct his staff to conduct) any independent inquiry whether the procedure conformed to the requirements of the established APPS-specific LOTO procedures (T. 425-26), and he never personally reviewed MMO-037-15. (T. 434-35).

62. When MPE Day arrived to work at around 10:30 p.m. on Tuesday, October 18, his supervisor (Kevin Kibodeaux) directed him to participate in the rebuild of Belt I-3-2 with only the IND-DCC-3 locked out and the APPS continuing to process mail. Day refused. He told Kibodeaux that he believed procedures required that the IND-MCC be locked out during the rebuild of belt I-3-2. (T. 132-35, 216). Kibodeaux informed Day that he had been instructed to “send home” any MPEs who refused to do the rebuild as directed. (T. 133-34). Day then asked and was permitted to confer with a shop steward before deciding whether to comply with the directive.

63. While Day was conferring with the shop steward, Kibodeaux reported to the acting plant manager (Hotchkiss) that Day still had safety concerns performing the rebuild with the APPS operating. Hotchkiss responded by an email sent at 12:04 a.m. on Wednesday, October 19, that he had “already checked at the highest levels through [MTSC],” but he instructed Kibodeaux not to “force anyone to work in what they may think is an unsafe environment,” although at the same time he directed Kibodeaux to “[m]ake sure [the APPS] is up and running” by 07:30 a.m. (Ex. R-22; T. 429-30).

64. After Day finished meeting with the shop steward, the shop steward met with Kibodeaux, and then MPE Day again met with Kibodeaux to reaffirm that he did not feel safe doing the rebuild with the APPS continuing to operate. (T. 135). Kibodeaux then informed Day that he would allow Day to opt out of working on the rebuild while the APPS continued to process mail, and Day opted out as permitted. (T. 135, 178).

65. None of the MPEs working on Tour 1 in the early morning of Wednesday, October 19, 2020, performed the rebuild while the APPS was processing mail. (T. 137). The repairs were not completed by 7:30 a.m. on October 19 as the acting plant manager Hotchkiss had directed Thibodeaux to accomplish just hours before.

66. The rebuild was completed on Thursday, October 20, though the record does not disclose the time of day the rebuild was complete. Mr. Day was one of the MPEs involved in replacing the motor for belt I-3-2 during Tour 1 on October 20, but he did this work during a PM window when the APPS was not operating. (T. 134; Ex. R-10 at 3).

III. DISCUSSION

The Secretary alleges a single willful/serious violation of the LOTO standard, specifically § 1910.147(d)(2), which requires that in executing LOTO procedures the “machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment.” Section 1910.147(d)(1)–(2) is set forth below in full (subparagraph (d)(1) provided for context):

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

(1) *Preparation for shutdown.* Before an authorized or affected employee turns off a machine or equipment, the authorized employee shall have knowledge of the type and magnitude of the energy, the hazards of the energy to be controlled, and the method or means to control the energy.

(2) *Machine or equipment shutdown.* The machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment. An orderly shutdown must be utilized to avoid any additional or increased hazard(s) to employees as a result of the equipment stoppage.

The citation alleges USPS violated the cited subparagraph (d)(2) in the following manner:

Employees are rebuilding an Automated Package Processing System, comprised of multiple machines with separate energy sources which have not been controlled. This continuing violation most recently occurred on or about October 18, 2016, when the previously developed hazardous energy control procedures were not applied to the complete machine assembly. The employer's ongoing responsibility is to ensure the adherence to the machine specific procedures to affect [sic] the necessary energy control for each system component.

To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was noncompliance with its terms; (3) employees were exposed to or had access to the violative conditions; and (4) the employer had actual or constructive knowledge of those conditions. *Donahue Indus. Inc.*, 20 BNA OSHC 1346, 1348 (No. 99-0191, 2003); *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

A. “Standard Applies” Element.

The LOTO standard’s “Scope” provision, § 1910.147(a)(1)(i), provides that the “standard covers the servicing and maintenance of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.”

The LOTO standard’s “Application” provision, § 1910.147(a)(2), provides in relevant part as follows:

(2) *Application.* (i) This standard applies to the control of energy during servicing and/or maintenance of machines and equipment.

(ii) Normal production operations are not covered by this standard (See subpart O of this part). Servicing and/or maintenance which

takes place during normal production operations is covered by this standard only if:

(A) An employee is required to remove or bypass a guard or other safety device; or

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

Two defined terms within the quoted “Scope” and “Application” provisions are “normal production operations” and “servicing and/or maintenance,” which are defined in § 1910.147(b) as follows:

Normal production operations. The utilization of a machine or equipment to perform its intended production function.

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

USPS acknowledges that the MPEs repairing belt I-3-2 would be risk of injury from hazardous energy relating to the operation of induction lane 3. USPS acknowledges further that the control of that hazardous energy was necessary to protect the MPEs from injury during the repair. (Resp’t Br. 11–13). USPS contends, however, that the MPEs repairing belt I-3-2 with induction lane 3 locked out⁴ and the APPS continuing to process mail (i.e., continuing “normal production operations”) were not working in an area “where an associated danger zone exists during a machine operating cycle” within the meaning of § 1910.147(a)(2)(ii)(B) quoted above.

⁴ References in this Discussion section to a component being “locked out” presupposes that the component had been de-energized and isolated from the energy source before being locked out. See § 1910.147(d)(2)–(4).

USPS argues therefore that by operation of § 1910.147(a)(2)(ii)(B) the LOTO standard did not apply “to all of the other machines that make up the APPS” (such as the other three induction lanes, the sorter train, and the shoe sorter), which the USPS argues are all “separate” machines from induction lane 3. (Resp’t Br. 11–13). This argument fails for at least the following reasons.

First, the APPS is a single machine for purposes of the applicability of the LOTO standard; it is not a collection of independent machines as USPS contends. This is because the three subsystems and the components of those subsystems “serve no other purpose besides the one they accomplish together when operating simultaneously.” *Sec’y of Labor v. Action Elec. Co.*, 868 F.3d 1324, 1332 (11th Cir. 2017) (deferring to Secretary’s informal interpretative guidance that “two pieces of equipment are part of one ‘machine’ if they do not function independently of one another or if both are sub-systems of a larger machine” [*id.* at 1330]).

The APPS is undoubtedly “one system” that serves no other purpose than to process mail items. Indeed, the APPS includes the word “system” in its very name—Automated Package Processing System. The single-sided APPS at the Center cannot process mail unless at least one of the four induction lanes in the IND Subsystem is operating. The fact that the APPS can continue to process mail with up to three of the four induction lanes shut down does not render the IND Subsystem, or its four induction lanes, independent machines for purposes of determining the LOTO standard’s application. *Cf. Action Electric*, 868 F.3d at 1334-35 (noting that two components of a “cooling bed” machine cannot “perform useful work in isolation” so that those components “are not independent ‘machines’ but are rather sub-systems of the same” cooling bed machine).

Second, the argument is flawed because it melds the third element of the Secretary’s burden of proof (employee access or exposure to a violative condition) into analysis for the first element

(the “standard applies” element). It is true that establishing a risk of injury is an aspect of the “standard applies” element for an alleged LOTO violation. *See Otis Elevator Co. v. Sec’y of Labor*, 762 F.3d 116, 121 (D.C. Cir. 2014) (quoting § 1910.147(a)(1)(i) in observing that application of the LOTO standard requires a showing that the hazardous energy “could cause injury to employees”); *see also* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, 36666 (Sept. 1, 1989) (final rule, to be codified at 29 C.F.R. pt. 1910) (“If an energy source does not have the capability of causing injury to employees, it is not ‘hazardous energy’ within the scope of this standard”). But the uncontroverted evidence here established that the MPEs repairing belt I-3-2 could be injured by hazardous energy associated with the operation of induction lane 3, and this suffices to establish the “standard applies” element for the alleged LOTO violation.⁵

Third, USPS’s argument fails by virtue of § 1910.147(a)(2)(ii)(A), quoted above, which provides that the LOTO standard applies to servicing activities conducted during normal production operations where an “employee is required to . . . bypass a guard or other safety device.” The provision operates to make the LOTO standard applicable to the repair of belt I-3-2 while the APPS continued to process mail because the MPEs were required to bypass the interlocks for two access gates to enable induction lanes 1 and 2 to continue to operate while they repaired belt I-3-2. (See Findings of Fact ¶ 14).

B. Non-compliance Element.

1. Proof of a Hazard Resulting from the Violative Condition Not Required.

The cited standard requires employers to control hazardous energy “using the procedures

⁵ USPS’s argument that no MPEs were endangered raises the issues of (1) whether any of the MPEs repairing belt I-3-2 had access or were exposed to the alleged violative condition, and (2) whether any MPEs were exposed to the risk of *serious* injury because of their access or exposure to the alleged violative condition. These matters are addressed *infra* in connection with discussion of the third element of the Secretary’s burden of proof and in connection with whether the violation was “serious” as defined in section 17(k) of the Act. 29 U.S.C. § 666(k).

established for the machine or equipment.” § 1910.147(d)(2). The Secretary alleges USPS did not comply with this standard during the repair of belt I-3-2 in that “the previously developed hazardous energy control procedures were not applied to the complete machine assembly.”

USPS’s defense focuses in large part on its contention that the Secretary failed to prove that the MPEs repairing belt I-3-2 while the APPS continued to process mail were at risk of being injured by the running machine. USPS argues that the LOTO standard is a “performance” standard, so that the Secretary was obliged to “prove a hazard before an employer is found to have been in violation of such [a performance] standard,” which USPS argues the Secretary failed to do. *See* Resp’t Br. 13–14, citing *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007).

The preamble to the LOTO standard aptly describes it as being “performance-oriented.” *E.g.*, 54 Fed. Reg. at 36,645 & 36,656. The standard’s “Scope” provision states that the “standard establishes minimum *performance requirements* for the control of such hazardous energy.” § 1910.147(a)(1)(i) (emphasis added). For example, the provisions of the LOTO standard that prescribe the matters that an energy control procedure must address are certainly “performance-oriented.” *See* § 1910.147(c)(4)(ii)(A)–(D); 54 Fed. Reg. at 36,656 (“The standard is written in performance-oriented language, providing considerable flexibility for employers to tailor their energy control programs and procedures to their particular circumstances and working conditions”); 54 Fed. Reg. at 36,684 (“The Final Rule is written in performance-based language that permits firms to develop lockout or tagout procedures that are most appropriate for their specific machines and equipment”).

But not all provisions of the LOTO standard are performance-oriented. Rather, some provisions of the LOTO standard have attributes of a specification standard. *See Otis Elevator*

Co., 24 BNA OSHC 1081, 1085 (No. 09-1278, 2013) (determining that subparagraph (f)(2)(i) of the LOTO standard is a specification standard), *aff'd* 762 F.3d 116 (D.C. Cir. 2014); *Am. Iron & Steel Inst. v. OSHA*, 577 F.2d 825, 837 (3d Cir. 1978) (holding that the Act permits the Secretary to promulgate standards that possess both performance standard and specification standard attributes).

The cited standard here provides that a “machine or equipment shall be turned off or shut down using the procedures established for the machine or equipment.” § 1910.147(d)(2). The word “shall” in this subparagraph connotes a requirement. *Maine Cmty. Health Options v. United States*, ___ U.S. ___, 140 S. Ct. 1308, 1320 (2020). Section 1910.147(d)(2) does not impose any precondition to the application of the mandate that employers utilize the energy control procedures that the employer has established to meet the LOTO standard’s requirements. That unconditional mandate renders the cited standard here, § 1910.147(d)(2), a specification standard. As with any specification standard, the Secretary was not required to prove an employer’s failure to comply with the standard created an actual hazard under the circumstances then present. *E.g., Otis Elevator Co.*, 24 BNA OSHC at 1085; *see also Bunge Corp. v. Sec’y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981) (“Unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a ‘serious’ one”).

2. *Established LOTO Procedures Not Followed.*

USPS argues that MMO-037-15 does not expressly prohibit locking out the IND-DCC for the repair of an induction lane’s “inside” belts (belts 2, 3, or 4), and thus USPS’s order that MPEs do so did not contravene its written procedures. (Resp’t Br. 5-6; Resp’t Reply Br. 1, n.1). This argument is rejected. The great weight of the evidence showed that USPS’s established LOTO

procedures contained provisions identifying the IND-MCC to be locked out for the rebuild of any of an induction lane's "inside" belts.

The APPS-specific LOTO procedure (MMO-037-15) contains numerous references to the maintenance manual for the APPS (designated the MS-202), and MPEs rely on the MS-202 for instructions on what EID to lock out for performing certain repair and maintenance activities. (Findings of Fact ¶ 32). MPEs testified that provisions of the MS-202 instructed locking out components other than the IND-DCC for certain activities that had to be done as part of the rebuild of an induction lane belt. That testimony was not controverted and was corroborated by provisions in the MS-202. (See Findings of Fact ¶ 35).

MPEs also testified that they were trained to lock out the IND-DCC only for certain minor maintenance activities, such as adjustment of the photo-eye. That testimony was similarly corroborated by portions of the literally voluminous MS-202 and was similarly uncontroverted and persuasive. (Findings of Fact ¶¶ 37, 44). The Center's maintenance manager (Pfanders) also corroborated the MPEs' testimony on this point, acknowledging that it was not normal operating procedure for MPEs to work on an induction lane while other induction lanes run, except for making certain "minor, typical repairs that we perform every day." (T. 562-63).

USPS focuses on the "recommended/not recommended" language used in Attachment 4 to MMO-037-15—locking out the IND-MCC for "conveyor repairs" being "recommended," and locking out the IND-DCCs being "not recommended." (Findings of Fact ¶ 39). USPS argues that these stated "recommended/not recommended" LOTO practices were simply just that—mere recommendations—and did not proscribe locking out the IND-DCC-3 for the repair of belt I-3-2. (Resp't Br. 5-6). This argument ignores the fact that the MS-202 augmented the MMO-037-15, and effectively transformed the MMO's "recommendations" to an instruction to lock out the

IND-MCC for the rebuild of an “inside” induction lane belt like belt I-3-2. (See Findings of Fact ¶¶ 35, 38, 39). *Angelica Textile Servs., Inc.*, 2018 WL 3655794, *2, 27 BNA OSHC 1246 (No. 08-1774, June 24, 2018) (involving written LOTO procedures that consisted of multiple documents), *vacated as moot, and instructing Commission to dismiss on remand*, 803 F. App’x 542 (2d Cir. 2020) (unpublished). This was confirmed by uncontroverted evidence that the Center’s MPEs had never locked out an IND-DCC in connection with a major repair activity on an induction lane, and that the MPEs understood MMO-037-15 prohibited doing so. The practice of the MPEs, whose understanding and judgment on the application of energy control practices their supervisors generally deferred, is supported by the provisions of Attachment 4 that locking out the IND-MCC “will remove 480 VAC from the conveyors of the Induction section of the machine, preventing motion of all conveyors in the Induction section *in order to facilitate belt, bearing, or roller replacement.*” (See Findings of Fact ¶ 39 [emphasis added]). In the rebuild of belt I-3-2, the belt, bearings, and rollers were rebuilt or replaced, as contemplated by the quoted provision in Attachment 4. (See Findings of Fact ¶ 41). The historical practice of the MPEs not to lock out the IND-DCC for major work on an induction lane is further bolstered by the provisions of MS-202 that instruct MPEs not to bypass the interlock feature of the access gates, which they were required to do in order to enable induction lanes 1 and 2 to process mail while they worked on induction lane 3. (See Findings of Fact ¶ 14).

Moreover, the indecisive “recommended/not recommended” language used in Attachment 4 is laden with ambiguity and is poorly suited to meet the LOTO standard’s requirement that written procedures be set forth “clearly and specifically.” § 1910.147(c)(4)(ii). Instructing that a certain energy control procedure is “not recommended,” without further explication, could reasonably be interpreted to convey to the MPEs the subtextual meaning that “this may be

dangerous.” Similarly, instructing that a certain energy control procedure is “recommended,” without further explication, can reasonably be interpreted to mean that “this procedure is safer” and ought to be utilized instead of the procedure that is expressly “not recommended.”

Lastly, as the Secretary argues, the only logical reading of Attachment 4 is that it mandates locking out the IND-MCC for “conveyor repairs” and “belt, bearing, and roller replacement” of an induction lane’s inside belts. This is because if such activities may be accomplished by locking out the IND-DCC instead of the IND-MCC, then the procedure described in Attachment 4 for locking out the IND-MCC for those activities would never have occasion to be used. Such a construction would render those provisions of Attachment 4 superfluous, having no operative effect. (Sec’y Reply Br. 11).

3. No Evidence USPS Had Unwritten Established LOTO Procedures.

USPS acknowledges that locking out an IND-DCC for the repair of any of an induction lane’s “inside belts” (like belt I-3-2) is not set forth in any written LOTO procedure. (Resp’t Br. 5). USPS argues nonetheless that doing so was an existing or established LOTO procedure that was excepted from the requirement of § 1910.147(c)(4)(i) that LOTO procedures be “documented,” pursuant to a regulatory exception to that requirement. *See* 54 Fed. Reg. at 36670 (stating that “OSHA believes that because of the need to follow the steps in the energy control procedure carefully and specifically, and the number of variables involved in controlling hazardous energy, a documented procedure is necessary for most energy control situations”). The exception to the requirement that procedures be in written form is set forth in a “Note” to § 1910.147(c)(4)(i) that provides as follows:

NOTE: *Exception:* The employer need not document the required procedure for a particular machine or equipment, when all of the following elements exist: (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.

USPS bore the burden of proving that it is entitled to the benefit of this exception. *Westvaco Corp.*, 16 BNA OSHC 1374, 1377 (90–1341, 1993) (“The party claiming the benefit of an exception bears the burden of proving that it comes within that exception”). USPS failed to meet its burden for at least the following two reasons.

a. The procedure used was not an “established” procedure for a belt rebuild.

The cited standard, § 1910.147(d)(2), requires that employers use the energy control procedures that the employer has “established for the machine or equipment” (regardless of whether such established procedures are in written form). There is no evidence that the unwritten lock out procedure that the MPEs were directed to utilize (to lock out the IND-DCC for the repair of an induction lane’s inside belt) had been “established,” or in other words was extant, before the MPEs were ordered to use it during the repair of belt I-3-2. *See* 54 Fed. Reg. at 36,666 (“The main thrust of the standard is to mandate the development, documentation and implementation of control procedures, and this is to be accomplished as outlined in paragraph (d) of the standard”). Rather, the great weight of the evidence is that the procedure had not been previously developed but was instead devised in the moment by the Center’s management, which was understandably concerned about the impact on productivity of shutting down the APPS during the repair. When MPEs

challenged the procedure, the Center's acting plant manager telephoned the author of the MMO-037-15 (Mr. Thompson) with a view to validating that procedure.

Mr. Thompson has vast technical expertise and experience with the APPS, but he does not regard himself to be an expert on compliance with OSHA standards. (T. 501). Mr. Thompson testified that when he advised Mr. Hotchkiss in that telephone conversation, he determined that the procedure that Hotchkiss described to him (locking out the IND-DCC-3 during the repair of belt I-3-2 while the APPS continued to process mail) was permissible "from a technical point of view" in that the MPEs performing the repairs would not be at risk of injury. (T. 505). But Thompson acknowledged that he did not then make any determination that the procedure complied with the provisions of MMO-037-15.⁶ (T. 505). Rather, in a written report that Thompson prepared for the hearing, he stated that in assessing the procedure that Hotchkiss had described to him, he "did not find issue with local policy allowing for this repair using the method described." (Ex. R-30 at 19).

There is no credible evidence that during or before Thompson's telephone conversation with Hotchkiss that he considered whether the procedure discussed was not required to be in writing because it qualified for the exception to the documentation requirement of § 1910.147(c)(4)(i). (See T. 492-98). Although Thompson's written report sets forth his belief that the procedure for locking out the IND-DCC for the repair of belt I-3-2 qualified for the exception to the LOTO standard's "documentation" requirement in § 1910.147(c)(4)(i), there is

⁶ Thompson provided this testimony in a discovery deposition, with which he was effectively impeached at the hearing. (T. 505). That deposition testimony bears greater indicia of reliability and is accorded greater weight than that portion of his hearing testimony that was somewhat contrary (e.g., T. 504) to his deposition testimony on this point. *Cf.* Fed. R. Evid. 801(d)(1)(A) (providing that a declarant's prior inconsistent statement given under penalty of perjury in a deposition is not hearsay), and Fed. R. Evid. 801(d)(2) (providing that opposing party's statement offered against that party is not hearsay).

nothing in Thompson’s written report or in his testimony declaring that Thompson had formulated that conclusion at any time before the OSHA investigation, or that he had even considered that issue in the course of his telephone conversation with Hotchkiss. (Ex. R-30 at 18-19; T. 492-98). It is more likely than not that Thompson considered that issue and formulated his opinion on it long after the repair of belt I-3-2 was completed, as part of his support of USPS’s defense in the matter (in which he testified as both “fact” witness and an expert witness, having been qualified without objection as an “expert on the APPS” [T. 445]). The absence of evidence as to when Thompson formulated his opinion regarding the regulatory exception to the requirement that procedures be written, coupled with his admitted lack of any special knowledge, expertise, or training in OSHA standards (T. 501), supports the conclusion that Thompson formulated this theory sometime after the belt repair was completed.

Thompson testified further that in his drafting of MMO-037-15 (or in drafting a prior iteration) he made the considered decision *not* to include a procedure for locking out an IND-DCC for work done on the “inside” belts of an induction lane (belts 2, 3 and 4), because he believed that including that procedure in the document would have lengthened it and thereby made it “completely too burdensome for the field.” (T. 492). This testimony makes little sense, seems highly unlikely, and is given no weight. Just as Attachment 4 to the MMO contains a one-paragraph instruction directing that the adjoining conveyors in the FSD Subsystem and the Sorter Subsystem be locked out when work is being done on an induction lane’s “outside” belts (belts 1 and 5—*see* the second “Warning” paragraph reflected in ¶ 39 of the Findings of Fact), a similarly concise or even somewhat longer instruction could have been included allowing for locking out only the IND-DCC for the repair of an inside belt (numbers 2, 3 or 4) without substantially lengthening or making more complex an already lengthy, detailed, and complex written procedure.

Such length and complexity seem nearly unavoidable in adequately documenting the LOTO procedures for the APPS considering the standard's requirement that LOTO procedures be set forth "clearly and specifically." § 1910.147(c)(4)(ii); *see also* 54 Fed. Reg. at 36,670 (commenting that the word "specific" in paragraph (c)(4) "emphasize[s] the need to have a detailed procedure, one which clearly and specifically outlines the steps to be followed," and observing that "[o]vergeneralization can result in a document which has little or no utility to the employee who must follow the procedure").

Perhaps even more significantly, there is no evidence that any of the MPEs at the Center had ever been informed of, or trained on, this supposedly established but unwritten LOTO procedure prior to the repair of belt I-3-2. It would have been a logical impossibility for the MPEs to have used an unwritten procedure about which they had no prior knowledge or training.

Based on Thompson's testimony and his written report, it is reasonably inferable that when Thompson advised Hotchkiss on the telephone, that Thompson had concluded only that the procedure Hotchkiss described to him could be a permissible LOTO procedure adopted under "local policy," and that Thompson did not analyze whether that procedure conformed to any established LOTO procedures that are applicable across the entire USPS (namely, the MMO-037-15 that Thompson had authored, or the MS-202 maintenance manual).

The MMO-037-15 expressly allows for local policy to supplement its procedures, and the MS-202 repeatedly reminds MPEs to follow any such local procedures. The Center, however, has not developed or trained its MPEs on any local energy control procedures to augment either the MMO-037-15 or the MS-202. This is confirmed by uncontroverted testimony of MPEs that the procedure they were directed to use had not previously been used for a major repair involving the IND Subsystem such as the rebuild of belt I-3-2. (Findings of Fact ¶ 42). This is corroborated

further by the testimony of the Center’s maintenance manager (Pfanders) that “normal procedure” would have been for the APPS *not* to process mail during the repair of belt I-3-2.⁷ (T. 563; Findings of Fact ¶ 44). Rather than endeavor to develop a local LOTO policy (and thereafter training employees on that local policy as would have been required by § 1910.147(c)(7)(iii)), the acting plant manager simply decreed that the belt repair would be conducted by locking out IND-DCC-3 while the APPS continued to process mail.⁸

b. The APPS does not qualify for the exception to the documentation requirement.

In any event, even if locking out the IND-DCC for the repair of an induction lane’s inside belt had been an established unwritten procedure at the time of the repair, the procedure would not qualify for the exception to the documentation requirement of § 1910.147(c)(4)(i). USPS’s argument in support of the exception is grounded in its flawed argument, rejected *supra*, that induction lane 3 is a machine that is separate and independent of the APPS, and for which compliance with the LOTO standard would be assessed independently of the APPS. (*See Resp’t Br.* 4-5; *Ex. R-30* at 18-19; T. 492-98). USPS has not met its burden to establish by a preponderance of the evidence that the APPS machine meets any of the eight elements of the exception to the documentation requirement of § 1910.147(c)(4)(i).

⁷ Mr. Pfanders gave that testimony in a discovery deposition, with which he was effectively impeached at the hearing. Like the deposition testimony of Mr. Thompson addressed in the preceding footnote, this deposition testimony bears greater indicia of reliability and is accorded greater weight than other of his hearing testimony that was somewhat contrary (e.g., T. 562) to the deposition testimony presented.

⁸ The acting plant manager ultimately allowed MPEs who believed the procedure was unsafe to opt out of participating in the repair. *Cf. Armstrong Steel Erectors, Inc.*, 18 BNA OSHC 1630, 1633, n.4 (No. 97-0250, 1999) (stating that “[r]esponsibility under the Act for ensuring that employees do not put themselves into any unsafe position rests ultimately upon each employer, not the employees, and employers may not shift their responsibility onto their employees”).

C. Employee Exposure Element.

At the direction of the Center's acting plant manager, MPEs repaired belt I-3-2 without using the established energy control procedures for the APPS. This is the violative condition to which uncontroverted evidence established that MPEs conducting the repairs were exposed, and about which they were reasonably concerned for their safety. *See* 54 Fed. Reg at 36675 ("Because their safety requires them to follow the steps of the procedure precisely, these employees must be properly trained, and that training must be reinforced to assure their continued proficiency"). USPS argues mightily that the MPEs were not exposed to risk of injury from hazardous energy while conducting the repairs with the IND-DCC-3 locked out and the APPS continuing to process mail. As is discussed *infra* in addressing whether the violation was proven to be "serious" within the meaning of section 17(k) of the Act, the Secretary failed to carry his burden to establish that there was substantial probability that death or serious physical harm could result from the violative condition proven here. But that failure of proof is not relevant to the matter of whether employees were exposed to or had access to that violative condition. Some MPEs at the Center were undoubtedly exposed. *Cf. Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981) (observing that violation of a specification standard presumes a hazard and that whether the condition resulting from the violation of a specification standard was hazardous "is relevant only to whether the violation constitutes a 'serious' one").

D. Employer Knowledge Element.

The acting plant manager had actual knowledge of the violative condition because he ordered that it happen in the face of continuing protestations of MPEs that doing so violated USPS's established energy control procedures. *See Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (an employer's knowledge is directed to the physical condition that constitutes a violation) *aff'd*, 79 F.3d 1146 (5th Cir. 1996); *Am. Eng'g & Dev. Corp.*, 23 BNA

OSHC 2093, 2095 (No. 10-0359, 2012) (knowledge may be imputed to the employer through its supervisory employee); *Sanderson Farms, Inc. v. OSHRC*, 964 F.3d 418, 428 (5th Cir. 2020) (“The Secretary need not prove that [the employer] understood that it was violating [the cited standard], but rather only awareness of the physical conditions constituting the violation.”)

E. “Willful” Classification.

For a violation that is done “willfully,” section 17(a) of the Act allows a penalty of up to ten times the maximum penalty for a “serious” or an “other-than-serious” violation. 29 U.S.C. § 666(a); 29 C.F.R. § 1903.15(d) (2017). A violation is “willful” where the cited employer either (1) acted in “conscious disregard” for the requirements of the Act, or (2) acted with “plain indifference” to employee safety. *See A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1351 (D.C. Cir. 2002) (observing that “conscious disregard” and “plain indifference” are alternative means of proving willfulness).

Whether a violation is “willful” presents a question of fact. *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3d Cir. 2005); *Dayton Tire v. Sec’y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012) (determining that the Commission’s finding of willfulness lacked “substantial supporting evidence”). The Commission has described the contours of a “willful” violation as follows:

A violation is willful if committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting a violation; such evidence is necessary to establish any violation, serious or nonserious. A willful violation is differentiated by a heightened awareness—of the illegality of the conduct or conditions—and by a state of mind—conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the

standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

Williams Enters. Inc., 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987) (internal citations omitted).⁹

"The hallmark of a willful violation is the employer's state of mind at the time of the violation." *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). The Secretary bears "burden of proof to show the requisite state of mind for willfulness." *Stanley Roofing Co.*, 21 BNA OSHC 1462, 1466 (No. 03-0997, 2006). "Where the requisite state of mind is manifested through the actions of supervisory employees, it

⁹ The Third Circuit and the D.C. Circuit are the two courts of appeals to which review of a final order of the Commission may be sought in this matter pursuant to section 11 of the Act. 29 U.S.C. § 660. Both of those courts have described a "willful" violation using articulations that are slightly different from the Commission's, but neither court has indicated that its respective articulation differs substantively from the Commission's. For example, in *Williams Enterprises* quoted above, the Commission expresses the "plain indifference" ground in terms of "indifference to employee safety" and also as "reckless disregard for employee safety or the requirements of the law generally." 13 BNA OSHC at 1256-57. In contrast, the D.C. Circuit has expressed the "plain indifference" ground in terms of "indifference to the Act's requirements." See *Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1254 (D.C. Cir. 2012) (describing a willful violation to be "an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements"). Even so, the D.C. Circuit in *Dayton Tire* did not express any disagreement with the Commission's "plain indifference to employee safety" formulation, which the Commission had recited in its underlying decision in that matter. *Dayton Tire*, 23 BNA OSHC 1247, 1266 (No. 94-1374, 2010), *rev'd on other grounds*, 671 F.3d 1249 (D.C. Cir. 2012). Similarly, the Third Circuit has stated that its formulation of the standard for a "willful" violation does not differ substantively from that of the D.C. Circuit or other federal courts of appeals. See *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980) (agreeing with D.C. Circuit's decision in *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1305 [D.C. Cir. 1978] that there is "little if any difference" between the Third Circuit's approach to willfulness and the approaches of other courts).

is imputed to the employer to the same extent as would be a supervisor's knowledge of violative conditions.” *Cont'l Roof Sys., Inc.*, 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997), citing *Tampa Shipyards*, 15 BNA OSHC 1533, 1539 (No. 86-360, 1992) (consolidated); *see also* *Dayton Tire*, 23 BNA OSHC 1247, 1266 (No. 94-1374, 2010) (imputing plant safety manager’s state of mind to the employer), *rev’d on other grounds*, 671 F.3d 1249 (D.C. Cir. 2012); *Donovan v. Williams Enters., Inc.*, 744 F.2d 170, 180 (D.C. Cir. 1984) (upholding willful citation where company president was aware of the standard and decided to forego compliance). “An employer’s motive for failing to comply with the Act’s requirements ... need not be evil or malicious in order to find a violation willful.” *Kaspar Wire Works, Inc.*, 18 BNA OSHC at 2181.

For the reasons described below, the Secretary has failed to meet his burden to establish that the violation was “willful” on grounds of either “conscious disregard” or “plain indifference.”

1. Conscious Disregard.

To establish willfulness because of “conscious disregard” (sometimes called “intentional disregard”), “the Secretary must show that the employer (1) had a heightened awareness of the applicable standard or provision prohibiting the conduct or condition and (2) consciously disregarded the standard.” *Jim Boyd Constr., Inc.*, 26 BNA OSHC 1109, 1111 (No. 11-2559, 2016), quoting *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1239-40 (11th Cir. 2002). Put differently, the Secretary was required to prove that an official or employee whose state of mind is imputable to USPS “was actually aware, at the time of the violative act, that the act was unlawful.” *Propellex Corp.*, 18 BNA OSHC 1677, 1684 (1999), quoted with approval in *AJP Constr., Inc. v. Sec’y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004). The requisite state of mind must exist “with regard to the specific circumstances of the violation in issue.” *Eric K. Ho*, 20 BNA OSHC 1361, 1378 (No. 98-1645, 2003) (consolidated), *aff’d* 401 F.3d 355 (5th Cir. 2005), *partially overruled on other grounds* by *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1580-81 (No. 94-1979, 2009).

The two USPS officials whose states of mind bear on the issue of willfulness are (1) Mr. Hotchkiss, the acting plant manager, and (2) Mr. Thompson, the author of MMO-037-15 who is based in Oklahoma and whose expertise Mr. Hotchkiss sought out. Both Hotchkiss and Thompson had actual knowledge that USPS had established energy control procedures for the APPS and that USPS required MPEs to use those established procedures in the repair of belt I-3-2. USPS's requirement that MPEs use those established procedures conforms to the requirement of the cited standard, § 1910.147(d)(2).

While both Hotchkiss and Thompson thus possessed a heightened awareness of the applicable standard, the evidence is insufficient to establish that either of them, whether considered individually or in a collective sense, consciously disregarded the cited standard in connection with the repair of belt I-3-2.

As for Thompson, even though he was based in Oklahoma and had no operational or supervisory responsibilities for the repair of Belt I-3-2, if the evidence showed that he intended to assist Hotchkiss in directing MPEs to use a LOTO procedure that Thompson knew was contrary to USPS's established procedures (i.e., in violation of § 1910.147(d)(2)), or that he intended to induce Hotchkiss to do so, such a state of mind would evince conscious disregard that could be imputed to USPS. *Cf. Donovan v. Williams Enters., Inc.*, 744 F.2d at 180 (upholding willful citation where company president was aware of the standard and decided to forego compliance). But the evidence fails to establish that Thompson possessed such knowledge or intent.

Thompson became directly involved in the repair of belt I-3-2 by dint of Hotchkiss's decision to seek him out and mine his knowledge and expertise about the APPS. Thompson's only direct involvement in Hotchkiss's decision to direct that the repair be done by locking out the

IND-DCC-3 while the APPS continued to run was their single telephone conversation on October 18, 2016.

Key to assessing whether Thompson acted in conscious disregard of the cited standard involves determining (1) the question that Hotchkiss posed to Thompson, and (2) Thompson's response to that question. For the reasons described below, the most reasonable inference from the evidence is that Hotchkiss asked Thompson whether locking out the IND-DCC-3 for the repair would be safe. The weight of the evidence is insufficient to establish that Hotchkiss asked Thompson whether doing so conformed to established LOTO procedures. Similarly, the most reasonable inference from the evidence is that Thompson told Hotchkiss that he believed it would be safe to lock out the IND-DCC-3 for the repair. More importantly, the weight of the evidence does not support a finding that Thompson considered whether locking out the IND-DCC-3 for the repair conformed to the established LOTO procedures, or that Thompson had opined on that question in speaking with Hotchkiss. The evidence relating to the precise content of the telephone conversation is detailed below.

There is no evidence of the duration of the telephone conversation. And the only detailed evidence of the content of that conversation is provided by Thompson. Although the email that Hotchkiss sent to his staff after the telephone conversation strongly suggests Thompson had told him that locking out the IND-DCC-3 was consistent with existing LOTO procedures (*see* Findings of Fact ¶ 60), neither Hotchkiss nor Thompson testified that Thompson had said this in the telephone conversation.

Hotchkiss did not describe in his testimony precisely what question he had posed to Thompson, nor did he testify to precisely what Thompson said to him. Rather, Hotchkiss testified simply that he contacted Thompson "for the purpose of making sure" that he "was doing the right

thing” (T. 426), and that based on Thompson’s response he believed he was “doing everything in accordance with regulations and safety and procedure that [he] needed to do.” (T. 425). In response to questions on cross-examination regarding whether Hotchkiss had described to Thompson the energy control procedures that managers were instructing MPEs to follow, Hotchkiss testified (in a tone that seemed to manifest some misplaced umbrage at having been asked): “No. I don't have to describe anything to Mike Thompson. He already knows it all.” When asked essentially the same question a second time, he reiterated: “I don't need to describe anything to Mike. He already knows it all.” (T. 435).

Hotchkiss essentially deferred completely to Thompson with respect to any matter relating to the APPS. Hotchkiss believed (with ample justification) that Thompson “basically wrote every book there is to write on the APPS machine,” and so Hotchkiss testified his approach to the APPS is that he does not “do anything technical ... unless I get the advice of [Thompson].” (T. 424-25).

In contrast to Hotchkiss’s testimony, Thompson provided some detail regarding the content of their telephone conversation. Thompson testified that Hotchkiss simply asked him “if it was possible, if it was safe to lockout at the induct” (T. 446), and that before answering he asked Hotchkiss a series of questions about the way the repair would be conducted. (T. 446-48). Thompson’s written report indicates that Thompson concluded that locking out at the IND-DCC-3 would be permissible as a *local* LOTO procedure. (*See* Thompson Report, Ex. R-30 at 19, stating “I did not find issue with local policy allowing for this repair using the method described.”). There is nothing in Thompson’s written report that states that in their telephone conversation that he told Hotchkiss that locking out the IND-DCC-3 conformed with the requirements of MMO-037-15 or other USPS-wide LOTO procedure. (Ex. R-30). Rather, in deposition testimony (with which Thompson was effectively impeached at the hearing and which is more credible than his somewhat

contrary hearing testimony [*see* footnote 6, *supra*; T. 504-05]), Thompson admitted that he advised Hotchkiss “from a technical point of view” and that he “did not make [the] determination” that locking out the IND-DCC-3 “would comply with the requirements in MMO-037-15.” (T. 505).

The whole of the evidence establishes that Thompson’s response to Hotchkiss’s inquiry was grounded in Thompson’s belief that MMO-037-15 permitted the Center to develop and implement a local LOTO procedure that would allow for the lock out of the IND-DCC for the repair of an induction lane’s “inside” belts (belts 2, 3 or 4). (See Findings of Fact ¶ 58).

Attachment 4 provides that locking out the IND-MCC for “conveyor repairs” and “to facilitate belt, bearing or roller replacement” (all of which was done in connection with the repair of belt I-3-2) is “recommended” and that locking out the IND-DCC is “not recommended.”¹⁰ Thompson could have reasonably concluded that under the circumstances that Hotchkiss described to him, locking out at the IND-DCC-3 would not violate the letter of MMO-037-15 because the MMO did not prohibit employing that means of energy control, but rather stated only that doing so was “not recommended.”¹¹ There is no evidence that Thompson was nearly as familiar with

¹⁰ In his testimony, Thompson described his reasons for using this “recommended/not recommended” language in Attachment 4. (T. 507-13). The reasons he gave are not at all self-evident from the text of MMO-037-15. Rather, his testimony indicates his implicit recognition that the objective meaning of this language in Attachment 4 did not reflect his subjective intent when he wrote it. In other words, Thompson did not mean for Attachment 4 to say what it actually says. Thompson testified that he originally utilized that “recommended/not recommended” language in drafting Attachment 2, which relates to the FSD Subsystem, and that for the sake of consistent language he reprised that same language in Attachment 4. He testified that he did not intend that language to apply to the repair of the “inside” induction lane conveyor belts (belts 2, 3 and 4), but that intent simply is not apparent in the actual language he used in Attachment 4. (T. 511-12; Ex. R-30 at 34-36).

¹¹ Section 1910.147(c)(4)(ii) of the LOTO standard requires that LOTO procedures “*clearly and specifically* outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy.” (emphasis added). The indecisive “recommended/not recommended” language employed in Attachment 4 of MMO-037-15 seems

the provisions of the voluminous maintenance manual, the MS-202, as he was with MMO-037-15, which he wrote. The MS-202 contains step-by-step actions for certain maintenance activities that had to have been performed as part of completing the repair of belt I-3-2. For some of those maintenance activities, the MS-202 instructed locking out the IND-MCC, as well as instructing MPEs to follow any local LOTO procedures. Assuming Thompson was recalling the “recommended/not recommended” language that he used in MMO-037-15 when he spoke to Hotchkiss, there is no evidence to support the finding that he also had a present awareness that provisions in the MS-202 instructed MPEs to lock out the IND-MCC for at least some aspects of the belt repair. The Center could conceivably have developed a local LOTO policy consistent with MMO-037-15 and MS-202 that would have allowed for locking out the IND-DCC for this type of conveyor repair.¹² It is apparent from Thompson’s written report that he contemplated the Center repairing belt I-3-2 under a such local procedure, which he believed would be a safe procedure.

neither particularly “clear” nor “specific,” and that language seems to have been a substantial factor in the chain of events leading to the violation here. However, the Secretary did not cite USPS for violating § 1910.147(c)(4)(ii), and USPS’s conformance to the requirements of that provision of the LOTO standard (which certainly is a performance-oriented provision) is not adjudicated herein.

¹² If the Center’s management had endeavored to develop and implement a local LOTO procedure that permitted locking out an IND-DCC for the repair of an induction lane’s “inside” belt, it should be noted that this decision does not find that any such local procedure would necessarily have conformed to the requirements of the LOTO standard. This decision simply recognizes that it was at least plausible on this record that such a local LOTO procedure might have been appropriately developed and implemented, and that if this had been done before the repair of belt I-3-2, the violation here of USPS not using its established LOTO procedures in the repair would not have been proven. *Cf.* T. 387-90 (testimony of the OSHA assistant area director that was critical of USPS’s failure to formally develop, implement, and train employees on the LOTO procedure the MPEs were directed to use in the belt repair).

For these reasons, the evidence is insufficient to establish that Thompson manifested conscious or intentional disregard of the requirements of § 1910.147(d)(2) when he opined to Hotchkiss that the repair of Belt I-3-2 could be done safely by locking out the IND-DCC-3.

As for Hotchkiss, he either (1) accurately understood what Thompson said to him (that the repair could be done safely by locking out the IND-DCC-3) and then deliberately mischaracterized Thompson to have said that USPS's established LOTO procedures allowed for locking out the IND-DCC for the belt repair, (2) recklessly misconstrued what Thompson said, or (3) carelessly misconstrued what Thompson said. The evidence is insufficient to establish that Hotchkiss deliberately mischaracterized what Thompson told him. The evidence is also insufficient to establish that Hotchkiss was "actually aware" at the time that he ordered the repair be done by locking out the IND-DCC-3, that USPS's established LOTO procedures prescribed otherwise. *See Propellex Corp.*, 18 BNA OSHC at 1684 (proving conscious disregard requires establishing the employer "was actually aware, at the time of the violative act, that the act was unlawful").

In view of the indecisive language used in Attachment 4 about locking out the IND-MCC ("recommended") versus locking out the IND-DCC ("not recommended") for "conveyor repairs" and "belt, bearing, or roller replacement" in the IND Subsystem, and considering further that there is no evidence that Hotchkiss was actually aware that some provisions of the voluminous MS-202 maintenance manual identified the IND-MCC to be locked out for certain maintenance actions that were integral to the belt repair, the whole of the evidence fails to establish that in directing the IND-DCC-3 be locked out for the repair of belt I-3-2 Hotchkiss was actually aware that established LOTO procedures did not permit doing so. The evidence is thus insufficient to establish that Hotchkiss consciously disregarded the requirements of the cited standard.

2. Plain Indifference.

A cited employer that is aware of the cited standard but has not been shown to have consciously disregarded it, may nevertheless be found to have willfully violated the standard upon a showing that the employer acted with plain indifference to employee safety or to the requirements of the Act. *Dayton Tire*, 671 F.3d at 1256-57 (assessing whether an employer with a heightened awareness of the cited LOTO standard was plainly indifferent to the requirements of the Act). The D.C. Circuit has remarked that “it takes a lot to be plainly indifferent.” *Id.* at 1256.

As regards Thompson, the evidence is insufficient to establish that in his communications with Hotchkiss he was plainly indifferent to the requirements of the Act or employee safety. Thompson’s role was that of consultant to Hotchkiss, and he had no operational responsibility for the Center’s maintenance operations or its use of established LOTO procedures. The evidence establishes that in advising Hotchkiss, Thompson believed that locking out the IND-DCC-3 for the repair of belt I-3-2 would not expose MPEs to the risk of injury from hazardous energy and that doing so would be a permissible local LOTO procedure. (T. 445-48; Ex. R-30 at 19, stating “I did not find issue with local policy allowing for this repair using the method described”). As discussed above, the evidence does not establish that he advised Hotchkiss that doing so was permitted under the established USPS-wide LOTO procedures (i.e., MMO-037-15 and MS-202).

Hotchkiss, the acting plant manager, had operational responsibility for the belt repair and assuring that MPEs used established LOTO procedures for that repair. When MPEs raised safety concerns, Hotchkiss took the initiative to consult with the author of the APPS-specific LOTO procedure, who expressed the view that locking out the IND-DCC-3 during the repair of Belt I-3-2 would not expose employees to the risk of injury from hazardous energy. Hotchkiss seems to have heard what he wanted to hear from Thompson. He did not endeavor to make an independent judgment that locking out the IND-DCC-3 for the repair was permitted by established LOTO

procedures. Rather, he seemed to assume simply that it was, since the author of the procedure had told him that doing so was safe. (See T. 434-35). Had Hotchkiss exercised reasonable diligence, he ought to have comprehended that his directive to lock out the IND-DCC-3 was contrary to the APPS-specific LOTO procedures, notwithstanding Thompson’s conclusion that doing so would be safe. *Cf. Dayton Tire*, 671 F.3d at 1255-56 (reversing Commission’s finding that a safety manager who had relied on a LOTO assessment conducted by her predecessor, and who had not conducted her own independent assessment, was “plainly indifferent” to the requirements of the Act). While Hotchkiss seems to have erroneously understood Thompson to have said that locking out the IND-DCC-3 for the repair of Belt I-3-2 would not contravene the established APPS-specific LOTO procedures, the circumstantial evidence is insufficient to establish that Hotchkiss was reckless in arriving at that erroneous understanding. The evidence is thus insufficient to establish that Hotchkiss acted with plain indifference to the requirements of the Act or employee safety. *See Williams Enters. Inc.*, 13 BNA OSHC at 1256-57 (expressing the “plain indifference” ground in terms of “reckless disregard for employee safety”); *see also Dukane Precast, Inc. v. Perez*, 785 F.3d 252, 256 (7th Cir. 2015) (stating that a showing of “plain indifference” requires proof that the employer “was reckless in the most commonly understood sense of the word”); *cf. Dayton Tire*, 671 F.3d at 1256-57 (noting that while a safety manager “could have done more” in response to employee concerns regarding LOTO, “she did not do nothing,” and that while the safety manager’s review of her employer’s LOTO program done at the urging of a senior corporate safety official “may not have been as thorough as the Commission would have liked, it did not display plain indifference”).

F. “Serious” Classification.

The Secretary’s complaint alleged that in addition to the violation having been “willful,” it was also “serious.” (Complaint ¶ 6). Section 17(k) of the Act provides that a violation is “serious”

if “there is a substantial probability that death or serious physical harm could result” from the violative condition or practice. 29 U.S.C. § 666(k); *Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324 (No. 86-351, 1991). “This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur.” *Oberdorfer Indus. Inc.*, 20 BNA OSHC 1321, 1330-31 (No. 97-0469, 2003) (consolidated) (citation omitted); *see also Sec’y of Labor v. Trinity Indus.*, 504 F.3d 397, 401 (3d Cir. 2007).

In contesting the citation, USPS put considerable effort into backing its assertion that the MPEs who repaired belt I-3-2 with the IND-DCC-3 locked out and the APPS continuing to process mail were not a risk of being injured. The undersigned agrees that the Secretary failed to carry his burden to establish a substantial probability that the precise LOTO violation established here was likely to result in an employee sustaining serious physical harm in the event of an accident. While there is reliable evidence that MPEs working on the belt repair while the APPS continued to operate would have been exposed to a struck-by hazard from mail items that might tumble over the guards of adjacent conveyors (about 66 inches above floor level), that evidence fails to establish that such a struck-by hazard was likely to result in death or serious physical harm, such as a severe laceration. (T. 475-76). *See Lisbon Contractors, Inc.*, 5 BNA OSHC 1741, 1742 (No. 11097, 1977) (stating that bruises and contusions do not support a classification of “serious”); *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993) (severe laceration constitutes serious physical harm); *S. Hens, Inc. v. OSHRC*, 930 F.3d 667, 682 (5th Cir. 2019) (“We have construed ‘serious’ injury to include broken bones, crushed toes, and chemical burns”). Similarly, the evidence of exposure to adjacent moving conveyors and exposure to flying machine parts in the event of certain machine failures was insufficiently weighty to establish the violation

as serious, particularly in view of reasonably plausible countervailing evidence presented by USPS. (E.g., T. 470-80).

Since the violation has not been established to have been “serious” as defined in section 17(k) of the Act, it is deemed “not to be of a serious nature” (in the language of § 17(c) of the Act), also more often described as “other-than-serious” (in the terminology of the Secretary). A violation is considered other-than-serious when “there is a direct and immediate relationship between the violative condition and occupational safety and health, but not of such relationship that a resultant injury or illness is death or serious physical harm.” *Crescent Wharf and Warehouse Co.*, 1 BNA OSHC 1219, 1222 (No. 1, 1973).

G. Penalty.

Section 17(c) of the Act provides that a “penalty may be assessed” for an other-than-serious violation (in contrast to section 17(b), which provides that a penalty for a serious violation “shall be assessed”). 29 U.S.C. § 666(b)–(c). The maximum penalty for the other-than-serious violation established here is \$12,675. 29 C.F.R. § 1903.15(d)(4) (2017). The Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) *aff’d*, 73 F.3d 1466 (8th Cir. 1996); *Allied Structural Steel*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975).

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that in assessing penalties, the Commission give “due consideration” to four criteria: the size of the employer’s business, the gravity of the violation, the employer’s good faith, and its prior history of violations. *Specialists of the S., Inc.*, 14 BNA OSHC 1910 (No. 89-2241, 1990). Gravity is the primary consideration among these four statutory criteria and is determined by “such matters as the number of employees

exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.” *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

Even though this violation was not proven to have been “serious” within the meaning of section 17(k) of the Act, the “other-than-serious” violation established here was grave. There can be little doubt that the Center’s management would have deferred to the MPEs judgment on what to lock out if that judgment had allowed for the APPS to continue to process mail during the repair. The assistant area director of OSHA’s Allentown, Pennsylvania, area office provided a lucid description of the safety dangers inherent in an employer overriding its established LOTO procedures. (T. 387-90). His stated concerns echo commentary in the LOTO standard’s preamble, wherein OSHA described management’s vital role in maintaining the integrity of a LOTO program by promoting adherence to established procedures:

OSHA believes that employee understanding and utilization of a standardized procedure are critical to the success of a lockout or tagout program. Without these elements and commitment from management, the effectiveness of the program can be seriously compromised. Proper training in the procedure, and explanation of how it works and why, are crucial to its implementation by the employees.

* * * *

The development and documentation of energy control procedures is of little use unless the employer requires all authorized employees to utilize the procedures that have been provided whenever they are servicing or maintaining machines or equipment.

54 Fed. Reg. at 36,653 and 36,667. And in the context of describing successful tagout programs, the preamble noted the importance of both supervisor and employee discipline in maintaining the integrity of such a program: “[D]iscipline ... appears to be the most critical to the success of these programs; the companies with effective tagout programs apply various types of disciplinary action to both supervisors and employees who violate the tagout procedures.” 54 Fed. Reg. at 36,655.

The Center's MPEs had been well trained to follow established LOTO procedures or risk discipline for failing to do so. Management's override of those established procedures for the repair of belt I-3-2 gave rise to legitimate concerns by MPEs that the procedure they were being required to use was unsafe. Such violative conduct undermines employee reverence for and confidence in a LOTO program, to the serious detriment of the efficacy and integrity of this important program.

In view of the size of USPS and the many complex machines that it operates and maintains throughout the country, the maximum penalty available for this grave other-than-serious violation is appropriate. Accordingly, a penalty of \$12,675 is assessed.

ORDER

The foregoing decision constitutes findings of fact and conclusions of law in accordance with Commission Rule 90(a)(1). 29 C.F.R. § 2200.90(a)(1). If any finding of fact is in actuality a conclusion of law or any legal conclusion stated is in actuality a finding of fact, it shall be deemed so, any label to the contrary notwithstanding.

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1910.147(d)(2) is AFFIRMED, is classified as an "other-than-serious" violation, and that a penalty of \$12,675 is ASSESSED.

/s/ _____
WILLIAM S. COLEMAN
Administrative Law Judge

Dated: February 16, 2021