

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

The Secretary,

v.

PACKERS SANITATION SERVICES, INC.,
LTD., D/B/A PSSI,

Respondent.

OSHRC Docket No. 23-1371

Appearances:

Benjamin Salk, Esq., Stephanie Mackenzie, Esq., Department of Labor, Office of Solicitor,
Chicago, IL
For The Secretary

Travis Vance, Esq., Lee Thomas, Esq., Fisher & Phillips, LLP, Charlotte, NC
For Respondent

Before: Judge Patrick Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. PROCEDURAL BACKGROUND.

This matter is before the United States Occupational Safety and Health Review Commission¹ (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). On April 27, 2023, a Compliance Safety and Health

¹ “[T]he Commission is responsible for the adjudicatory functions under the OSH Act.” *StarTran, Inc. v. OSHRC*, 290 F. App’x 656, 670 (5th Cir. 2008) (unpublished). Its function is to “act as a neutral arbiter and determine whether the Secretary’s citations should be enforced over employee or union objections.” *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam). Thus, Congress vested the Commission with the “adjudicatory powers typically exercised by a court in the agency-review context.” *Martin v. OSHRC, (CF&I Steel Corp.)*, 499 U.S. 144, 151 (2012).

Officer (CSHO) initiated an inspection of a food processing facility in Bolingbrook, Illinois, after a sanitation worker was injured. As a result, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty (Citation) to Respondent Packers Sanitation Services, Inc., Ltd. (PSSI). The Citation alleged one Serious violation of 29 C.F.R. § 1910.147(d), with a total proposed penalty of \$15,625.00. PSSI timely contested the Citation by filing a Notice of Contest with the Commission.

This case proceeded under the conventional case rules of the Commission. A trial was held on September 24-25, 2024, in Chicago, Illinois. The following individuals testified at trial: (1) CSHO Ester Marin; (2) Elizabeth Rocha, Director of Health and Safety for West Liberty Foods; (3) [redacted], a Maintenance Worker at the facility at issue; (4) Jacinto Sevilla, Sanitation Manager for PSSI at the facility at issue; (5) Freddy Herrera, Sanitation Supervisor for PSSI at the facility at issue; and (6) Robert Lowe, former Vice President of Safety for PSSI.

During trial, PSSI raised a due process issue regarding its inability to review the CSHO's unredacted notes about her interviews with government informer witnesses. At the conclusion of evidence, the Court recessed the trial to allow the Parties to fully brief the issue. PSSI filed a *Motion to Compel or, in the Alternative, a Motion to Dismiss the Case* (PSSI Motion or Motion to Dismiss) for the government's purported failure to produce the CSHO's unredacted notes. The Secretary responded to PSSI's Motion, after which the Court denied PSSI's Motion in a written Order dated December 2, 2024. On the same date, the Court issued an Order closing the proceedings and directing the Parties to file post-trial briefs.² In its post-trial brief, PSSI renewed its Motion. The Secretary filed her post-trial brief and, on January 17, 2025, also filed her response

²Affirmative defenses not asserted in a respondent's answer or discussed in post-trial submissions are deemed waived. *Ga.-Pac. Corp.*, No. 89-2713, 1991 WL 132732, at * 3 (OSHRC, June 28, 1991).

to PSSI's renewed Motion contained in PSSI's post-trial brief. The post-trial briefs, PSSI's renewed Motion, and the Secretary's response were considered by the Court in reaching its Decision.

Pursuant to Commission Rule 90(a), 29 C.F.R. § 2200.90, after hearing and carefully considering all the evidence and the arguments of the Parties, the Court issues this Decision and Order as its findings of fact and conclusions of law.

II. STIPULATIONS.

The Parties stipulated to various facts regarding the incident giving rise to this Citation. (Ex. J-10, Joint Stipulations). The Joint Stipulations were received and admitted as a Joint Exhibit into the record. (Tr. 12). *See Armstrong Utils. Inc.*, No. 18-0034, 2021 WL 4592200, at *2 n.2 (OSHRC, Sept. 24, 2021) (finding it was "plain error" to not accept parties' stipulation). The Court will refer to the Joint Stipulations as necessary in this Decision.

III. JURISDICTION.

The Court finds it has jurisdiction over these proceedings pursuant to section 10(c) of the Act by PSSI filing its Notice of Contest. *See Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 995-1000 (5th Cir. 1975) (describing "Enforcement Structure of OSHA," noting that once a notice of contest is filed, "the Secretary is required to initiate the administrative hearing by notifying [the Commission]"), *aff'd*, 430 U.S. 442 (1977); 29 U.S.C. § 659(c). The Court also finds PSSI was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3), (5). (J. Stip. 1, 4; Answer ¶¶ 1, 3).

IV. PRELIMINARY ISSUE: RENEWED MOTION TO DISMISS.

On December 2, 2024, the Court denied PSSI's Motion to Dismiss. PSSI had argued the Secretary's failure to disclose material evidence, including potential admissions of the injured employee relating to his misconduct, violated its due process rights. As previously noted, PSSI renewed its Motion to Dismiss in its post-trial brief (Renewed Motion) and presented new arguments not set forth in its original filing.

At issue in PSSI's Motion and Renewed Motion are the CSHO's witness interview notes, which contain statements from individuals the Secretary claims are entitled to protection under the government informer privilege.³ The Secretary provided PSSI with redacted copies of these notes during discovery. At trial, counsel for the Secretary posed general questions to the CSHO about what she learned from her interviews with employees. (*See, e.g.*, Tr. 55-58, 64-66). Then, on cross-examination, the Secretary objected to PSSI's counsel's inquiries into the contents of the CSHO's notes on the basis of the government informer privilege. (Tr. 171). PSSI's counsel argued PSSI was entitled to the notes under the Jencks Act and due process considerations. (Tr. 172). The Court discussed the objection with counsel at length and directed PSSI to file a motion on the subject after the Court recessed the trial. (Tr. 172-93). Because the CSHO had not disclosed any information she received from those protected individuals while answering questions, the Court did not allow PSSI's counsel to question her on the redacted portions of her notes. (Tr. 190).

In its Motion, PSSI argued that *Jencks v. United States*, 353 U.S. 657 (1957) required the government to produce all reports and statements made by government informants and PSSI had

³ "The informer's privilege is the government's right to withhold from disclosure the identity of persons furnishing information on violations of the law to law-enforcement officers, including OSHA compliance officers." *Birdair, Inc.*, No. 10-0838, 2011 WL 3250680, at *1 (OSHRC, Apr. 27, 2011). "The purpose of the privilege is to protect the identity of informers, and thus it protects a communication to the extent that its contents would reveal the informer's identity." *Id.*

an essential need for the production. The Court denied PSSI's Motion, concluding that: (1) any motion to compel was untimely; (2) PSSI's due process rights were not violated; (3) the government had not waived the government informer's privilege; and (4) PSSI had not established substantial need for the unredacted material. (*See* Order Denying Motion, OSHRC Docket No. 23-1371 (Dec. 2, 2024)).

By way of background, the Secretary invoked the government informer privilege during discovery regarding some witnesses which the CSHO interviewed during her investigation. The Secretary provided PSSI with redacted interview statements of those individuals. The Secretary did not include any government informers other than [redacted] in her final witness list before trial. (Tr. 181; Sec'y Final Witness List). The Court clarified, on the record, that no government informer witnesses other than [redacted] would be testifying. (Tr. 180-81).

During the CSHO's testimony, she referenced statements of employees she had interviewed during her investigation, which is proper under *Regina Construction*, No. 87-1309, 1991 WL 104227, at *3 (OSHRC, May 15, 1991). During cross-examination, PSSI's counsel questioned the CSHO on her interview notes, believing she had disclosed information she received from the government informer identified to be a witness. However, the CSHO had not referenced any information contained in her redacted witness interview notes, so PSSI's counsel did not further cross-examine the CSHO on the topic.

In its Order denying PSSI's Motion, the Court distinguished every case PSSI cited for its proposition that it is entitled to the unredacted government informer statements. Specifically, every case cited by PSSI involved conduct before or during trial in which the government informer privilege was deemed to be waived or the government informer appeared as a witness. PSSI was essentially making the argument because the CSHO referenced in her testimony the statements of

employees she had interviewed during the investigation, the privilege was waived. In its Order denying PSSI's Motion, the Court followed *Massaman-Johnson (Luling)*, No. 76-1484, 1980 WL 10593, at *3-4 (OSHRC, May 2, 1980) and held since the government informer had not been called as a witness and the government had not waived the privilege, PSSI was not entitled to the unredacted interview statements.

When PSSI included its Renewed Motion in its post-trial brief, PSSI provided supplemental authority in support of its argument that due process required the government to produce the CSHO's unredacted notes. Resp't Brief 15-16. PSSI also contended the Secretary failed to properly invoke the government informer's privilege, the deliberative process privilege, and the investigatory files privilege.⁴ *Id.* at 16. PSSI demands this case be dismissed.

From the outset, the Court notes PSSI's Renewed Motion, in its post-trial brief, is in fact an untimely motion for reconsideration. "A party adversely affected by a ruling on any motion may file a motion for reconsideration within 7 days of service of the ruling." Commission Rule 40(i). PSSI did not do that. Moreover, the untimely Renewed Motion does not comply with Commission Rule 40, which requires any motion to "be made in a separate document," "not...included in another pleading or document." Commission Rule 40(a). In addition, PSSI improperly advanced new issues and arguments in its Renewed Motion that were not raised in its original Motion. For these reasons, the Court has grounds to deny PSSI's Renewed Motion outright.

However, in addition to the above bases of denial, the Court will deny PSSI's Renewed Motion on the merits. First, on Respondent's request for dismissal, under well-established Commission case law, "dismissal is too harsh a sanction for failure to comply with certain pre-

⁴ PSSI had asserted this argument in a footnote in the "Background" section of its Motion.

hearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings.” *Stone & Webster Constr., Inc.*, No. 10-0130, 2012 WL 1965437, at *5 (OSHRC, May 23, 2012) (citation omitted). Here, there is no pre-hearing order with which the Secretary did not comply. In fact, the first time these issues were raised before the Court by PSSI was at trial. PSSI failed to follow established Commission Rules to bring discovery disputes, like those contained in PSSI’s Motion, to the Court before discovery ended—or at least before trial began. The Court is in no position to reward a party based on their own self-inflicted prejudice.⁵ And, PSSI has not shown any contumacious conduct or pattern of disregard for Commission proceedings by the Secretary.

Moreover, PSSI’s supplemental authority does not alter the Court’s initial decision to deny PSSI’s Motion for an unredacted copy of the CSHO’s notes. In *Pratt & Whitney Aircraft*, the Commission reaffirmed its own precedent that “any material in the statements that would reveal the identity of confidential informants need not be produced.” No. 13401, 1981 WL 18894, at *2 (OSHRC, Apr. 27, 1981) (citing *Massman-Johnson*, 1980 WL 10593, at *3-4). The Commission ultimately concluded the Secretary had to produce the CSHO’s notes *with redactions made as to government informants*. *Id.* (emphasis added). This is in line with the Court’s order denying PSSI’s Motion.

PSSI again cites *Jencks v. United States* and *Frazee Construction Company*, No. 1343, 1973 WL 4127 (OSHRC, Aug. 8, 1973), in support of its Renewed Motion. However, *Jencks* only requires the production of an informer’s prior statements when that informer is called as a witness at trial. *Jencks*, 353 U.S. at 667. And, *Frazee Construction*, cited by Respondent in support of its

⁵ The Court, instead of dismissing PSSI’s arguments outright at trial for PSSI’s failures, provided PSSI a fair opportunity to brief the Court on its position, have the Secretary respond, and the Court, after careful analysis, make its ruling. Even after this opportunity, PSSI still did not follow Commission Rules on reconsideration and filing such requests as a separate document.

position, is wholly inapposite to this case. Specifically, the judge in *Frazee Construction* ordered an *in camera* inspection of the CHSO's notes, and the government was "adamant and unremitting" in refusing the judge's directives. *Frazee Constr. Co.*, 1973 WL 4127, at *2. The Commission rejected the government's multiple claims of privilege (irrelevancy, timeliness, executive privilege, and exemption under the Freedom of Information Act) and held the government's refusal to comply with the judge's order, including the judge's decision to conduct an *in camera* inspection, deprived the respondent of a fair and impartial trial. *Id.* at *6. None of the circumstances here mirror those presented in *Frazee Construction*.

Lastly, Respondent has waived any claim the Secretary failed to properly invoke the government informer's privilege, the deliberative process privilege, or the investigatory files privilege because of perceived defects in her privilege log, specifically the lack of a signature by the proper person with authority. These arguments were not timely raised. Failure to comply with procedural requirements, such as ensuring the privilege log is signed by the proper person with authority, must be raised timely before the Court. *See, e.g., United States v. O'Neill*, 619 F.2d 222, 2225-26 (3d Cir. 1980) (holding the proper way to assert an objection to a claim of privilege is in writing and by motion, which allows the court to rule on the disputed privilege). PSSI should have followed proper procedure and filed a motion during the discovery phase, at which time the Secretary could have cured the issue or presented arguments to the Court that she believed the privilege log was adequate. PSSI is trying to catch the Secretary on a technicality after discovery has closed and trial has concluded. Such efforts are unpersuasive and are rejected.

PSSI's Renewed Motion, contained in its post-trial brief, is DENIED, and the Court reaffirms its previous findings and conclusions in its Order Denying Motion, OSHRC Docket No. 23-1371 (Dec. 2, 2024).

V. BACKGROUND.

PSSI & the West Liberty Foods Bolingbrook Facility

PSSI is a company that provides sanitation services for food processing and manufacturing facilities operated by other companies, including a food processing plant operated by West Liberty Foods, LLC, in Bolingbrook, Illinois (Facility). (J. Stip. 3, 5, 6). The Facility is an automated sandwich-making plant with four fully automated lines and one semi-automated line. (Tr. 245). West Liberty Foods employees worked at the Facility between approximately 6:00 AM and 11:00 PM or midnight, seven days a week. (Tr. 246). Then, PSSI employees cleaned and sanitized the production lines during the overnight shift, from 11:00 PM or midnight until 5:00 or 5:30 AM, seven days a week. (Tr. 246).

The Facility contained a fully automated sandwich line in the MAP2 room, where lunch meat and cheese were sliced, applied to bread by a robotic system, and packed into a modified atmosphere package (also referred to as “MAP”). (Tr. 246-47). A component of the fully automated sandwich line was a set of two bread line conveyors (an upper and lower conveyor), which moved the bread down the production line. (Tr. 247-49; Exs. J-1, J-2). The bread line conveyors were powered by electricity, and each conveyor had a separate switch that controlled energization and contained a lockout point to which a lock could be affixed. (Tr. 84-85, 250-52; Ex. C-7). The lower conveyor was operated by a foot pedal. (Tr. 85, 251, 331; Exs. J-1, J-3; J. Stip. 10). Pressing the foot pedal advanced the conveyor belt. (Tr. 85-86, 149, 154, 331, 383). Lifting one’s foot off the foot pedal stopped the conveyor belt. (Tr. 154, 383). The foot pedal could only move the conveyor belt if the machine was energized. (Tr. 86). In other words, if the machine was locked out, the foot pedal did not advance the conveyor. (Tr. 86). Sprockets on a bar engaged with the conveyor belt to make it move. (Tr. 127, 253; Ex. C-5).

PSSI had written sanitation procedures for cleaning a bread line, which will be described in more detail in the following section. (Tr. 428; Ex. J-5). Generally, however, the sanitation procedures for a bread line conveyor required a dry pickup of food scraps, covering electrical components in plastic, a first rinse for heavy soils, the application of detergent, hand scrubbing, another rinse, and final sanitation. (*See* Ex. J-5). The written sanitation procedures did not include any instructions for drying a bread line conveyor. However, PSSI sanitors were trained to dry the conveyor with an air hose while the conveyor was running. (Tr. 329-30). The sanitor controlled the MAP2 bread line conveyor belt with the foot pedal. (Tr. 382-83). PSSI employees were trained to stay at least six inches away from any moving equipment, and they were reminded by their managers to keep the foot pedal on the ground. (Tr. 344, 363-64). PSSI workers could also hand-dry the conveyor belt with paper towels, which required the conveyor to be locked out. (Tr. 362-63).

PSSI Written Policies

PSSI had several written policies regarding safety, sanitation guidelines, disciplinary action, and requirements specific to the Facility. The relevant written policies in this case include the Employee Safety Handbook (Ex. J-7), the Cleaning Procedures and Training Documentation Manual (Ex. C-12),⁶ and Equipment-Specific De-Energization Procedures (*See, e.g.*, Ex. J-6).

1. Employee Safety Handbook

PSSI's Employee Safety Handbook (Safety Handbook) contained general sanitation and safety guidelines, including general lockout/tagout (LOTO) procedures. (*See* Ex. J-7). All PSSI employees were trained on the Safety Handbook. (Tr. 402; *see, e.g.*, Ex. R-1 ([redacted] training records)). PSSI required employees cleaning a piece of equipment or machinery to follow PSSI's

⁶ This exhibit was also introduced as Ex. R-4. Ex. J-5 is the cleaning procedure for conveyors and is contained within Exs. C-12 and R-4.

LOTO procedures. (Tr. 405-06; Ex. J-7 at PSSI0056). The Safety Handbook defined LOTO as “a procedure to render equipment totally inoperative and apply a lockout device to ensure the power remains off.” (Ex. J-7 at PSSI0053). The Safety Handbook went on to specify when LOTO should be used, including any time an employee is less than an arm’s length from an operational pinch point.

PSSI requires all team members to maintain a safe distance (Minimum arm’s length) when working around running equipment. Anytime machine guarding is removed, or a team member is working within arm’s length of an operational pinch point, the equipment must be locked out, or have secondary guarding or guarding by restraint. However, lockout/tagout must be used anytime a team member must cross the plane of operation or put any part of his/her body past the point of operation. If you must hose, hand scrub, clean, or pull meat scraps from inside the equipment, a lockout/tagout device must first be applied.

(Ex. J-7 at PSSI0053). The Safety Handbook included the following definitions relevant to this case:

Breaking the Plane of Operation – Exposing any part of your body to the operating mechanics inside or within processing equipment. You can break the plan[e] by reaching, stepping, crawling, or leaning into the exterior of any processing equipment or machinery, and into the operating mechanisms which cut, blend, extrude, or otherwise process food product. Breaking the plane of operation is never permitted, whether or not it is done intentionally or accidentally.

* * *

Pinch Point – Any point at which it is possible for a person or a part of a person’s body to be caught between moving parts of a machine, or between the moving and stationary parts of a machine, or between material and any part of the machine.

(Ex. J-7 at PSSI0054 - PSSI0055). The Safety Handbook also required periodic LOTO inspections by supervisory staff and LOTO training for employees. (Ex. J-7 at PSSI0061).

In addition to safety rules, the Safety Handbook contained PSSI’s progressive disciplinary policy, which consisted of a verbal warning, a written warning, a written warning with three-day suspension without pay, and, finally, dismissal. (Ex. J-7 at PSSI0127- PSSI0128). However,

employees who violated certain rules, like LOTO, were to be immediately terminated. (Ex. J-7 at PSSI0128; Tr. 420 (zero-tolerance policy for violations of “lifesaving rules” like LOTO)).

2. Cleaning Procedures and Training Documentation Manual

PSSI had a Cleaning Procedures and Training Documentation Manual (Cleaning Procedures Manual) that was specifically created for the Facility at issue. (Ex. C-12). The Cleaning Procedures Manual included detailed task descriptions for cleaning and sanitizing specific equipment or machines. (*See, e.g.*, Ex. J-5; Ex. C-12). It also included various required training programs for all PSSI employees, including job skills training, job safety training, and food safety training, among others. (Ex. C-12 at 10).

To clean and sanitize a conveyor, PSSI’s written cleaning procedures included the following steps. First, a PSSI employee performed a dry pickup of floor scraps, then covered electrical or sensitive equipment in plastic. (Tr. 323; Ex. J-5 (PSSI Sanitation Cleaning Procedures for conveyors) at PSSI0152). Next, “when required,” the PSSI employee locked out electrical, hydraulic, pneumatic, and any other source of power at the source prior to starting sanitation. (Ex. J-5 at PSSI0152). Then, the PSSI employee followed detailed steps to rinse the conveyor, apply detergent solution (which required the sanitor to “[a]pply LOTO device before reaching inside conveyor plane of operation”), rinse the conveyor again, dispose of any food scraps in drains, and apply sanitizer. (Tr. 323-24; Ex. J-5 at PSSI0152- PSSI0154). The second rinse cycle required conveyors to be running to “ensure all areas are rinsed.” (Ex. J-5 at PSSI0154). Final sanitizing and disinfecting also required “any equipment that can be run safely should be run.” (Ex. J-5 at PSSI0154).

After quality control verified the equipment was completely clean, the conveyor was dried. (Tr. 323-24; J. Stip. 12, 13). Drying procedures for conveyors were not expressly included in the

Cleaning Procedures Manual. (See Ex. J-5). PSSI's policy, however, was to dry conveyors using a handheld air hose while the conveyor belt was running or hand-dry the conveyor with paper towels while the conveyor belt was locked out. (Tr. 350, 431-32; *see also* Ex. C-18 at 4 ("As of April 20, 2023, PSSI did not require employees follow the lockout procedure for the MAP2 bread line when sanitizing and drying the MAP2 bread line conveyor.")). If a sanitor had to cross the plane of the conveyor's operation, PSSI expected the worker to lock out the machine. (Tr. 157, 431-22, 453; Ex. J-5).

3. Equipment-Specific De-Energization Procedures.

PSSI contends it trained sanitors on the LOTO procedures specific to machines assigned to that sanitor, such as the MAP2 bread line conveyor. (Tr. 425). PSSI had written LOTO procedures specifically for a "Flat Lower Conveyor" in the "North Sandwich" area on the "Bread Line" (hereinafter referred to as "Lower Conveyor LOTO Procedures"). (Ex. J-6; Tr. 113-14). Those procedures will be discussed later. The Lower Conveyor LOTO Procedures did not specify when and under what circumstances LOTO had to be used on a conveyor.

PSSI Safety Program & Work Rules

In addition to its written policies, PSSI required its sanitors to undergo mandatory safety training, which was conducted in their native languages. (Tr. 405, 429). PSSI's safety training included a three-week on-boarding training, which included both hands-on and computer-based learning with the assistance of crew members that worked at the given facility. (Tr. 405; *see, e.g.*, Ex. R-1 (Documentation of [redacted] completing computer-based training)). General LOTO training and testing was covered in the new employee's on-boarding training. (Tr. 405). Once the new sanitor completed on-boarding training, they were assigned a specific machine or area to clean. (Tr. 425). PSSI sanitors were then trained on that machine or equipment's specific LOTO

procedures. (Tr. 425).

Every day before their shifts, PSSI employees attended a pre-shift safety meeting, which included a personal protective equipment check and stretches to prepare for the shift. (Tr. 406). PSSI sanitors were also expected to practice the LOTO steps on a practice board, which included applying their locks, verifying energy sources are disconnected, removing their locks, and re-energizing the machine. (Tr. 360, 418). All PSSI sanitors participated in daily “two-minute drills,” wherein the entire facility was shut down while workers stretched as a group or had training on hazard identification. (Tr. 406-07). These drills were intended to break up the overnight shift when workers might get tired and lose focus. (Tr. 406-07).

PSSI sanitors were also required to attend weekly safety meetings, which covered a variety of topics and were tracked by PSSI’s safety managers in a computer system called Origami. (Tr. 407, 433). LOTO was a frequent topic of these safety meetings, and employees were reminded they were prohibited from crossing the plane of operation of energized equipment. (Tr. 432-33). LOTO-specific refresher trainings were completed annually to verify that PSSI employees understood the seven steps of LOTO and how to apply their locks properly. (Tr. 424). Jacinto Sevilla—one of the Sanitation Managers at the Facility—trained his sanitors to stay at least six inches away from running machinery. (Tr. 322, 344). Any time a PSSI employee had to cross the plane of operation, he was expected to lock out the machine. (Tr. 345, 431).

PSSI management personnel were responsible for ensuring safety procedures were followed at PSSI facilities, and they were trained to walk the Facility to look for safety violations. (Tr. 438). Supervisors were generally present on the floor for the entire shift, and site managers spent about four hours of each shift doing rounds on the floor. (Tr. 321, 379). PSSI Area Managers and Division Managers, who oversee a number of facilities within a certain geographic region,

would regularly visit each facility to audit its safety compliance. (Tr. 409). Audits, safety trainings, and disciplinary actions were tracked and reviewed by PSSI's safety team. (Tr. 296, 433).

The Accident

On April 20, 2023, [redacted], a food safety sanitor, was assigned to clean the MAP2 bread line. (J. Stip. 8, 9). Freddy Herrera supervised the sanitors cleaning equipment in the MAP2 room. (Tr. 375-76). Jacinto Sevilla was the Site Manager who oversaw PSSI's operations across the Facility. (Tr. 318-19).

After cleaning and sanitizing the bread line conveyor, [redacted] used a handheld air hose to dry the underside of the lower conveyor. (Tr. 381). The conveyor was not locked out or de-energized, in accordance with PSSI's regular practice. (Tr. 329, 382-83; J. Stip. 14). Rather than advancing the conveyor belt by pressing the foot pedal with his foot, [redacted] wedged the foot pedal into the side of the machine. (Tr. 330, 352, 455). As a result, the conveyor belt ran continuously as [redacted] dried it with the air hose. (Tr. 127, 330, 455; Ex. R-3 (photographs depicting the jammed foot pedal and air hose)). While crouching down drying the lower conveyor belt, [redacted]'s clothing got caught by the sprockets, and he was pulled in and injured. (Tr. 47, 62, 95-96, 127; Ex. C-2 (Rapid Response Investigation); Ex. C-3 (video of accident); Ex. R-6 at 1 (OSHA Investigation Summary); Ex. R-7 at 2 (OSHA Violation Worksheet)).

[Redacted] was later fired for violating PSSI safety policies. (Ex. R-2 ([redacted]'s termination paperwork)). According to Lowe, [redacted] was fired for crossing the plane of operation without locking out the conveyor. (Tr. 434). Sevilla, however, believed [redacted] was fired for wedging the foot pedal in the conveyor to keep it running. (Tr. 329). Before this accident, neither Sevilla nor Herrera had heard of any employees wedging the foot pedal in the conveyor to keep the conveyor belt moving continuously. (Tr. 333, 372).

OSHA Investigation and Citation

OSHA initiated an inspection after it received a report of [redacted]'s hospitalization from PSSI. (Tr. 40; Ex. C-1; J. Stip. 15). CSHO Marin went to the Facility on April 27, 2023, and observed West Liberty Foods employees working during normal production hours. (Tr. 49, 52; J. Stip. 16). However, since the accident occurred during cleaning and sanitation by PSSI employees, she later returned for the PSSI staff's overnight shift. (Tr. 53). She observed PSSI sanitors drying the MAP2 room equipment with air hoses and paper towels, with one person crouched under the belt system of the MAP2 bread line. (Tr. 54). The conveyors were locked out during CSHO Marin's inspection. (Tr. 82; Ex. C-7).

CSHO Marin interviewed four PSSI sanitation employees, who discussed common work practices for sanitation, LOTO procedures, and training. (Tr. 57-58). The sanitors told CSHO Marin that [redacted] was drying the conveyor with an air hose while it was running because it was faster and [redacted] had jammed the foot pedal so the conveyor would run continuously. (Tr. 62, 64).

CSHO Marin also interviewed PSSI management employees, including Sevilla and Herrera, and observed both were very active and present on the floor of the Facility during cleaning. (Tr. 61). She discussed with them methods of sanitation, how many individuals they supervised, and LOTO procedures. (Tr. 59). Sevilla told the CSHO the conveyor was locked out during cleaning, but that [redacted]'s supervisor (Herrera) had taken his lock off the conveyor before [redacted] began drying. (Ex. R-7 (Violation Worksheet)). However, Herrera told the CSHO he had removed his lock from the conveyor because he was leaving the room and [redacted] had almost finished drying the conveyor belt. (Tr. 128-29; *see also* Ex. R-7 at 3). In any event,

there was no supervisor lock on the conveyor at the time of the accident, and the conveyor was not locked out.⁷

On August 22, 2023, OSHA issued to PSSI a single-item Citation for a Serious violation of the LOTO standard for application of energy control, 29 C.F.R. § 1910.147(d). (*See* Citation at 6). The Citation reads as follows:

29 CFR 1910.147(d): The established procedure for the application of energy control (the lockout or tagout procedures) did not cover the actions listed in and was not done in sequence as required by 29 CFR 1910.147(d)(1)-(6):

On or about April 20, 2023, an employee was exposed to machine hazards associated with moving parts and pinch-points during cleaning of a Bread Line Conveyor which resulted in the fracture to the employees left arm. The employer failed to implement energy control application steps as the machine was not shut down or turned off to perform the servicing work [per the 1910.147(d)(2) requirements]. As a result, the remaining applicable energy control elements, involving machine isolation [(d)(3)], LOTO device application [(d)(4)], dissipation of residual energy [(d)(5)(i)], and verification of isolation [(d)(6)], were not implemented to protect employees from machine servicing hazards.

Id. (bracketed language in original). The Citation had a proposed penalty of \$15,625.00. *Id.*

VII. DISCUSSION.

a. Legal Standard.

To establish the violation of a safety standard under the Act, the Secretary must prove: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition.

⁷ PSSI claims it “practices ‘supervisor control’ which is an additional, enhanced safety feature of its lockout/tagout program not required by OSHA standards.” Resp’t Brief at 5. “Supervisor Control is adding one (1) additional step to the normal lockout procedure that takes control of the equipment away from the team member and gives exclusive control to the Site Manager/Supervisor/Lead.” (Ex. J-7 at PSSI0057). However, there is no evidence—and PSSI does not claim—that supervisor control was required while the MAP2 bread line conveyor was dried.

Atl. Battery Co., No. 90-1747, 1994 WL 682922, at *6 (OSHRC, Dec. 5, 1994).⁸ The Secretary has the burden of establishing each element by a preponderance of the evidence. *The Hartford Roofing Co.*, No. 92-3855, 1995 WL 555498, at *3 (OSHRC, Sept. 15, 1995).

b. Citation 1, Item 1 - 29 C.F.R. § 1910.147(d).

The Secretary cited PSSI for a serious violation of 29 C.F.R. § 1910.147(d). That standard regulates the control of hazardous energy (lockout/tagout) and has two components: (i) having a procedure for the application of energy control; and (ii) the energy controls have to be done in sequence as required by 29 C.F.R. § 1910.147(d)(1)-(6). Specifically, the Secretary cited PSSI for violating subsection (d), which requires established LOTO procedures to cover the following elements and actions in the following sequence: (1) Preparation for shutdown; (2) Machine or equipment shutdown; (3) Machine or equipment isolation; (4) Lockout or tagout device application; (5) Relief of, disconnection of, restraint of, and otherwise render safe stored energy; and (6) Verification of isolation. 29 C.F.R. § 1910.147(d).

i. The Cited Standard Applies.

Under Commission precedent, “the focus of the Secretary’s burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer.” *Southern Pan Servs. Co.*, No. 08-0866, 2014 WL 7338403, at *4 (OSHRC, Dec. 18, 2014); *see also Ryder Transp. Servs.*, No. 10-0551, 2014 WL 5025979, at *2 (OSHRC, Sept. 29, 2014) (concluding “that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here”).

In order for the cited 29 C.F.R. § 1910.147(d) regulation to apply, there must be a piece of

⁸ For most standards the Secretary is not required to prove the existence of a hazard each time a standard is enforced. *Bunge Corp. v. Sec’y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981); *Greyhound Lines-West v. Marshall*, 575 F.2d 759, 762 (9th Cir. 1978) (Secretary not required to prove violation related to walking and working surfaces constituted a hazard).

machinery which is covered under the LOTO provisions. To be covered, the MAP2 bread line conveyor must be a machine which falls under the coverage of 29 C.F.R § 1910.147(a)(1)(i).

A standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect. *See Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) (“regulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section”) (internal quotation marks and citation omitted). Section 147(a)(1)(i) “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 injuries to employees.” 29 C.F.R. § 1910.147(a)(1)(i) (emphasis added). The standard “applies to the control of energy during servicing and/or maintenance of machines and equipment.” *Id.* § 1910.147(a)(2). According to § 1910.147(b), “servicing and/or maintenance” specifically includes, among other activities, cleaning of machines. *Id.* § 1910.147(b). [Redacted] was engaged in an activity specifically covered by the LOTO standard: drying the machine, which is part of cleaning. (Tr. 379).

The Preamble⁹ of the LOTO standard notes “lockout or tagout is not required by this standard if the employer can demonstrate that [an] alternative means enables the servicing employee to clean or unjam or otherwise service the machine without being exposed to unexpected energization or activation of the equipment or release of stored energy.” Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644-01, 36646-47 (Sept. 1, 1989) (to be codified at 29 C.F.R pt. 1910). “Alternative means” includes “special tools and/or alternative procedures which keep the employee’s body out of the areas of potential contact with machine

⁹ The Preamble is the best and most authoritative statement of the Secretary’s legislative intent for a standard susceptible to different interpretations. *Am. Sterilizer Co.*, No. 86-1179, 1992 WL 23177, at *3 (OSHRC, Jan. 22, 1992).

components, or which otherwise maintain effective guarding.” *Id.*

PSSI had written LOTO procedures for de-energizing the lower conveyors of its machines (Ex. J-6); however, as discussed below, there is a dispute as to whether it applied to the MAP2 bread line conveyor at issue. PSSI contends this LOTO procedure does apply to the MAP2 bread line conveyor. Resp’t Br. 5. Assuming PSSI’s written policy does apply to the MAP2 bread line conveyor, which the Court at this point does not find, it is evidence PSSI recognized the LOTO standards apply to the MAP2 bread line conveyor.

In addition to PSSI having LOTO policies which it contends govern the MAP2 bread line conveyor, there is testimony that PSSI supervisors actually locked out the bread line conveyor at various steps in the sanitation process. (Tr. 140-41). This action constitutes a further acknowledgment by PSSI of the applicability of the LOTO regulations to the MAP2 bread line conveyor.

PSSI’s main argument, however, is the LOTO standard is inapplicable here because—under the particular circumstances of this case—[redacted] was aware the conveyor belt was running, so energization could not be “unexpected.” PSSI’s focus on [redacted] himself is misplaced because it superimposes the subjective awareness of an employee with the operation of the machine. An employee’s subjective awareness of whether a machine is energized does not control whether the LOTO standard applies. *See, e.g., Otis Elevator Co.*, No. 09-1278, 2013 WL 3998034, at *3 (OSHRC, Apr. 8, 2013) (holding the “applicability of the LOTO standard does not turn on whether or not [the activity] happened to proceed as the [employee] expected”), *aff’d*, 762 F.3d 116 (D.C. Cir. 2014); *Burkes Mech., Inc.*, No. 04-475, 2007 WL 2046814, at *5 (OSHRC, Jul. 12, 2007) (finding the standard applied to workers cleaning debris around and underneath a running conveyor); *Dayton Tire*, No. 94-1374, 2010 WL 3701876, at *7 (OSHRC, Sept. 10, 2010)

(rejecting the employer’s argument the energization of machines was not unexpected when the equipment was in an automatic mode during servicing), *aff’d in relevant part*, 671 F.3d 1249 (D.C. Cir. 2012). Rather, “a machine is subject to ‘unexpected energization’ where employees are endangered by a machine that can accidentally or inadvertently become energized *and* there is no warning mechanism to alert employees that the machine is about to start.” *Alro Steel Corp.*, No. 13-2115, 2015 WL 6685499, at *18 (OSHR CALJ, Sept. 25, 2015) (emphasis in original); *see* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36647 (“Further, even though the machine or equipment has been shut off, and even if residual energy has been dissipated, an accident can still occur if there is an inadvertent activation of that machine or equipment. Inadvertent activation can occur due to an error on the part of the employee who is conducting the maintenance or servicing activity, *or by any other person.*”) (emphasis added).

In addition, PSSI’s argument ignores the other two elements of the LOTO regulation on coverage. The regulation applies to any machine where the unexpected energizing, start up, or release of stored energy *could occur* and *could cause* injury. In other words, the regulation does not require there be actual start up, or actual unexpected energization, or actual release of stored energy for it to apply. The regulation’s Preamble supports its application to an event that could occur and cause injury. *Gen. Motors Corp.*, No. 91-2973, 1995 WL 247469, at *2 (OSHRC, Apr. 26, 1995) (consolidated), *aff’d*, 89 F.3d 313 (6th Cir. 1996).

The facts of this case demonstrate the MAP2 bread line conveyor is a machine that could unexpectedly start up, or could be unexpectedly energized, or could release stored energy that could cause injury. Specifically, it was common practice to dry the conveyor with an air hose while it was energized. The sanitor used a foot pedal to advance the conveyor belt while drying it with an air hose. PSSI required the foot pedal to remain on the floor. (Tr. 387). Thus, someone walking

by the MAP2 bread line conveyor could inadvertently step on the foot pedal, causing the conveyor to start up without warning. *See Anthony Marano Co.*, OSHRC Docket No. 19-0622 (OSHR CALJ, Dec. 20, 2021) (holding the conveyor at issue could be turned on without warning to the employee responsible for cleaning it, thus resulting in unexpected energization), *directed for review*, OSHRC Docket No. 19-0622 (Feb. 10, 2022). This risk of unexpected and inadvertent start up is even more probable if the foot pedal, which is black, was resting on a black rubber mat, as described by the CSHO and depicted in a photograph taken at the site. (*Compare* Exhibit J-3 (photograph of foot pedal on black mat), *with* Exhibit J-1 (photograph of foot pedal on gray concrete)).

There was no warning if the pedal was pressed and the conveyor started up. As a result, a sanitation worker—who might be in close proximity to the conveyor—could be injured if the foot pedal was inadvertently pressed and the conveyor moved. This is one of the scenarios the LOTO standard was intended to prevent. *See Control of Hazardous Energy Sources (Lockout/Tagout)*, 54 Fed. Reg. at 36648 (“The generally accepted best means to minimize the potential for inadvertent activation is to ensure that all power to the machine or equipment is isolated, locked or blocked and dissipated at points of control . . .”).

Moreover, PSSI required its employees to place their bodies into an area where an associated danger zone existed. *See* 29 C.F.R. § 1910.147(a)(2)(ii)(B). Specifically, PSSI’s standard procedure allowed workers to dry the running conveyor at a distance of six inches from energized equipment, including a pinch point where the upper and lower conveyors converged. And, sanitors wore long-sleeved frocks (personal protective equipment) which could—and did—get caught in the moving parts of the conveyor belt. (Tr. 288, 309-10).

The use of an air hose to dry the conveyor does not render the standard inapplicable because the hose itself could pose a hazard to the sanitor. *See Control of Hazardous Energy Sources*

(Lockout/Tagout), 54 Fed. Reg. at 36647 (“The use of extension tools or devices to permit the operator to stay outside these danger areas, while of some benefit in reducing direct employee exposure to the hazards of entanglement or entrapment, can, in itself, result in injuries to employees. This can occur, for example, when an employee is struck by the tools or devices that inadvertently come in contact with moving machine components, and are pulled from the employee’s grasp.”). And, in fact, the air hose did not permit [redacted] to remain outside the zone of danger. He was injured while using the air hose when his sleeve got pulled into the conveyor. The Court finds the alternative methods implemented by PSSI do not meet the requirements of the Preamble or the regulation to render the cited regulation inapplicable.

Lastly, the fact that the MAP2 bread line conveyor had a single source of energy, i.e., electricity via an electrical plug (Ex. J-6; Tr. 214-15), does not relieve PSSI of its duty under the regulation. Specifically, the regulation contains an exemption from coverage for single source energy machines if the electrical plug is pulled from the electrical outlet and the employee maintains control over the electrical plug. 29 C.F.R. § 1910.147(a)(2)(iii)(A). The employer bears the burden of demonstrating, by preponderance of the evidence, that it complied with the exception. *See Westvaco Corp.*, No. 90-1341, 1993 WL 369040, at *3 (OSHRC, Sept. 14, 1993) (“The party claiming the benefit of an exception bears the burden of proving that it comes within that exception.”).

Here, PSSI presented no evidence [redacted] had unplugged the bread line conveyor or had control over the plug, thus falling beyond the reach of the exemption. *See Tops Markets, Inc.*, No. 94-2527, 1995 WL 542443, at *4 (OSHR CALJ, Sept. 8, 1995) (holding that without exclusive control of the plug, the work cannot be exempt under the LOTO standard because another employee might accidentally replace the plug and energize the equipment), *aff’d*, 1997 WL 93943

(OSHRC, Mar. 3, 1997), *aff'd*, 132 F.3d 1483 (D.C. Cir. 1997) (table). Rather, the evidence is to the contrary.

For the reasons stated above, the Court finds the MAP2 bread line conveyor is a machine which falls within the parameters of 29 C.F.R. § 1910.147(a)(1)(i). Therefore, the Secretary has carried her burden the cited regulation applies.

ii. The Standard was Violated.

The next element of the Secretary's *prima facie* case is the determination of whether PSSI violated the cited regulation. The Secretary alleges PSSI violated § 1910.147(d) because it "failed to implement energy control application steps as the machine was not shut down or turned off to perform the servicing work [per the 1910.147(d)(2) requirements]." (Citation at 6) (bracketed language in original). The Secretary further alleges, as a result, the remaining applicable energy control elements involving machine isolation, LOTO device application, dissipation of residual energy, and verification of isolation were not implemented. *Id.*

During the trial, the CSHO testified three different times that the Lower Conveyor LOTO Procedures did not apply to the MAP2 bread line conveyor and that it applied to a different machine. (Tr. 170, 217, 220). This testimony would be consistent with the machines in the Facility. The Facility had four fully automated lines and one semi-automated line. (Tr. 245). It is not clear from the testimony; however, the existence of two types of machines would logically require a different LOTO policy. And it could be the Flat Lower Conveyor LOTO Procedure applied to either the automated lines or to the semi-automatic line but not both. Neither party addressed this important and relevant discrepancy in their post-trial briefs and the Secretary ignored the consistent testimony of her own witness. The Court finds it necessary to address this issue since the regulation

requires a LOTO policy to be in place that is applicable to the MAP2 bread line conveyor. And, it is against this LOTO policy PSSI's compliance with the regulation is measured.

As previously referenced, PSSI had three documents which set forth its LOTO requirements. PSSI's Safety Handbook contained general sanitation and safety guidelines, including general LOTO procedures. (*See* Ex. J-7). PSSI required employees cleaning a piece of equipment or machinery to follow PSSI's LOTO procedures. The Safety Handbook defined LOTO as "a procedure to render equipment totally inoperative and apply a lockout device to ensure the power remains off," and it required an employee working less than an arm's length from an operational pinch point to use LOTO. However, the Safety Handbook did not contain the step-by-step procedure an employee would use to lock out the MAP2 bread line conveyor.

Second, PSSI had a Cleaning Procedures Manual that was specifically created for the Facility at issue. (Ex. C-12). The Cleaning Procedures Manual included detailed task descriptions for cleaning and sanitizing a lower bread line conveyor. Those procedures included language that the PSSI employee had to lock out electrical, hydraulic, pneumatic, and any other source of power at the source prior to starting sanitation "when required." (Ex. J-5 at PSSI0152). Drying procedures for conveyors were not included in the Cleaning Procedures Manual, but PSSI's policy was to dry conveyors using a handheld air hose while the conveyor belt was running or hand-dry the conveyor with paper towels while the conveyor belt was locked out. If a sanitor had to cross the plane of the conveyor's operation, PSSI expected the worker to lock out the machine. So, while the Cleaning Procedures Manual again required LOTO in some instances, it did not contain specific step-by-step procedures to lock out the MAP2 bread line conveyor.

PSSI does not contend the Safety Handbook or the Cleaning Procedures Manual contained the step-by-step instructions to lock out the MAP2 bread line conveyor required to comply with

29 C.F.R. § 1910.147(d). Instead, PSSI contends the written LOTO procedures for a “Flat Lower Conveyor” in the “North Sandwich” area on the “Bread Line” applied. However, the CSHO testified machine-specific procedures for the MAP2 bread line conveyor “did not exist” at the time of the incident. Lowe testified the Lower Conveyor LOTO Procedures were the machine-specific lockout procedures for a lower conveyor, but he never confirmed they applied to the MAP2 bread line conveyor. (Tr. 469-70). Instead, the LOTO procedures Lowe referenced are specifically for a “Flat Lower Conveyor” in the “North Sandwich” area on the “Bread Line.” (Ex. J-6; Tr. 113-14). Lowe’s testimony does not affirmatively testify the MAP2 Bread Conveyor was considered a Lower Flat Conveyor for its procedure to cover the MAP2 Bread Conveyor. The CSHO testified these procedures applied to a different conveyor belt and not the MAP2 bread line conveyor. (Tr. 170, 217, 220) This testimony is consistent with the two types of machines located in the Facility.

The LOTO procedures for the Flat Lower Conveyor in the North Sandwich area are set forth below:

DE-Energization Procedure

1. Notify the affected employees that the energy control procedure is being applied
2. Identification – Energy Source Listed in column 2¹⁰
3. Shut down the machine by normal stopping procedure by: Turn Switch to Off¹¹
4. Disconnect energy source
5. Apply Lockout device: Lock, tag and Hasp¹²
6. Dissipate Stored or Residual Energy by: Attempt to run

¹⁰ The energy source is listed at the bottom of the page as “Electric” located at the “Local Disconnect Switch.” (Ex. J-6).

¹¹ This step had seven blank boxes that could be marked with an “X” for the particular action to be taken. An “X” marked the box next to “Turn Switch to Off.” (Ex. J-6). Other options included: Push Button to Stop; Flip Switch to Off; Move Handle to Off; Shut Valve Off; Unplug Machine; and Other. (Ex. J-6).

¹² This step had four blank boxes that could be marked with an “X” for the particular action to be taken. An “X” marked the box next to “Lock, tag and Hasp.” (Ex. J-6). Other options that were not marked included: Ball valve Lockout device; Gate Valve Cover; and Barrel or plug lockout device. (Ex. J-6).

7. Verification
8. Utilize administrative controls (if necessary)

(Ex. J-6).

The LOTO regulation requires specificity. General procedures for lockout/tagout are not acceptable. *Drexel Chem. Co.*, No. 94-1469, 1997 WL 93945, at *5 (OSHRC, Mar. 3, 1997). The standard, by its terms, does not require an employer to identify each specific piece of equipment requiring lockout procedures. The Preamble to the standard clarifies the requirement that a plan provide detailed instructions does not require an employer to identify each machine. 54 Fed. Reg. 36,644, 36,670 (1989). The employer's procedures can apply to a group of similar machines, types of energy, or tasks if a single procedure can address the hazards and the steps to be taken satisfactorily. *Id.*; see also *Drexel Chemical Co.*, 1997 WL 93945, at *6 ("Because the standard requires the lockout procedures for each type of machine to be specifically defined, and because there are different types of machines at the plant, Drexel must have more than one lockout procedure.").

The challenge for the Court is which version of the testimony is credible: that of CSHO Marin or that of Lowe. No specific LOTO procedure specifically identifying the MAP2 bread line conveyor was produced at trial. But, as stated above, that specificity is not necessary. Nevertheless, although PSSI's position is the Lower Conveyor LOTO Procedures were the machine-specific lockout procedures for the MAP2 bread line conveyor, there was no testimony expressly confirming that. In contrast, CSHO Marin was consistent in her assessment the Lower Conveyor LOTO Procedures did not apply to the MAP2 bread line conveyor but rather applied to other lower conveyor machines in the area. Accordingly, PSSI should have rebutted the CSHO's testimony when it had the opportunity to do so. Yet, PSSI never presented testimony the MAP2 bread line conveyor was a "Flat Lower Conveyor" in the "North Sandwich" area on the "Bread Line;" that

the flat lower conveyors were similar machines, or had the same types of energy and power source; or that a single procedure could address the hazards and the steps to be taken satisfactorily in regards to all lower conveyor machines, which included the MAP2 bread line conveyor. *See* 54 Fed. Reg. 36,644, 36,670 (1989); *see also Drexel Chem. Co.*, 1997 WL 93945, at *6 (“Drexel did not introduce evidence to support its claim that all of its machines and equipment met the elements of the exception.”). Without this testimony, the Court cannot find the Lower Conveyor LOTO Procedures covered the MAP2 bread line conveyor at issue in this case. The Court credits the testimony of the CSHO that the Lower Conveyor LOTO Procedures did not cover the MAP2 bread line conveyor.

However, notably, both Parties in their post-trial briefs focused their arguments on the Lower Conveyor LOTO Policy and whether it was followed by PSSI. Such agreement by the Parties on a core issue of fact may allow the Court to determine that both parties had fair notice and consented to applying the Lower Conveyor LOTO Policy to the MAP2 bread line conveyor. This does not require an amendment to the Citation or Complaint. Rather, the Court can rely on Federal Rule of Civil Procedure 15(b) (Rule 15) by analogy.¹³

Rule 15(b)(2), which governs amendments to pleadings during and after trial, provides “issues litigated by express or implied consent are treated in all respects as if they had been raised in the pleadings...” *Nat’l Bus. Forms & Printing, Inc. v. Ford Motor Co.*, 671 F.3d 526, 538 (5th Cir. 2012) (citing Fed. R. Civ. P. 15(b)(2)). “As long as fair notice is afforded, an issue litigated at

¹³ The Court recognizes Rule 15(b) is used to amend pleadings to comport to the evidence. In this case, the Citation, Complaint and Answer were not, and need not, be amended. The Court is utilizing Rule 15(b) as an example of the Court’s authority to recognize a fact recognized by both parties which was not established as fact by the evidence. In the alternative, since both Parties were in agreement on this point, the Court can also view their arguments in applying the Lower Conveyor LOTO Procedures as a stipulation of the Parties as to its applicability to the MAP2 bread line conveyor.

the hearing may be decided by the judge even if the issue is not explicitly raised in the pleadings.” *Nat’l Realty & Constr. Co. v. Occupational Safety & Health Review Comm’n*, 489 F.2d 1257, 1264 (D.C. Cir. 1973). An amendment under Rule 15(b)(2) “is proper only if two findings can be made—that the parties tried an unpleaded issue and that they consented to do so.” *McWilliams Forge Co.*, No. 80-5868, 1984 WL 908440, at *2 (OSHRC, July 20, 1984).

Following Rule 15(b), the Court finds both parties had fair notice and consented to applying the Lower Conveyor LOTO Policy to the MAP2 bread line conveyor. Determining whether the Lower Conveyor LOTO Policy is sufficient is a fact-specific inquiry that focuses on “the complexity of the equipment and the control measures to be utilized.” *General Motors Corp.*, No. 91-2834E, 2007 WL 4350896, at *7 (OSHRC, Sept. 23, 2019) (citing Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36,644, 36,670 (Sept. 1, 1989) (final rule).

CSHO Marin admitted at trial that, if followed, the steps listed in the Lower Conveyor Procedures would generally be effective to lock out the MAP2 bread line conveyor. The actions were listed in the order they need to be performed to be effectively locked out. And, those steps were in line with the regulation: prepare and inform surrounding employees, shut down the machine, isolate the energy, apply the device, dissipate residual energy and then verification. (Tr. 131). Accordingly, the Court finds the Lower Conveyor LOTO Procedures follow the sequence required by the regulation.

However, the Secretary alleged the issue was not the written sequence itself. Instead, she alleged that PSSI violated § 1910.147(d) because it “failed to *implement* energy control application steps as the machine was not shut down or turned off to perform the servicing work [per the 1910.147(d)(2) requirements].” (Citation at 6) (bracketed language in original) (emphasis added). The Secretary has met her burden to prove a violation of the regulation. CSHO Marin testified the

lockout device was not applied,¹⁴ and the machine's energy was not isolated. This is undisputed by PSSI. (*See* J. Stip. 14). Therefore, the steps outlined by the regulation were not accomplished.

The failure to lock out a machine while it was being dried did not necessarily violate PSSI's work rules. Although PSSI had a written LOTO policy with step-by-step instructions for de-energizing the MAP2 bread line conveyor, it had work rules in place that allowed sanitors to work near running equipment as long as they "maintain[ed] a safe distance (minimum arm's length)." In fact, PSSI's cleaning procedures for conveyors required the conveyors to be running at certain stages of cleaning. And, it was common practice for sanitors to dry the MAP2 bread line conveyor with an air hose while it was running.

"The Commission has consistently held that an employer's work rules must simply reflect[] the requirements of the cited standard." *MasTec N. Am., Inc.*, No. 15-1574, 2021 WL 2311875, at *5 (OSHRC, Mar. 2, 2021) (citations omitted). "The obligation to develop, document and utilize LOTO procedures only arises when employees are engaged in the activities covered by the LOTO standard." *AJM Packaging Corp.*, No. 16-1865, 2022 WL 1102423, at *6 (OSHRC, Apr. 1, 2022) (internal citation and quotation marks omitted). As discussed, the provisions of the cited standard applied to the MAP2 bread line conveyor because it could start up unexpectedly, placing an employee at risk of physical harm. PSSI failed to require its workers to lock out the conveyor, in accordance with its own Lower Conveyor LOTO Procedures. Instead, PSSI allowed its sanitors to dry the MAP2 bread line conveyor while it was energized and the sanitor was in close physical

¹⁴ LOTO, under the facts of this case, would have been required. PSSI policies, as discussed above, would have required it because [redacted] broke the plane of operation. He did not maintain an "arm's length" distance from a pinch point. [Redacted] was using an air hose at the time of the incident. For his shirt to have come into contact with the machine's pinch point, both the air hose and his hand position on the hose would have been closer to the pinch point than an "arm's length" distance. If the air hose or his hand placement on the hose was at an "arm's length" distance, his shirt could not have close enough to be pulled into the pinch point of the machine.

proximity to the conveyor's moving components. This violated the cited standard. More specifically, PSSI failed to ensure sanitors isolated the conveyor, applied a LOTO device, dissipated residual energy, and verified isolation. *See* 29 C.F.R. § 1910.147(d). During her inspection, the CSHO observed a PSSI employee at the MAP2 bread line conveyor, in a couched position and underneath the belt system, drying the conveyor. (Tr. 54). She testified the conveyor was isolated, a LOTO device was applied, residual energy was dissipated, and isolation was verified; i.e. the conveyor had been locked out. (Tr. 82-85). This demonstrated the Lower Conveyor LOTO Procedures were both feasible and effective during the machine's operation.

As discussed above, PSSI trained its employees that they should stay away six inches from a pinch point. A "pinch point" was defined in PSSI's Safety Handbook. The Safety Handbook also defined what "breaking the plane of operation" meant, and that it required LOTO. Specifically, the Safety Handbook required LOTO "anytime machine guarding is removed, or a team member is working within arm's length of an operational pinch point," or "anytime a team member must cross the plane of operation or put any part of his/her body past the point of operation." (Ex. J-7 at PSSI0053).

Notably, there is a conflict between the Safety Handbook's requirement to stay at least an arm's length away from a pinch point and how employees were trained to stay six inches away from a running machine. (*Compare* Ex. J-7 at PSSI0053 *with* Tr. 344, 363-64). With such a conflict, there can be no clear rule or understanding by employees when the LOTO steps discussed above should be implemented. This conflict may have resulted in confusion by [redacted] as to when to apply a LOTO device, to dissipate residual energy, and verify isolation – steps required by the cited regulation, in that order. The Secretary has carried her burden the cited regulation was violated.

iii. Employees were Exposed to a Hazard.

Establishing whether there is a risk of injury is an aspect of the Court's analysis of whether the standard applies 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 the hazardous energy "could cause injury to employees"); *see also* Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. at 36666 ("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"). Nevertheless, "[t]he Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Prods., Inc.*, No. 93-1853, 1997 WL 694096, at *2 (OSHRC, Nov. 7, 1997) (citations and footnotes omitted). The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Refin., Ltd.*, No. 08-1386, 2015 WL 1957889, at *11 (OSHRC, Apr. 23, 2015), *rev'd in part on other grounds*, 845 F.3d 179 (5th Cir. 2016). The zone of danger is the "area surrounding the violative condition that presents the danger to employees" *RGM Constr. Co.*, No. 91-2107, 1995 WL 242609, at *5 (OSHRC, Apr. 24, 1995); *Boh Bros. Constr. Co., LLC*, No. 09-1072, 2013 WL 949386, at *18 (OSHR CALJ, Mar. 4, 2013)

The MAP2 bread line conveyor had a pinch point at the exit end, where sprockets rotated on a bar and engaged the conveyor belt to make it move. (Tr. 253; Ex. J-1). PSSI allowed sanitors to get as close as six inches to the energized conveyor belt. These conditions and policies exposed employees to a caught-in or crushing hazard. *N. Landing Line Constr. Co.*, No. 96-721, 2001 WL 826759, at *8 (OSHRC, July 20, 2001) ("[M]inimal upward movement, inadvertent or otherwise,

would have placed some part of [the employee's] body closer than 28 inches from the energized parts.”). And, a PSSI sanitor was actually injured when his sleeve got caught in the sprockets of the conveyor and pulled in as the employee broke the plane of operation and placed himself in the zone of danger. *See S & G Packaging, Co., LLC*, No. 98-1107, 2001 WL 881250, at *3 (OSHRC, Aug. 2, 2001) (injuries establish actual exposure to the violative condition). Accordingly, this Court finds PSSI exposed its employees to a hazardous condition. The Secretary has established employee exposure.

iv. PSSI Had Knowledge.

Finally, the Court turns to the element of knowledge. “In order to establish knowledge, the Secretary must show that [the employer] knew of, or with the exercise of reasonable diligence could have known, of the noncomplying condition.” *Precision Concrete Constr.*, No. 99-0707, 2001 WL 422968, at *4 (OSHRC, Apr. 25, 2001). In the absence of actual knowledge, “[c]onstructive knowledge is established where the evidence shows that the employer could have known about the cited condition with the exercise of reasonable diligence.” *Greenleaf Motor Express, Inc.*, No. 03-1305, 2007 WL 962961 at *3 (OSHRC, Jan. 29, 2007).

PSSI knew it had a written LOTO policy with step-by-step instructions for de-energizing the MAP2 bread line conveyor. PSSI required employees to lock out a machine if their action would break the plane of operation. PSSI’s Vice President of Safety designed the template with those instructions. (Tr. 426-27; Ex. J-6). In his role as Vice President of Safety, he would have been aware of the conflict between what PSSI policies required in terms of safe distance and how the employees were trained contra to those policies. As a result, PSSI supervisors would actually know by the way the employees were being trained, i.e. employees could work within six inches of a pitch point, that such permission automatically violated PSSI’s plane of operation rule, which

required at least an “arm’s length distance from a pinch point” and therefore LOTO would be required. (Ex. J-7 at PSSI0053).

Additionally, as discussed above, PSSI’s supervisors had a consistent presence on the floor of the Facility, and both of [redacted]’s supervisors were in the Facility on the night of the accident. The CSHO testified that one of the employees she interviewed told her that [redacted] had wedged the foot pedal into the side of the conveyor. (Tr. 158, 215). For that employee to know this, the wedged foot pedal would have to have been in plain sight. [Redacted] crouched under the lower conveyor and using an air hose would also have been in plain sight. Supervisors would have been in a position to observe that [redacted] had broken the plane of operation. The running conveyor would also have been open and obvious, and the conveyor running continuously would not occur unless the foot pedal was constantly depressed. (Tr. 154). The running machine should have prompted the supervisor to investigate why the conveyor was running continuously, which included locating the foot pedal. The evidence shows PSSI supervisors could have known about [redacted]’s activities, which violated the regulation and PSSI’s own policies, with the exercise of reasonable care and diligence. *See KS Energy Servs., Inc.*, No. 06-1416, 2008 WL 2846151, at *7 (OSHRC, July 14, 2008) (finding employer could have known, with the exercise of reasonable diligence, of the violative condition that was in plain view).

Accordingly, the Court concludes the Secretary established PSSI had both actual and constructive knowledge. The Secretary has proven all elements of her *prima facie* case.

c. Affirmative Defense: Unpreventable Employee Misconduct.

PSSI argues any violation of the LOTO standard was the result of unpreventable employee misconduct (UEM). Specifically, PSSI argues [redacted] violated PSSI’s safety rule that required him to advance the conveyor by depressing the foot pedal with this foot rather than wedging it in

the machine as he did. PSSI also contends [redacted] violated PSSI's safety rule of maintaining a safe distance from the moving conveyor belt. Lastly, PSSI claims [redacted] violated PSSI's safety rule when he crossed the conveyor's plane of operation without locking out the conveyor.

In order to establish the affirmative defense of UEM, an employer is required to prove that it: (1) has established work rules designed to prevent the violation, (2) has adequately communicated these rules to its employees, (3) has taken steps to discover violations, and (4) has effectively enforced the rules when violations are discovered. *Precast Servs., Inc.*, No. 93-2971, 1995 WL 693954, at *1 (OSHRC, Nov. 14, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). PSSI carries the burden of proof for an affirmative defense, and the standard is preponderance of the evidence. *Hamilton Fixture*, No. 88-1720, 1993 WL 127949, at *10 (OSHRC, Apr. 20, 1993) *aff'd*, 28 F.3d 1213 (6th Cir. 1994).

For a UEM defense, PSSI must establish it took diligent efforts to "discover and discourage violations of safety rules." *Propellex Corp.*, No. 96-0265, 1999 WL 183564, at *6 (OSHRC, Mar. 30, 1999). PSSI had audit, inspection, and walk-around procedures (Audits) in place to detect violations of work rules. Those procedures, set below in the following paragraph, apply to each of the work rules PSSI claims [redacted] violated. However, the Court will address whether those procedures were effective in identifying the specific work rule violation as it related to the three work rules PSSI has alleged [redacted] violated.

Lowe testified that PSSI's technical services teams were "boots on the ground," conducting quarterly audits at PSSI's facilities. (Tr. 394-96). Those audits had food safety and employee safety components, including a review of lockout procedures and hazard assessments. (Tr. 395). The audits also "look[ed] for behaviors." (Tr. 395). The technical services teams would note if a facility had a high number of violations during their walk-throughs and would correct the issue with

management staff. (Tr. 439). In addition to the technical services team audits, PSSI division managers made re-occurring visits to PSSI facilities to conduct safety audits. (Tr. 409). And, supervisors walked the floor of PSSI facilities daily looking for safety rules violations. (Tr. 438). If a supervisor observed a violation, he had to stop, intervene, and take action, which included coaching or disciplining the employee or—for more serious hazards—initiating an investigation. (Tr. 438).

The Court will now address the merits of PSSI's UEM claim as to each purported rule violation.

i. Foot Pedal Rule

PSSI claims it had a rule requiring employees to operate the foot pedal only while it was on the floor, which was verbally communicated to employees. (Tr. 341, 387); *see GEM Indus.*, No. 93-1122, 1996 WL 710982, at *6 n.5 (OSHRC, Dec. 6, 1996) (noting that under Commission precedent, safety rule need not be written as long as it is clearly and effectively communicated), *aff'd*, 149 F.3d 1183 (6th Cir. 1998). The Court finds PSSI had a foot pedal work rule.

Sevilla testified he reminded his employees about the rule every two weeks. (Tr. 345, 346, 361, 364). The frequency of this communication is deemed effective.

PSSI management implemented procedures to audit performance with work rules, as discussed above. Effectively performing these Audits would have detected if employees were misusing the foot pedals, so Seville and Herrera would not need to rely on whether they had ever heard of anyone picking up the foot pedal or wedging it into the machine. (Tr. 345, 361, 364). If Sevilla and Herrera specifically looked at how foot pedals were used by sanitors, the Court assumes they would have testified to that at trial. And, while PSSI had Audit procedures in place, PSSI

offered no testimony that individuals performing those Audits were actually looking for violations of the foot pedal rule.

The above seemingly contradictory testimony and lack of affirmative testimony makes the existence of an effective audit program in place as to the foot pedal rule questionable at best. There is no evidence that supervisors monitored employees for compliance of this work rule. Based on the above, the absence of any evidence PSSI management monitored employees for compliance with the foot pedal work rule, or evidence that Audits discovered violations, the Court draws the reasonable inference that PSSI Audits failed to discover and discourage work rule violations. *North Landing Line Constr. Co.*, No. 96-721, 2001 WL 826759, at *5 (OSHRC, July 20, 2001) (reasonable inferences can be drawn from circumstantial evidence). In other words, PSSI did not establish its Audit program was effective.

PSSI also presented no credible evidence it enforced rules violations by following its disciplinary policy except for the discipline of [redacted]. The discrepancy in the record for the reason [redacted] was fired highlights this issue. According to Lowe, [redacted] was fired for crossing the plane of operation without locking out the conveyor. Sevilla, however, believed [redacted] was fired for wedging the foot pedal in the conveyor to keep it running. This demonstrates a lack of effective enforcement of PSSI rules. And, the absence of any additional evidence that PSSI management enforced its disciplinary policy, except in this one instance, is sufficient evidence from which to reasonably infer PSSI failed to do so. *Id.*

On a final note, it is irrelevant that [redacted] jammed the foot pedal while drying the MAP2 bread line conveyor. Under the facts of this case and the applicable standard, the conveyor should have been de-energized during drying because [redacted] broke the plane of operation. This should have triggered LOTO procedures, negating [redacted]'s subsequent misconduct. In short,

the violation was caused by the failure to follow the LOTO procedure, not the act of jamming the foot pedal into the side of the machine. *See TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at *4 (OSHRC, June 2, 2022) (“To prove a UEM defense, the employer must establish it had a work rule that effectively implemented the requirements of the standard.”), *aff’d*, 74 F.4th 347 (5th Cir. 2023). As such, it cannot serve as the basis of the UEM defense. *See Johnson Brass & Machine Foundry, Inc.*, No. 21-1294, 2024 WL 5206740, at *19 (OSHR CALJ, Nov. 15, 2024) (“JBM’s established procedures entail employees violating the cited standard as a matter of course, and so the [unpreventable employee misconduct] defense is not established.”) (citing *TNT Crane & Rigging*, 2022 WL 2102910, at *4).

The Court rules even if PSSI could advance the foot pedal work rule as the basis for its UEM defense, it failed to prove it had an effective Audit program to detect work rule violations and it did not discipline employees for violations of work rules.

ii. “Arm’s Length” Rule

The “arm’s length” rule was contained in PSSI’s Safety Handbook and required employees to “maintain a safe distance (Minimum arm’s length) when working around running equipment.” (Ex. J-7 at PSSI0053). However, there was a competing unwritten work rule that sanitors could be as close as six inches to running machinery. The Court finds there can be no effective safety program or work rule where the written safety rules differ from the instructions given by supervisors regarding the distance an employee must maintain from running equipment.

A discrepancy between a written work rule and verbal instructions is evidence of ineffective communication of work rules to employees. *See J. K. Butler Builders, Inc.*, 1977 WL 35868, at *2 (finding no UEM where respondent’s rule conflicted with the direction given by the foreman, and the employees were complying with the foreman’s instructions); *cf. Thomas Indus.*

Coatings, No. 06-1542, 2012 WL 1777086, at *6 (Feb. 28, 2012) (finding fall protection work rules were adequately communicated based on evidence showing how company trained employees).

Although PSSI had a robust safety and audit program, as discussed above, the Court finds there can be no effective audit where written rules are contradicted by training. In other words, what should the individuals doing the auditing be looking for – an employee breaking the plane of operation by not keeping an arm’s length distance or an employee working less than six inches from the pinch point? This is important, since the answer would determine when the employee needed to implement LOTO, and, if the LOTO procedure was not followed, at what point was the employee violating PSSI’s rules and the cited regulation. The Court finds PSSI’s audit program was defective due to the contradiction discussed above.

There was also no credible evidence presented that PSSI enforced rules violations by following its disciplinary policy. The absence of any evidence that PSSI management enforced its disciplinary policy for rules violations is sufficient evidence from which to reasonably infer PSSI failed to do so. *North Landing Line Constr. Co.*, 2001 WL 826759, at *5 (reasonable inferences can be drawn from circumstantial evidence).

iii. The Rule Against Crossing the Plane of Operation

This defense is closely related to the prior “arm’s length” rule defense. The Court incorporates its discussion of that work rule here, as the two are interrelated. PSSI had a written rule prohibiting employees from crossing a running machine’s plane of operation, defined as “[e]xposing any part of your body to the operating mechanics inside or within processing equipment.” (Ex. J-7 at PSSI0054). The written rule also prohibited “reaching . . . into the exterior

of any processing equipment or machinery.” However, for the same reasons the arm’s length was ineffective, the Court finds PSSI’s work rule against crossing the plane of operation ineffective.

PSSI’s written rule allowed an employee to maintain an arm’s length distance from a running machine, including operating mechanics inside or within equipment, as long as the employee did not cross the plane of operation. However, employees were trained that they could get as close as six inches to a running machine, which necessarily allowed employees to reach in close proximity (and exposing a part of their bodies) to the running machinery, including pinch points and the machine’s plane of operation. There can be no effective work rule when there are such contradictions.

A discrepancy between a written work rule and verbal instructions is evidence of ineffective communication of work rules to employees. *J. K. Butler Builders, Inc.*, 1977 WL 35868, at *2; *cf. Thomas Indus. Coatings*, No. 06-1542, 2012 WL 1777086, at *6 (Feb. 28, 2012) The conflicting rules necessarily result in ineffective communication of rules to employees. And, it resulted in an ineffective Audit program.

Lastly, as stated previously, there was no credible evidence that PSSI enforced rules violations by following its disciplinary policy. Even the reason for [redacted]’s termination was inconsistent among corporate management and [redacted]’s own supervisor. The absence of any additional evidence PSSI management enforced work rule violation discipline, except in this one instance, pursuant to its disciplinary policy is sufficient evidence from which to reasonably infer PSSI failed to do so. *North Landing Line Constr. Co.*, 2001 WL 826759, at *5 (reasonable inferences can be drawn from circumstantial evidence).

In conclusion, PSSI failed to carry its burden to prove the UEM affirmative defense under any of its theories by a preponderance of the evidence. *Kerns Bros. Tree Serv.*, No. 96-1719, 2000 WL 294514, at *8 n.6 (OSHRC, Mar. 16, 2000).

d. Characterization.

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result” from the violation. “This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur.” *Conagra Flour Milling Co.*, No. 88-2572, 1992 WL 215113, at *7 (OSHRC, Aug. 18, 1992). Here, the consequences of being pulled into running equipment that is not locked out could be very serious. *See, e.g., Burkes Mech., Inc.*, 2007 WL 2046814, at *7 (“The accident that occurred as a result of BMI's failure to lockout the conveyor demonstrates the seriousness of this violation.”); *see also J-Lenco, Inc.*, No. 01-0712, 2002 WL 1546566, at *8 (OSHR CALJ, July 1, 2002) (affirming serious citation where “the failure to have specific procedural LOTO steps could have resulted in serious physical harm, such as broken bones or crushing injuries”).

The Court AFFIRMS Citation 1, Item 1, as a Serious violation.

VI. PENALTY.

Section 17(j) of the Act requires the Commission to give “due consideration” to four criteria when assessing penalties: (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer’s prior history of violations. 29 U.S.C. §666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the

likelihood of an actual injury. *J. A. Jones Constr. Co.*, No. 87-2059, 1993 WL 61950, at *15 (OSHRC, Feb. 19, 1993).

The severity of the violation was determined to be high because there was a potential for a worker to suffer great harm or death. (Tr. 134; Ex. R-7). The probability was found to be greater because employees were regularly conducting tasks in personal protective equipment (causing a greater risk of getting pulled into machinery) throughout the entire shift in proximity to the zone of danger. (Tr. 134; Ex. R-7). Accordingly, the gravity was deemed high. (Ex. R-7). There was no reduction for history because CSHO Marin discovered PSSI had prior violations involving LOTO. (Tr. 135). There was no reduction for size because PSSI was a large company, and there was no reduction for good faith because CSHO Marin found obtaining documents from PSSI and working with the company “very, very difficult.” (Tr. 136-37; Ex. C-4 (Safety Narrative)). PSSI does not address or rebut the CSHO’s testimony as to penalty. Therefore, the Court gives controlling weight to the testimony of the Secretary relating to the penalty factors.

Taking all of these factors into consideration, the Court will assess a penalty of \$15,625.00.

ORDER

The foregoing decision constitutes the Court's Findings of Fact and Conclusions of Law in accordance with Commission Rule 90(a), 29 C.F.R. § 2200.90(a). Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1910.147(d), is AFFIRMED, and a penalty of \$15,625.00 is assessed.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Date: July 21, 2025
Denver, Colorado