BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	**DOCKET NOS.:** **OSHANC: 2023-6575** **OSHANC: 2023-6590**
COMPLAINANT,	)	
v.	)	**INSPECTION NUMBERS:** **318264546**
TEIJIN AUTOMOTIVE TECHNOLOGIES NORTH CAROLINA INC. ***and its successors***	)	**318264892**
RESPONDENT.	)	**CSHO IDS: N4078 P1901**

FILED

JUN 23 2025

NC OSH Review Commission

DECISION AND FINAL ORDER

THIS MATTER was duly noticed and came on for hearing before the undersigned on January 7, 8, 9, 10, 2025, via the Lifesize video platform. The Complainant, Commissioner of Labor of the State of North Carolina ("Complainant"), was represented by Ms. Stacey A. Phipps, Special Deputy Attorney General and Ms. Monique D. Nketah, Assistant Attorney General, N.C. Department of Justice. Respondent Teijin Automotive Technologies North Carolina, Inc. was represented by Mr. Curtis G. Moore and Mr. Lawrence D. Hilton, Fisher & Phillips LLP.

PROCEDURAL HISTORY

On August 1, 2023 Complainant issued one Serious citation with four items (Items 001, 002, 003a and 003b) based on Inspection No. 318264546. On September 14, 2023 Complainant issued one Non-Serious citation with five items (Item 001, 002, 003, 004a and 004b) based on Inspection No. 318264892. Respondent timely submitted a Notice of Contest for the citations and requested formal pleadings in both matters. The matters were separately docketed as NC OSH Docket No. 2023-6575 (Inspection No. 318264546) and NC OSH Docket No. 2023-6590 (Inspection No. 318264892). The Complaints were filed on November 7, 2023 (No. 2023-6575) and November 29, 2023 (No. 2023-6590). Answers were filed on November 27, 2023 (2023-6575) and December 15, 2023 (No. 2023-6590).

Pursuant to Respondent's unopposed motion, the separate matters were consolidated for hearing. Following the January 7-10, 2025 enforcement hearing, the parties submitted post-hearing motions and briefs.

RESPONDENT'S MOTION TO DISMISS / MOTION FOR ADVERSE INFERENCE

Respondent filed a Motion to Dismiss Complainant's citations, or, in the alternative for an Adverse Inference. Respondent asks the Court to dismiss all citations due to the investigators' destruction of notes taken during the investigation. Both of the investigators spoke with Respondent's employees as they conducted their on-site investigations. Some of those conversations took place in private interviews; other conversations occurred as the investigators conducted their "walk-around" inspections following the opening conferences. In their testimony at the enforcement hearing, both testifying investigators minimized the significance of their notes, claiming the notes were used to "jog" their memories when creating a record of their investigation in the OSHA Express database used to produce the official report of the investigation. See Findings of Fact #32 - #35; #38, *infra*. Yet, both investigators relied upon attributed employee statements, based on the respective investigator's memory, and which were reported in summary form, to establish grounds to support elements of their recommended citations.

Respondent makes various claims regarding what documents they believe they were entitled to receive pursuant to public records laws governing NC OSH investigations and enforcement actions. Some of Respondent's claims are incorrect statements of the governing law. However, Respondent is correct that at least portions of the investigators' notes constituted witness statements which N.C. Gen. Stat. §95-136(e1) required the Complainant to disclose to the Respondent ten days prior to the enforcement hearing. Because Complainant's investigators were following an agency-wide policy of shredding their handwritten notes, Respondent was deprived of the opportunity to use the contemporaneously memorialized statements in the preparation and presentation of their case.

Based upon applicable legal authorities, whether the denial of documents created by the government during its respective investigations should be the basis for sanctions, and including what level of sanctions may be appropriate, are questions to be determined on a case-by-case basis. In this case, Complainant's destruction of the investigators' notes deprived the Respondent of some opportunities to meaningfully confront the allegations against it. While the circumstances fall short of warranting complete dismissal of all citations, some sanctions are warranted and have been applied in the final decision.

What Documents Was Respondent Entitled to Receive and When Was It Entitled To Receive The Documents?

These questions are entirely controlled by N.C. Gen. Stat. §§95-136(e) and 95-136(e1). North Carolina's Public Records Law as codified in Chapter 132 of the General Statutes does not apply NC OSHRC enforcement hearings.

N.C. Gen. Stat. §95-136(e) provides, in pertinent part:

> *The Commissioner is authorized to compile, analyze, and publish, in summary or detailed form, all reports or information obtained under this section. Files and other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are pending, except that, subject to the provisions of subsection (e1) of this section, an employer cited under the provisions of this Article is entitled to receive a copy of the official inspection report which is the basis for citations received by the employer following the issuance of citations.*

Complainant is required to include in the official investigative report only those materials which are the basis for the citations received by the employer. Complainant was authorized to summarize information and to include ***only*** the information summaries in its official report of the investigation. Complainant was not required to include, for instance, "Draft 1B Forms" (Def. Mem. p 8) or investigators' notes in its official report. Subject to the exceptions provided in subsection (e1), Respondent is not entitled to receive investigators' notes while the enforcement proceeding is pending. Furthermore, and making no judgment as to what conduct constitutes a defensible investigative practice, Complainant need not make a verbatim record of witness statements and may limit the official investigative report to summaries of witness statements and other information.

Complainant may determine, in its discretion, what information constitutes the basis for the citations received and what information is to be included in the official report of the investigation. "[T]he power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151 (1991). If the agency's interpretation is reasonable and consistent with the agency's delegated authority a court should defer to the agency's knowledge and expertise. *Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality, Div. of Water Res.*, 271 N.C. App. 674, 707, 845 S.E.2d 802, 823 (2020), *aff'd* 385 N.C. 1, 891 S.E.2d 83 (2023) ("A reviewing Court should defer to [the] agency's interpretation of statutes or rules it administers

so long as the agency interpretation is reasonable and based upon a permissible construction of the statute or rule.") (Cleaned up). [1]

However, *Sound Rivers* does not divest courts of their function in interpreting statutes. A court should consider the validity of the agency's reasoning, including "consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Company,* 323 U.S. 134, 140 (1944). Adopted by North Carolina Appellate Courts in *Britthaven, Inc. v. N.C. Dept. of Human Resources,* 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995) and *Total Renal Care of N.C., L.L.C. v. N.C. HHS,* 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005). In the instant case, the agency's decision to include only summaries of witness statements and to exclude draft documents in the *official* report of the inspections is consistent with the language of its enabling statute, consistent with the agency's own published regulations, and consistent with its historical conduct toward its constituents.

The above-cited sections of N.C. Gen. Stat. §95-136 do not, however, permit the destruction of investigators' notes. First, once the enforcement proceeding is concluded, those documents are subject to the disclosure requirements of Chapter 132. See N.C. Gen. Stat. §132-1.9, esp. Sections (e) and (h). Second, and directly pertinent to Respondent's motion, the notes may contain witness statements required to be produced ten days prior to the enforcement hearing, as provided in N.C. Gen. Stat. §95-136(e1):

> *The Commissioner shall make available to the employer 10 days prior to a scheduled enforcement hearing unredacted copies of: (i) the witness statements the Commissioner intends to use at the enforcement hearing, (ii) the statements of witnesses the Commissioner intends to call to testify, or (iii) the statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer; provided a written request for the*

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[1] *Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality, Div. of Water Res.*, 271 N.C. App. 674, 845 S.E.2d 802, 823 (2020) is still binding precedent in North Carolina, not altered by the U.S. Supreme Court's decision in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024). In *Philip Morris USA, Inc. v. North Carolina Dept. of Revenue,* 386 N.C. 748, 909 S.E.2d 197 (2024) the North Carolina Supreme Court considered whether to defer to the agency's interpretation of its enabling statute. The Court had the opportunity to overrule *Sound Rivers* based on the U.S. Supreme Court's reasoning in *Loper Bright,* but did not do so. Instead, the only reference to *Loper Bright* in the majority's opinion concerns an agency's inconsistent conduct toward its constituents. *Id.*, at 764, 204. It is also referenced in the dissenting opinion. *Id.*, at 774; 215.

statement or statements is received by the Commissioner no later than 12 days prior to the enforcement hearing.

The statute does not make a distinction between written statements provided directly by a witness and oral statements of a witness which are written verbatim or in summary form by an investigator. Furthermore, a Compliance Safety and Health Officer (investigator) will usually be the Complainant's witness at the enforcement hearing and the officer's notes will likely contain the statements that constitute the investigator's own "witness statements" within the meaning of N.C. Gen. Stat. §95-136(e1). See also *N.C. State Bar v. Harris*, 139 N.C. App. 822, 826-27, 535 S.E.2d 74, 76 (2000) (investigator's notes from witness interviews "relating to the subject matter of the [investigator's] testimony" elicited on direct examination required to be disclosed).

Complainant would like the Court to view the notes as "transitory" and subject to instructions allowing destruction pursuant to conditions described in Chapter 121 of the North Carolina General Statutes. Complainant's effort to interpret the notes within this framework is unpersuasive. The definition of "transitory" documents assumes that the documents have "little or no . . . evidential value to the creating agency." Compl. Mem., p 9 (external citations omitted). It is impossible to make such a preemptive determination as to "evidential value" before trial preparation and the instant hearing illustrates exactly why this is so. Respondent was cited for eleven violations. For seven of the eleven alleged violations the investigators relied upon summaries of statements attributed to employees as evidence of employer knowledge. Compl. Ex. C1, pp 108-109; 113; 117. Compl. Ex. C3, pp 77; 81, 86, 93, 98-99. Where the investigators' notes contemporaneously recorded the substance of employee statements which are the basis for assigning liability to the employer, then the notes clearly have some evidentiary value and are not transitory.[2] What evidentiary value the notes have cannot be established prior to the enforcement hearing and certainly cannot be established if they are preemptively destroyed.

In summary, N.C. Gen. Stat. §95-136(e) only requires Complainant to include in the "official report of the investigation" material which the Complainant decides constitutes the basis for the citations received by the employer. However, ten days prior to the enforcement hearing, pursuant to a request as described in N.C. Gen. Stat. §95-136(e1), Complainant is required to disclose material gathered during the investigation which constitutes witness statements, whether provided by the witness's own hand, captured verbatim in the investigator's notes, or, summarized in the investigator's notes. Furthermore, the investigator's own statements must be produced insofar as those statements pertain either to matters about which the Complainant intends for the investigator to testify, or, constitute statements that

[2] CSHO Hayward testified that he only takes notes "if there's anything of value."

"might support an employer's affirmative defense or otherwise exonerate the employer."[3] The North Carolina Public Records law, codified in Chapter 132 of the General Statutes, does not govern document disclosure for the enforcement hearing.

Due Process

As a general rule, the right to evidence gathered by the government is fundamental to the procedural due process rights of the Respondent. *Frazee Construction Company*, 4 OSAHRC 188, 1973 OSAHRC LEXIS 201 at *190-191; *195-196, (Aug. 8, 1973) (Cleaned up). Having determined that Respondent did not have a full opportunity to confront the evidence presented by the government's witness, the question to address is: In spite of the government's failure to provide the investigators' handwritten notes, did the Respondent receive constitutionally adequate due process?

The failure to follow the requirements of the statute, while not unimportant, does not, by itself, automatically sustain the right to a remedy for denial of due process. *Goodrich v. Newport News Sch. Bd.*, 743 F.2d 225, 227 (4th Cir. 1984)(where minimal due process for notice and opportunity for hearing are provided, violation of procedure does not by itself "sustain an action for redress of procedural due process"). The standard for determining whether the process provided is constitutionally adequate is the federal constitution. *Tooly v. Schwaller*, 919 F.3d 165, 172 (2d Cir. 2019) ("In determining how much process is adequate, we look to federal constitutional standards rather than state statutes to define the requirements of procedural due process." (cleaned up)). See also *Zinermon v. Burch*, 494 U.S. 113, 126 (1990) (the issue before the court is "what process the State provided, and whether it was constitutionally adequate").

The requirements of due process in the federal constitution are "flexible and call for such procedural protections as the particular situation demands." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). Therefore, to determine if more process was due a court should weigh

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative

[3] Pursuant to the express language of N.C. Gen. Stat. §95-136(e1), 13 NCAC 07A.0303, and, N.C. Gen. Stat. §1A-1, R. 26(b)(3) there may be aspects of an investigator's notes which are not required to be disclosed. Since there are no notes to examine in this case, further analysis as to the scope of required disclosures need not be undertaken here.

> burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

In the circumstances of this case, the Court concludes that Respondent's interests are significant and that the government's burden in providing additional procedural due process would not be significant. The Respondent's interests in any proceeding before the State's Occupational Safety and Health Review Commission include potential property loss in the form of a monetary penalty and any finding of a violation may have implications for the size of future penalty assessments. On the other hand, the reasons provided by the Government for the destruction of handwritten notes do not articulate any serious burden for the government to maintain and produce electronic copies of investigators' notes. Crawford Test., Day 1, T pp 89:16 - 90:7; 98:13-17.

The determinative question is whether the risk that Respondent could be erroneously deprived of its property was mitigated by other due process safeguards in place. After careful consideration, the Court finds that the procedures followed in this case created a risk of erroneous deprivation of Respondent's property that was not adequately mitigated by other procedural safeguards. The destruction of the investigators' notes, coupled with "official reports" that contained only vague, conclusory summaries of witness statements which, in turn, were used to support essential elements of the Government's case was not constitutionally adequate. It is not clear that the investigators' notes would have yielded any "smoking gun" evidence to refute Complainant's allegations. But when the government provides no factual details in its summaries of the witness statements used to establish liability, and then destroys the only contemporaneously created record of those statements, basic fairness is lacking.

Nowhere is this better illustrated than by the shift in CSHO Hayward's testimony when he was trying to reconstruct details regarding a supervisory employee who allegedly provided a statement confirming the employer's knowledge of a missing machine guard. Respondent's manager assigned a supervising employee to provide translation services while the CSHO spoke with another Spanish-speaking employee about the missing machine guard. In his official report of the investigation, CSHO Hayward used the translator's own statement as grounds to establish employer liability for the missing machine guard. On cross-examination, Hayward initially stated that the translator / supervisor had independently responded to a question she was asked about knowledge of the missing machine guard. Hayward Test., Day 2, T p 33:19-23. When Hayward became uncomfortable with questions about interviewing a supervisor without the employer's knowledge, Hayward then testified that the translator / supervisor ***spontaneously volunteered*** the information while translating statements from the Spanish-speaking employee.

Compl. Ex. C1, p 108; Hayward Test., Day 2, T p 36:6-20. To explain his inconsistent statements, Hayward claimed that he refreshed his recollection by looking at his official report. The report, however, contained no information about the translator / supervisor having spontaneously volunteered the information. On the same subject matter, Hayward also supplied detail in his testimony regarding the molding supervisor's knowledge of the missing guard; those details also were not contained in his official report. Hayward Test., Day 1, T p 92:20-22. Compl. Ex. C1, p 109. See Finding of Fact #36(a)-(c), *infra.*

To be sure, in many instances the opportunity for vigorous cross-examination is a constitutionally adequate procedural safeguard. See, e.g., *Satterfield v. Edenton-Chowan Board of Educ.*, 530 F.2d 567, 576 (4th Cir. 1975) (finding that teacher who received opportunity to present his evidence and to cross-examine witnesses had adequate procedural due process). However, in this case, where an investigator was relying upon out-of-court statements that he said were collected in the normal course of his investigation, the fact that he attempted to bolster the credibility of the out-of-court statements by including details in his testimony not supplied in his official report means that the Respondent did not learn facts that were the basis for the citations issued until the enforcement hearing. The Government's burden to produce the investigator's contemporaneously recorded notes of witness interviews was minimal and was outweighed by the significant chance that its witness would misstate the evidence originally gathered. The foregoing examples are illustrative of the due process deprivation observed in this case and are not intended to be comprehensive. As noted *supra*, for the majority of citation items the investigators tended to provide only summaries of witness statements in their respective reports as the primary evidence that Respondent had knowledge of the alleged violations.

Having found that the procedures used in this case were not constitutionally adequate due process, the next question is what remedies should be applied to address the inadequate process. In deciding on sanctions, there are two principal considerations for a court. First, sanctions should be applied to remedy conduct which undermines the administration of justice. Second, a court's inherent power to sanction conduct that violates procedural rules should be exercised with restraint, keeping in mind "the strong policy that cases be decided on the merits." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993). The choice of sanction should be aimed at restoration of the deprivation caused by the violative conduct. Dismissal of all of the citations is not required nor warranted. As more fully described in the decision below, the evidence establishing some of the citation items was not dependent upon witness statements collected by the investigators. What makes sense in this case is to exclude as evidence the summaries of witness statements for individual citation items where that evidence is used as proof of the

employer's knowledge of a violation.[4] The sanctions are applied to individual citation items as described in the Final Decision below.

THE ENFORCEMENT HEARING

WITNESSESS

For the Complainant: Mr. Michael Hayward, Compliance Safety & Health Officer, N.C. Department of Labor
Ms. Jill Warren, Compliance Safety & Health Officer, N.C. Department of Labor
Mr. Ric Shumann, Complaint Desk Supervisor, N.C. Department of Labor
Ms. Tracy Breeding, former Plant Manager, Teijin Automotive
Mr. Eddie Fischer, Regional Environmental Health & Safety Director, Teijin Automotive
Ms. Laura Crawford, District Supervisor for Compliance, N.C. Department of Labor

For the Respondent: Mr. Eddie Fischer, Regional Environmental Health & Safety Director, Teijin Automotive
Dr. David Brani, Professional Engineer, David Brani Engineering

EXHIBITS

The following exhibits were admitted into evidence at the hearing:

For the Complainant: C1 - Investigative File for Docket No. 2023-6575,

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[4] Respondent urges the Court to apply an "adverse inference" as a sanction for spoliation of evidence. While the sanction adopted produces essentially the same outcome, the legal theory is very different. Making an "adverse inference" is not intended to be a lesser sanction than dismissal. The adverse inference assumption by a fact-finder is an evidentiary rule. Under North Carolina law, the framework for analyzing whether an adverse inference should be applied is described in *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 527 S.E. 2d 712 (2000). To decide whether the inference is warranted, a Court must consider the degree of culpability. *Id.*, at 184, 716. Since the destruction of the notes was due to an agency-wide policy that had nothing to do with any individual investigator's motives, an adverse inference would not be warranted.

Inspection No. 318264546

C2 - Photographs for Inspection No. 318264546, Identified as Photos #1 - #115

C3 - Investigative File for Docket No. 2023-6590, Inspection No. 318264892

C4 - Photographs for Inspection No. 318264892, Identified as Photos DSCN 2511 - DSCN 2602, and, Teijin Supplied Photos #1 - #3

C5 - Dec. 31, 2024 / Jan. 3, 2025 email between Michael Hayward and Elvir Ljeti (dieffenbacher.ca)

C6 - N.C. Department of Labor Referral Report

For the Respondent:

R12 - Lock Out Tag Out Policy

R15 - Hourly Employee Handbook 2023

R16 - Hydraulic Press 3407 Manual - Fluid Systems

R17 - Hydraulic Press 3407 Manual - Safety

R22 - Photo Mount Picture 84 (Operator Running Press 17)

R24 - OSH Photo 85 (Access Gate - Wider View)

R25 - Photo Mount Picture 89 (Operator Carrying Materials)

R28 - Photo IMG_1820

R29 - Photo IMG_1851

R32 - OSH Photo 49 (Measurement at Slitter Table)

R42 - Photo IMG_0780

R77 - Certificate for Unredacted Case File Insp. 318264546 (Safety)

R80 - Sample CSHO Performance Evaluation (admitted for demonstrative purposes only)

R83 - NC Field Operations Manual, Chapter 3 - Inspection Procedures

R88 - Expert Report of David M. Brani, Ph.D.

R90 - ISO 16092 - 3 Machine Tools Safety Presses

R95 - Video 002 - (Brani)

R96 - Video 003 - (Brani)

R97 - Video 004 - (Brani)

R98 - OSHA Online 7 Form

R99 - Dieffenbacher Manual Excerpt - Operation 2.4 Die Change

For the Parties:

J1 - Affidavit of Anne P. Weaver

Judicially Noticed Exhibits:

29 CFR 1910.147(e)

29 CFR 1910.147(f)

FINAL DECISION

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, judicially noticed information pursuant to N.C. Gen. Stat. §8C-1-201and the entire record in this proceeding, the Undersigned makes Findings of Fact and Conclusions of Law. In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness and any interests, biases, or any prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Based upon the foregoing, the Undersigned makes the following:

Findings Of Fact

1. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina. N.C. Gen. Stat. § 95-126 et seq. ("the Act"). Stip. #2.

2. Respondent Teijin Automotive Technologies North Carolina ("Teijin") is a corporate entity which is authorized to do business in the State of North Carolina. It maintains a place of business in Salisbury, North Carolina. Stip. #3.

3. Respondent Teijin's business includes manufacturing composite materials for automotive, heavy truck, marine, and recreational vehicles. Stip. #4.

4. Respondent's manufacturing process includes the use of mechanical and hydraulic presses where raw materials are mechanically fed into an extruder, which is then heated. The heated composite is then moved to a mold in the press where it is molded to customer specifications. When molding is complete, excess material is cut away from the molded product and the product is moved to another part of the assembly process for further manufacturing and finishing. Compl. Ex. C1, p 69.

5. Four of the presses in Respondent's plant had robots which were assigned to the press for the purpose of performing some of the functions that a human operator would otherwise perform near the press. In particular, the robot

assigned to a press could be used to load raw materials or pick up material from the extruder. Hayward Test., Day 1, T[5] pp 56; 62; 67. Fischer Test., Day 3, p 35:17-22.

6. Compliance Health and Safety Officer ("CSHO") Michael Hayward was assigned to conduct an inspection at Respondent's Salisbury, North Carolina plant after NC OSH's complaint desk received a complaint from an individual who identified himself as an employee ("the initial complaint"). Stip. #7, 9. Hayward Test., Day 1, T pp 26:22-27:2.

7. Following the opening conference, CSHO Hayward conducted an inspection that included the areas around Respondent's Press #17 and Press #19. In plain sight, CSHO Hayward observed conduct and conditions indicative of health and safety violations other than those suggested by the initial complaint. CSHO Hayward documented his findings regarding all alleged violations. Ultimately, there was one recommended citation based on the initial complaint. In addition, CSHO Hayward recommended citations for other alleged violations that he observed. He also sent an intra-department referral for a health inspection based on conditions observed and/or reported by employees. Hayward Test., Day 1, T pp 30:20-24; 34:21-39:7; 43:10-19.

8. While inspecting the area near Press #19, CSHO Hayward observed that an employee was standing with his head under the press's "ram danger zone" while the press was still fully energized. Hayward observed that, on the press's operating control console, the "set-up" mode was selected. This is the feature used when employees are changing the product molds. While the press is in set-up mode, it is possible for an operator to operate the ram of the press at a high speed if other control circuit safety features are not manually selected. These safety features were not selected while CSHO Hayward observed the employee under the ram danger zone. CSHO Hayward further observed that the lockout/tagout disconnect in the power cabinet was in the "on" position and not locked out. Hayward Test., Day 1, T p 33:3-7 and pp 45-53. Compl. Ex. C2, Photos #69 - #74.

9. There are a number of control circuit safety features inherent to the presses. These features are automatically activated when the press is in production mode. They are not active in the set-up mode unless selected. Hayward Test., Day 1, T p 58; Compl. Ex. C1, pp 76; 132 -135.

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[5] The hearing was recorded via the Lifesize video platform. The recording was subsequently transcribed, at the parties' undertaking, by Huseby Global Litigation. The transcript was reviewed by the parties' counsel and submitted into the record. Citations to the transcript will follow the form: "Day xx, T p x"

10. Although the manufacturer supplies multiple two-hand control desks to use with the presses, it is possible to operate a press using only one two-hand control desk. CSHO Hayward observed that only one two-hand control desk was being used on the first day of his inspection. Compl. Ex. C1, pp 76; 134. Hayward Test., Day 1, T pp 54:20 - 55:11; 181:23 - 182:1. Fischer Test., Day 3, T p 57:17-25.

11. When removing a mold set and replacing with another, a large transport cart holds the mold set under the press ram, preventing the ram from moving. However, the transport cart is not in this position during the entirety of the mold change process. Ex. R88, Report of Dr. Brani, pp 7-8.

12. Changing the mold involves making small adjustments to finalize the alignment of the mold with the press and requires putting the press into the "manual inch" mode. However, Respondent's employees did not use proper procedures for testing and positioning the mold during this phase of the set-up. Hayward Test. Day 1, T p 58:2-10.

13. The employee in the danger zone was later identified as an Area Lead who was training to perform the job of a "Process Tech." One of a process tech's functions is to examine the bolts holding the molds in the press to make certain that the press is ready to resume production following the mold change. The bolts are located in the ram danger zone. Hayward Test., Day 1, T pp 47:24 - 48:2. Compl. Ex. C1, p 129. Compl. Ex. C2, Photo #74.

14. The employer's knowledge that its employees were not using proper lockout/tagout procedures when the press was placed in set-up mode was revealed by the Respondent's manager, Eddie Fischer, during his testimony at the enforcement hearing.

    a) CSHO Hayward attributed knowledge of improper lockout/tagout procedures to the employer based on Respondent managers Eddie Fischer and Lee Floyd. When CSHO Hayward pointed out that an employee was under the press ram while the press was still energized the managers provided responses that indicated they were aware of what the employee was doing and believed that the employee was performing the task safely and without violating the lockout/tagout standard. Compl. Ex. C1, pp 89-90. Hayward Test., Day 1, T p 127:13-16.

    b) Mr. Eddie Fischer testified at the enforcement hearing and had the ability to confront CSHO Hayward's testimony regarding the statements that Hayward attributed to him. He was asked if he agreed that Officer Hayward's characterizations of his responses were accurate. Fischer testified that his responses were "taken out of context" because it wasn't clear to him what the

employee was doing and that exceptions to the lockout/tagout standard might apply depending on what job function the employee was performing. Fischer Test., Day 3, p 65:1-18.

c) Mr. Fischer's explanation was not credible because CSHO Hayward took photographs demonstrating that the press was in "set-up" mode and that the control circuit safety devices were not selected, making it clear what job the employee was performing, or, at the very least, that the employee was working in set-up mode without control circuit safety devices. Compl. Ex. C2, Photo #72.

15. Dr. David Brani was tendered to the court as an expert in the field of mechanical engineering, including machine safeguarding, and testified on behalf of Respondent. Brani Test., Day 3, T pp 182-188 (qualifications); p 189. Ex. R88.

16. Dr. Brani incorrectly stated that employees involved in mold change operations would not be exposed to unexpected re-energization of the press ram. Dr. Brani's conclusion was incorrect because: (1) he assumed, without additional evidence, that employees are "always trained to look for anybody that may be underneath the ram;" and (2) he incorrectly stated that the press could not be re-started without two employees separately starting two two-hand control panels simultaneously. Brani Test., Day 3, T pp 229:4-6; 229:6-10.

17. The assumptions informing Dr. Brani's opinion regarding unexpected re-energization of the press RAM were unsupported by substantial evidence in the record.

a) First, the record reveals that the employee observed to be under the press ram at the time of the inspection was not trained on lockout/tag out procedures. Moreover, the power point slides submitted by the Respondent describing its safety training for lockout/tagout do not make any statements instructing employees to look for others near the machinery and do not discuss re-start at all. Respondent's Exhibit #33, submitted to demonstrate employee orientation training, contains one statement that employees "ensure no one is in an unsafe position." The statement is not specific to the presses or to the set-up process for changing molds. Ex. R33, p 9. See Compl. Ex. C1, pp 193-207 (employer training materials); 208-211 (training records illustrating that training took place after OSHA inspection);

b) Second, the manufacturer's manual for the press specifically stated that the press could be re-started with one two-hand control and both Dr. Brani and Respondent's manager Eddie Fischer admitted during cross-examination

that the press could be operated with one two-hand control. See Compl. Ex. C1, p 191 (stating the control desks are assigned according to the number of operators). Compl. Ex. C2, Photo #72 (control panel). Hayward Test., Day 1, T pp 54:20 - 55:11 (on the day of inspection only one two-hand controller was logged in while employee was changing die set). Brani Test., Day 3, T p 13:4-10. Fischer Test., Day 3 T p 57:17-25 (nothing would prevent an operator from using single two-hand control while an employee is under the press placing a charge).

18. Dr. Brani opined that "at the end of the day" when the press is ready for re-start, someone may be underneath the ram and "the only way to guard against an injury in that instance is vigilance." Dr. Brani's opinion that vigilance was the only guard against injury assumed that full lockout/tagout procedures were not practical. Brani Test., Day 3, pp 230:25 - 231:4.

19. The mold change-out process takes approximately two hours. Hayward Test., Day 1, T p 61:21-25. A mold might be in place for several weeks at a time or "indefinitely." Compl. Ex. C1, p 129 (email statement of Respondent's manager).

20. While inspecting the area near Press #17, CSHO Hayward observed an employee inside the gated area where there was a Fanuc Robot attached to the press. The employee was retrieving material from the extruder and during the retrieval process parts of the employee's body necessarily passed underneath the robot head. Hayward Test., Day 1, T pp 65-67. Compl. Ex. C2, Photos #80 - #84.

21. While the employee was inside the gated area, the interlock gate was open and locked in the open position but the operator had used another employee's lock. Keeping the interlock gate open interrupts circuitry to the robot. The servo control switch panel for the robot remained in the "on" position with the key inserted into the switch. Hayward Test. Day 1, T pp 70-71. Compl. Ex. C2, Photos #82, #83.

22. With the servo switch in the "on" position, removing the lock from the interlock gate and closing the gate could energize the robot, although other steps would need to be completed. Hayward Test. Day 1, T p 71. Compl. Ex. #C1, p 200. See also Finding of Fact #24, *infra*.

23. The employee who was inside the gated area by Press #17 at the time that CSHO Hayward observed him removing material from the extruder had not yet received training in lockout/tagout procedures. Hayward Test., Day 1, p 77. Compl. Ex. #C1, pp 208-211.

24. Dr. Brani described a series of actions required to re-start the robot, including that another employee would have to physically enter the robot cage and relocate the Human Machine Interface ("HMI") (a computer monitor with a screen touch panel) and the two-hand control device to the outside the cage; place both devices in their respective positions by securing matching interlock pin-connectors on each device; the extruder would need to be stopped and the conveyor of the extruder would stop conveying materials to the employee working inside the robot cage; the extruder would then need to be re-started and would emit an audible horn sound. All of these steps would have to be completed regardless of whether the servo switch key was in the "on" position. Once all of these actions had taken place and the interlock gate was closed then the robot could re-start. Ex. R88, pp 11-16. Brani Test., Day 3, T pp 193:23 - 194:11; 196-197; 207:12 - 209:4; 210:10 - 211:10.

25. The electronic circuitry of the interlock gate is designed to prevent re-start, such that when it is opened the command signals are interrupted and the robot remains inert. If the interlock gate circuitry were to fail, the fail would be on "the safe side." In other words, the robot would default to the open gate status and would not spontaneously re-energize. Brani Test., Day 3, T pp 202:19 - 203:22.

26. Dr. Brani opined that formal lockout/tagout was not needed for the robot because adequate machine guarding was built into the robot system. Brani Test., Day 3, pp 204:24 - 205:22.

27. Dr. Brani also opined that the physical proximity of an individual inside the robot cage and another employee attempting to re-start the robot, including with the second employee having to step into the robot cage to re-locate the control panels, make it extremely unlikely that the second employee would not be aware of the first employee. Brani Test., Day 3, pp 193:23 - 194:2; 206:12-19; 207:12 - 208:6; 209:16 - 22. Compl. Ex. C2, Photo #85.

28. If Respondent were to completely de-energize the robot, re-energization would take approximately four days due to the need to re-program the robot / computer. Hayward Test. Day 1, T p 67. However, Respondent's robot attachments to the various presses are still being developed and Respondent has an option to dedicate a robot to a particular press. Compl. Ex. C1, pp 128-129 (employer email to CSHO); 200 (employer lockout/tagout training for robot).

29. While conducting his initial walk-around, and based on the initial complaint, CSHO Hayward looked for missing machine guards. He observed a slitter machine (slitter table #13), used for cutting fiberglass material into smaller pieces. The slitter was not working but the machine was energized and

missing a side machine guard. An operator was using the slitter table to manually cut materials. Hayward Test., Day 1, T pp 88-89; Comp. Ex. #C1, Photo #45; #47-#48.

30. CSHO Hayward also observed an electrical outlet cover that was secured with one screw instead of two and with sufficient space behind the loose plate that inadvertent direct contact with electrical wires was risked. Hayward Test., Day 1, T p 96. Compl. Ex. #C1, Photo #111. In the same area, CSHO Hayward observed a damaged cabinet housing the electrical sources for a Honda Punch router. The damaged door could not fully enclose the cabinet and potentially exposed employees to electrical shock if an employee inadvertently made contact with the electrical wires in the cabinet. Hayward Test. Day 1, pp 100-101. Compl. Ex. #C1, Photo #108.

31. As a result of CSHO Hayward's inspection, one Serious citation with six items was issued on August 1, 2023, carrying the following proposed abatement dates and penalties:

ITEM	STANDARD	ABATE DATE	PENALTY
	CITATION ONE (Serious)		
001a	29 CFR §1910.147(c)(4) failure to develop, document and utilize procedures for control of potentially hazardous energy when employees are engaged in activities covered by the lockout/tagout standard	8/25/2023	$ 15,625.00
001b	29 CFR §1910.147(c)(7) failure to properly train employees in lockout/tagout requirements and procedures	8/25/2023	Grouped
001c	29 CFR §1910.147(c)(8) failure to ensure that lockout/tagout procedures are performed only by authorized employees	8/25/2023	Grouped

002	29 CFR §1910.212(a)(1) failure to provide proper machine guarding	corrected during inspection	$9,000.00
003a	29 CFR 1910.305(b)(2)(i) failure to provide and maintain proper outlet covers	corrected during inspection	$15,625.00
003b	29 CFR 1910.303(g)(2)(i) failure to provide proper guarding against incidental contact with live parts of electrical equipment	corrected during inspection	Grouped

Compl. Ex. C1 pp 21-26.

32. CSHO Hayward made handwritten notes during his inspection, including during the opening conference, the walk-around and when speaking with employees. Hayward stated that he took notes when he spoke with employees, "if there's anything of value" but the notes consisted of "one or two words." The notes are summarized and entered into the OSHA Express data base used for creating the official investigative report. All notes, including assignment sheets, were shredded once the citations were issued. Hayward Test., Day 1, T pp 21:5-12; 22:5-6; 149:1-4; 154:8-11;156:8-157:13; 183:6-9.

33. Hayward relies on his notes when drafting his official report, but "they are a miniscule part" of his case file and "almost all" of the pertinent information is provided from his memory. Hayward Test., Day 1, T p 161:1-3.

34. Hayward now understands that by shredding his notes he may be destroying information not included in his official report which could be beneficial to the employer being investigated. Hayward Test., Day 1, T p 164:8-13.

35. CSHO Hayward summarized the statements that he received from employees. He did not take any written statements from employees. Hayward Test., Day 1, p 23.

36. CSHO Hayward's findings that the employer was knowledgeable about violations that he found were, in several significant instances, based upon the employee that Hayward summarized. For instance:

a) Hayward attributed knowledge of the missing slitter guard to a statement made by a supervising employee who was assigned to provide translation for a Spanish speaking employee. Initially, Hayward testified that the supervisor / translator responded to a question from him. Then, he testified that the supervisor / translator spontaneously volunteered the information. Hayward Test., Day 1, pp 90-91. Hayward Test., Day 2, T pp 34-36. See esp. p 36:12-14. Compl. Ex. C1, p 109

b) Hayward also attributed employer knowledge of the missing slitter guard to Respondent's Molding Supervisor. His investigative report contains a conclusory statement: "CSHO interviewed Molding Supervisor Victor Washington who stated he knew about the missing guard on the #13 slitter table." Compl. Ex. C1, p 108. However, in his testimony at the enforcement hearing CSHO Hayward embellished his original statement, stating: "according to -- to Washington, the supervisor, and also the hourly employee, that the guard had been missing for a long time . . . ." Hayward Test., Day 1, T p 92:20-22. In his investigative report the only statement regarding the length of time the guard had been missing was attributed to the Spanish speaking hourly employee. No details were provided, such as who told the supervisor and when he was told and whether the CSHO disclosed that he had other statements confirming Mr. Washington's knowledge. . Compl. Ex. C1, pp 108-109.

c) Regarding the unsecured electrical outlet box covering and the damaged cabinet door for the punch router, employer knowledge in the official report was attributed to a supervisory employee who allegedly stated that she walked through the area "several hours each day" and did not look for safety violations. In his testimony at the enforcement hearing, CSHO Hayward stated only that, during a short interview on the production floor, the supervisory employee stated she walked through the area "several times a day." Compl. Ex. C1, p 113. Hayward Test., Day 1, T p 97:14-19; 137:19 - 138:2. No details were provided as to what the supervisory employee did see or why the equipment would have been likely to have been seen.

37. Based upon the referral provided by CSHO Hayward, which included 2 complaints received by the NC DOL Complaint Desk, Health Compliance Officer Jill Warren conducted an inspection of Respondent's worksite beginning May 5, 2023, returning June 8, 2023 and August 16, 2023. Warren Test., Day 2, T pp 87-89; 91-92.

38. Officer Warren took notes during her inspection, summarized the notes in the OSHA Express database and then shredded the notes. Warren uses her notes to remind her "of what goes on in the inspection." Warren Test., Day 2, pp 81:12-23; 82:4-5; 132:20-23; 133:8-11; 133:20-24.

39. Officer Warren observed employees were working in an area crowded with bins and containers and believed that employees did not have an access to the building exit that was at least twenty-eight inches wide. Warren Test., Day 2, T p 104. Compl. Ex. C4, Photo 2557.

40. There was a twenty-nine inch wide aisle of egress at the back of the workstation along the front of the press that was illustrated in Respondent's photographs. Ex. R58, R59. Warren Test., Day 2, T pp 184-186.

41. While Officer Warren testified that the aisle of egress illustrated in Respondent's exhibits had initially been blocked, she admitted that she did not have any photographs illustrating the allegedly blocked aisle and admitted that her narrative did not contain any reference to that particular aisle being a blocked aisle. Warren Test., Day 2, T pp 186-188.

42. Officer Warren observed pallets of chemicals outside Respondent's indoor storage room. After receiving a shipment of hazardous chemicals that exceeded the capacity of Respondent's inside flammable storage room, employees had stacked pallets containing 55 gallon drums and other five gallon containers of Category 3 hazardous chemicals next to the spray booth and the flammable storage room. There were more than one hundred twenty gallons of flammable liquids stored on those pallets. Warren Test., Day 2, T pp 110-111. Compl. Ex. C4, Photo 2572 - 2575.

43. Given the size and location of the pallets, the violation was open and obvious and the employer knew or should have known of the violation. Compl. Ex. C4, Photo #2572.

44. Respondent admitted that there were more than one hundred twenty gallons of flammable liquids stored on the pallets that Officer Warren had photographed. Fischer Test., Day 3, T p 50:16-22.

45. Officer Warren observed employees using paint that had been mixed into smaller 32 ounce disposable cups. Acetone was also put in the same kind of disposable cups for the employees to use. Neither the paint nor the other chemicals were properly labeled so that employees would be warned of potential hazards. Officer Warren also observed that it was Respondent's supervisor who mixed the paint and poured the acetone into the cups and brought those over to the employees who were working in the Finesse department. Warren Test., Day 2, T pp 113-117. Compl. Ex. C4, Photos 2543, 2546.

46. Respondent admitted that employees were using secondary containers that were not properly labeled. Fischer Test., Day 3, T pp 50:23 - 52:9.

47. While taking samples to determine if there was excessive spray from a Sherwin-Williams spray paint that was being used, Officer Warren requested the Safety Data Sheet for the Sherwin-Williams paint. She was supplied with the Safety Data Sheet that had been provided by Custom-Pak products, a third party vendor from whom Respondent had purchased the paint. Employees were unable to locate a Safety Data Sheet provided directly by Sherwin-Williams. Warren Test., Day 2, T pp 118-119.

48. Once she learned that Sherwin-Williams had not created a Safety Data Sheet for the black spray paint and, instead, appeared to rely upon third party vendors to supply employers with the Safety Data Sheet, Officer Warren filed an OSHA complaint against Sherwin-Williams. After filing the complaint against the manufacturer, Officer Warren obtained a Safety Data Sheet from Sherwin-Williams. Warren Test., Day 2, T pp 211-212; 213:19 - 214:2.

49. The employer's safety data sheets were accessible via the employer's computer network. When she conducted her inspection, Officer Warren did not see computer kiosks in the plant where employees could access safety data sheets. Officer Warren believed that employees did not have access to the Safety Data Sheets via Respondent's computer network and attributed her belief to statements made to her by Rodney Hopper, Respondent's Environmental Health & Safety Manager. At the time of Officer Warren's inspection, Mr. Hopper had been employed with Respondent for less than six months. Officer Warren also asked another supervisor (whom she described as "that supervisor, whoever, in that finesse area") whether employees had computer access and received a response that they did not. Warren Test., Day 2, T pp 218-220; 227-229. Fischer Test., Day 3, T p 30:7-10.

50. Officer Warren's reliance upon statements attributed to Respondent's managers was not a reasonable basis for finding that the Respondent had knowledge of the violation given that Mr. Hopper had worked with Respondent for less than six months and that Officer Warren did not ask to view the computer kiosks herself.

51. Eddie Fischer was Respondent's Regional Environmental Health and Safety Director for approximately one year prior to the hearing. Before that he was a Regional Environmental Health and Safety Manager. Overall, at the time of the hearing, he had been Respondent's employee for approximately ten years and his office was located in the Salisbury plant during his management tenure. Mr. Fischer credibly testified that the computer kiosks were installed approximately five years prior to Officer Warren's inspection and that the

Safety Data Sheets stored on Respondent's hard drives were accessible to all employees. Fischer Test., Day 3, T pp 28-29; 41- 43. 44:4-18.

52. As a result of CSHO Warren's inspection, one citation with four items (including sub-parts) was issued on September 14, 2023, carrying the following proposed abatement dates and penalties:

ITEM	STANDARD	ABATE	PENALTY
	CITATION ONE (NonSerious)		
001	29 CFR 1910.37(a)(3) failure to ensure unobstructed exit routes	corrected during inspection	$00.00
002	29 CFR 1910.106(e)(2)(ii)(b) attempting to store more than 120 gallons of flammable liquids outside an inside storage room	corrected during inspection	$ 00.00
003	29 CFR 1910.1200(f)(6) failure to properly label containers of hazardous chemicals	upon receipt	$2,700.00
004a	29 CFR 1910.1200(g)(8) failure to make hazardous chemical safety data sheets accessible to employees	upon receipt	$ 2,700.00
004b	29 CFR 1910.1200(h)(2)(iii) failure to inform employees of the location of hazardous chemical safety data sheets	upon receipt	Grouped

Compl. Ex. C3, pp 27-31.

Conclusions Of Law

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012). The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Respondent is an employer within the meaning of N.C. Gen. Stat. §95-127(11). Stip. #5.

3. The Review Commission has jurisdiction over the parties and the subject matter pursuant to N.C. Gen. Stat. § 95-135. Stip. #1.

4. 29 CFR §1910.147(c)(4) requires that an employer develop, document and utilize procedures to control the unexpected release of hazardous energy when employees are engaged in servicing and maintenance of machines or equipment. See also 29 CFR §1910.147(a)(2).

5. When Respondent's employees were changing the molds in Respondent's Press #19 they were engaged in activities covered by 29 CFR §1910.147(c)(4). Changing the molds was a set-up procedure used to prepare the press for its normal production operation. The procedure was not a routine or repetitive task performed during production. (See Findings of Fact ("FOF") #19). The mold change procedure was not subject to the minor servicing exception for the lockout/tagout standard. 29 CFR §1910.147(a)(2)(ii); 29 CFR §1910.147(b).

6. The mold change procedure used by Respondent also did not fall under the testing and positioning exception to the lockout/tagout standard because Respondent did not follow the sequence of actions required by 29 CFR §1910.147(f)(1).

7. It was Respondent's burden to show by the preponderance of the evidence that exceptions to the Lockout/Tagout Standard applied and Respondent did not meet this burden. *MATSU Alabama, Inc., d/b/a A Division of MATCOR Automotive, Inc.*, Docket No. 13-1713, 25 OSHC (BNA) 1952, 2015 OSAHRC LEXIS 63 at *20 (Sept. 29, 2015) ("The Commission has repeatedly held... that the party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim.") *Internal citations and quotation marks omitted.*

8. Complainant met its burden to show by the preponderance of the evidence that changing molds on Respondent's mechanical and hydraulic presses exposed employees to the unexpected release of energy in violation of 29 CFR §1910.147(c)(4).

   a) The lockout/tagout standard was intended to prevent industrial accidents during the servicing of machines that are turned off but connected to a power source, retain stored energy, or are re-activated by another worker unaware that servicing is in progress. *MATSU Alabama, Inc., d/b/a A Division of MATCOR Automotive, Inc.*, Docket No. 13-1713, 25 OSHC (BNA) 1952, 2015 OSAHRC LEXIS 63 at *17-18 (Sept. 29, 2015).

b) The standard specifically requires that Complainant prove that the potential release of energy be unexpected, in other words "without sufficient advance warning to the employee." *General Motors Corp., Delco Chassis Div.*, Docket Nos. 91-2972, 91-3116, 91-3117 (consolidated), 17 OSHC 1217, 1219 (BNA), 1995 LEXIS 58 at *11, *aff'd Reich v. GMC*, 89 F.3d 313 (6th Cir. 1996).

c) Complainant proved that Respondent's employees were exposed to the unexpected release of energy while changing molds on the presses because:

i) the control circuit safety features were bypassed during set-up. FOF #8, #19.

ii) another operator could come along and re-start the press using only one two-hand control desk and could operate the press at a high rate of speed. FOF #10, #17(b).

iii) it was difficult to see an employee working under the press ram. Compl. Ex. #C2, Photo #69.

iv) placing the transport cart under the ram was not an effective machine guard alternative because the cart did not remain in that place during the entirety of the change procedure and because the employee performing work under the ram did not necessarily have complete control over the transport cart. FOF #11, #13. See also *MATSU Alabama, Inc., d/b/a A Division of MATCOR Automotive, Inc.*, Docket No. 13-1713, 25 OSHC (BNA) 1952, 2015 OSAHRC LEXIS 63 at *26 (Sept. 29, 2015) (finding that safety blocks were not an effective lockout/tagout alternative because the blocks were not under the exclusive control of the tool and die makers).

d) Complainant's evidence of the violation was the CSHOs photographs demonstrating that an employee was working in the danger zone of Press #19's ram, that the press was in set-up mode, that none of the electronic circuit safety protections were selected, that the employee was difficult to see and that only one two-hand control desk was being used. FOF #8, #10.

9. Complainant has met its burden to show that Respondent had actual knowledge that employees changing molds were not complying with the lockout/tagout standard since the Respondent's managers asserted that the employee was working under an exception to the lockout/tagout standard. The assertion that the work was subject to an exception was also an admission that encountering the employee performing the work as described, *supra*, was not unexpected. Furthermore, while the manager was testifying under oath at the enforcement hearing he had the opportunity to refute the CSHO's evidence of his knowledge of Respondent's standard mold change procedure.

However, the manager did not offer a credible explanation for the admissions he made. FOF #14(a)-(c). See *Commercial Metals Company, d/b/a CMC Steel New Jersey*, OSHC Docket No. 22-1556 , 2024 OSAHRC LEXIS 15 at *40-41 (Sept. 30, 2024) (The employer's knowledge is directed to the physical condition that constitutes a violation. It is not necessary to show the employer knew or understood the condition was hazardous.) *Internal citations omitted.*

10. Complainant correctly found that Respondent's violation of the lockout/tagout standard during the mold change procedure was a serious violation. A violation is serious if it creates a substantial probability of death or serious physical harm. The proximity of the employee to the ram created a substantial probability of death or serious physical harm. See, *Choice Fabricators, Inc.*, OSHC Docket No. 08-0944, 2009 OSAHRC LEXIS 32 at *17 (FN 4), (May 15, 2009) ("The issue is not whether an accident is likely to occur; it is rather whether the result would likely be death or serious harm if an accident should occur.")

11. Complainant did not meet its burden to show that the lockout/tagout standard applied to the employee working at Press #17 in the vicinity of the Fanuc Robot.

a) The lockout/tagout standard only applies if the potential for re-energization of the robot would be ***unexpected***. *General Motors Corp., Delco Chassis Div.*, Docket Nos. 91-2972, 91-3116, 91-3117 (consolidated), 17 OSHC 1217, 1219 (BNA), 1995 LEXIS 58 at *11, *aff'd Reich v. GMC*, 89 F.3d 313 (6th Cir. 1996).

b) "Energization is 'unexpected' in the absence of some mechanism to provide adequate advance notice of machine activation." *Dayton Tire, Bridgestone / Firestone*, OSHC Docket No. 94-1374, 23 BNA 1247, 1251, 2010 OSAHRC LEXIS 65, *aff'd in relevant part*, 671 F.3d 1249, 1257 (D.C. Cir. 2012).

c) The Complainant is not permitted to speculate that energization "may" occur. Complainant "must show that there is some way in which the particular machine could energize, start up, or release stored energy without sufficient advance warning to the employee." *General Motors Corp., Delco Chassis Div.*, Docket Nos. 91-2972, 91-3116, 91-3117 (consolidated), 17 OSHC 1217, 1219-1220 (BNA), 1995 LEXIS 58 at *11, *aff'd Reich v. GMC*, 89 F.3d 313 (6th Cir. 1996). In affirming the Commission in *General Motors*, the Sixth Circuit noted that "use of the word 'unexpected' connotes an element of surprise, and there can be no surprise when a machine is designed and constructed so that it cannot start up without giving a servicing employee

notice of what is about to happen." *Reich v. GMC*, 89 F.3d 313, 315 (6th Cir. 1996).

d) In certain instances, "control circuit type devices in machines may operate in such a manner that eliminates the potential of injury from hazardous energy during certain servicing or maintenance activities, so that the LOTO standard does not apply in those circumstances." *Sec'y of Labor v. AJM Packaging Corporation*, OSHC Docket No. 16-1865, 2020 OSAHRC LEXIS 65 at *63-64 (Sept. 8, 2020). The Fanuc Robot's control circuit safety devices described by Dr. Brani do not require employees to affirmatively select those devices and protect the employee even when some devices, such as light curtains, must be bypassed.

e) Where re-energization of the robot is dependent upon a series of steps that would alert employees that the robot is about to start-up lockout/tagout is not required. Dr. Brani, who was qualified as an expert in mechanical engineering, including machine safeguarding provided testimony describing a series of actions required to be taken before the robot can be re-started. These actions will alert an employee of the impending start up. See FOF #24 - #27. The undersigned concludes that the evidence in this record is equivalent to the circumstances in *General Motors*, where that Court held:

> *Under the circumstances described in the record, . . . any . . . employee engaged in maintenance of the machine would be alerted to the possible activation of the press by the several steps that must occur before the press cycles. This would afford sufficient notice that energization was about to occur and provide sufficient time to the employee to vacate the danger zone.*

General Motors, 1995 LEXIS 58 at *11.

12. In light of the inapplicability of the lockout/tagout standard, Respondent's employees' lack of training and failure to restrict the use of personal locks do not constitute a violation.[6]

13. Based upon the Court's conclusion that the citation for violation of the lockout/tagout standard only applied to one of the two instances documented by Complainant in support of Citation 1, Item 001 (Docket No. 2023-6575), the

[6] The Court does not approve of the tardy training provided to the employees involved nor of the lack of attention to detail concerning the use of personal locks. However, in this instance, the conduct described does not support the requirements for finding a safety violation.

Court further concludes that the penalty calculation for that citation item is not correct and must be MODIFIED.

a) The CSHO assumed that there were 27 employees involved potentially exposed to the hazard associated with the alleged lockout/tagout violations including press operators for Press #17. There is nothing in the record to support the actual number of employees identified by the CSHO, even if it is assumed that there are only nine press operators as his violation worksheet indicates. Compl. Ex. C1, p 75.

b) The only evidence in the record regarding the number of employees exposed to the mold change hazard is CSHO Hayward's testimony that two employees are assigned to perform a mold change. Hayward Test., Day 2, T p 29.

c) The record evidence also indicates that the frequency with which a mold change has to be done on any press is several weeks to "indefinitely." Compl. Ex. C1, p 129 (email statement of Respondent's manager).

d) The Court holds that the severity of a potential injury is High, as determined by the CSHO but that the probability of an injury should be evaluated as Lesser, based on factors that yield a score of "4" rather than "7.3" as determined by Complainant. The calculation is based on the following:

i) no more than six employees are exposed (two for each shift);
ii) a frequency score of "1" is based on the testimony that mold change occurs "several weeks to indefinitely" for each of the presses;
iii) a proximity score of "8" is retained because the employee would be under the ram.
iv) The Court also considers as a mitigating factor that the percentage of time during which an injury could amounts to around 20% of the time during the mold change process takes place.

e) The Court determines that the calculated penalty is $10,000.00, based on the schedule of penalties in Complainant's 2023 Field Operations Manual. This figure is also consistent with the violation worksheet completed for Citation 1, Item 002 where CSHO Hayward based his recommended penalty on Gravity Based Penalty factors calculated to be High Severity/Lesser Probability. Compl. Ex. C1, p 107.

14. The Court has already determined that Complainant deprived Respondent of due process in its assessment of the violations described in Docket No. 2023-6575, Citation 1, Items 002, 003a and 003b and will apply the sanctions previously described. The Court's review of Respondent's Motion to Dismiss,

supra pp 2-9, including all findings, legal authorities and analysis is incorporated in its entirety herein by reference. The Court holds, therefore, that Complainant failed to demonstrate by the preponderance of credible evidence that the employer had knowledge of the missing machine guard at Slitter Table #13, the insecure electrical outlet covering or the damaged electrical cabinet as alleged in Citation 1, Items 002, 003a and 003b. Because Complainant has not proved an essential element of those alleged violations, Docket No. 2023-6575, Citation 1, Items 002, 003a and 003b are VACATED.

15. Complainant failed to demonstrate, by the preponderance of evidence presented at the enforcement hearing, that Respondent violated 29 CFR 1910.37(a)(3) by obstructing exit routes for employees. Based upon Findings of Fact #39 - #41, there was an exit route at the back of the work station that complied with the applicable regulation. Docket No. 2023-6590, Citation 1, Item 001 is VACATED.

16. Based upon the Court's Findings of Fact #42 - #44, the violation of 29 CFR 1910.106(e)(2)(ii)(b), for the storage of hazardous chemicals outside Respondent's storage room, identified in Docket No. 2023-6590 as Citation 1, Item 002 is AFFIRMED.

17. Based upon the Court's Findings of Fact #45 and #46, the violation of 29 CFR 1910.1200(f)(6) for the failure to properly label containers of hazardous chemicals being used by employees, as stated in Docket No. 2023-6590, Citation 1, Item 003 is AFFIRMED.

18. Based upon the Court's Findings of Facts #49 - #51 and the Court's previous determination that Complainant deprived Respondent of due process by attributing employer knowledge of the violation to summaries of employee statements withheld from the Complainant (described *supra* at pp 2-9 incorporated herein by reference) the Court holds that Complainant has failed to prove by the preponderance of the evidence that Respondent violated 29 CFR §1910.1200(g)(8) allegedly failing to make safety data sheets available to employees. In Docket No. 2023-6590, Citation 1, Item 004a is VACATED.

19. Based upon the Court's Findings of Fact #47 and #48, the Court holds that Complainant has failed to demonstrate by the preponderance of the evidence that Respondent violated 29 CFR 1910.1200(h)(2)(iii), allegedly failing to maintain the location and availability of safety data sheets for the Sherwin Williams paint used by employees. This violation in Docket No. 2023-6590, Citation 1, Item 004b is, therefore, VACATED.

20. CSHO Warren properly calculated the penalties for the violations in Docket No. 2023-6590 which have been affirmed by the Court.

ORDER

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

In Docket No. 2023-6575

Citation 1, Item 001a is MODIFIED and a penalty of $10,000.00 is assessed against the Respondent.
Citation 1, Item 001b is VACATED.
Citation 1, Item 001c is VACATED.
Citation 1, Item 002 is VACATED.
Citation 1, Item 003a is VACATED.
Citation 1, Item 003b is VACATED.

In Docket No. 2023-6590

Citation 1, Item 001 is VACATED.
Citation 1, Item 002 is AFFIRMED. No penalty is assessed for Citation 1, Item 002.
Citation 1, Item 003 is AFFIRMED. A penalty of $2,700.00 is assessed for Citation 1, Item 003.
Citation 1, Item 004a is VACATED.
Citation 1, Item 004b is VACATED.

Respondent's total penalty amount of **$12,700.00** shall be paid within **30 days** of the entry of this ORDER.

This the 23rd day of June 2025.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner Presiding
maleon@leonlaw.org

APPENDIX A

PARTIES' STIPULATIONS

Prior to the hearing the parties submitted a joint prehearing report which included the following stipulated facts:

1. Pursuant to N.C.G.S. § 95-135, the Review Commission has jurisdiction over the parties to this action and its subject matter.

2. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, including making inspections and issuing citations.

3. Respondent, Teijin Automotive Technologies North Carolina Inc. ("Teijin"), is a corporate entity which is authorized to do business in North Carolina. It is active and current and maintains a place of business in Salisbury, North Carolina.

4. Respondent's business includes manufacturing composite materials for automotive, heavy truck, marine, and recreational vehicles.

5. Respondent is an "employer" within the meaning of N.C.G.S. § 95-127(11).

6. CSHOs Michael Hayward and Jill Warren were the compliance safety and health officers for Inspection Nos. 318264546 and 318264892 conducted an inspection of Respondent's worksite located at 6701 Statesville Blvd, Salisbury, North Carolina (the Worksite).

7. CSHO Michael Hayward conducted the safety inspection, Inspection No. 318264546 (the "Safety Inspection").

8. CSHO Jill Warren conducted the health inspection, Inspection No. 318264892 (the "Health Inspection").

9. According to NC OSHA's inspection file, the Safety Inspection was initiated because of the receipt of a complaint at NC OSHA's complaint desk.

10. According to NC OSHA's inspection file, the Health Inspection was initiated because of the receipt of a complaint at NC OSHA's complaint desk and a referral received from CSHO Hayward.

11. On August 1, 2023, Complainant issued one SERIOUS citation with three items and five subparts for the Safety Inspection. The Citation and Notification of Penalty had the following proposed abatement dates and penalties:

Inspection No. 318264546			
Item No.	**Standard**	**Abate Date**	**Penalty**
Citation One (Serious)			
001a	29 CFR 1910.147(c)(4)(i)	8/25/2023	$15,625.00
001b	29 CFR 1910.147(c)(7)(i)(A)	8/25/2023	$0.00
001c	29 CFR 1910.147(c)(8)	8/25/2023	$0.00
002	29 CFR 1910.212(a)(l)	Corrected	$9,000.00
003a	29 CFR 1910.305(b)(2)(i)	Corrected	$15,625.00
003b	29 CFR 1910.303(g)(2)(i)	Corrected	$0.00
TOTAL		$40,250.00	

12. On September 14, 2023, Complainant issued one NONSERIOUS citation in the Health Inspection with four items and two subparts, carrying the following proposed abatement dates and penalties:

Inspection No. 318264892			
Item No.	**Standard**	**Abate Date**	**Penalty**
Citation One (NonSerious)			
001	29 CFR 1910.37(a)(3)	Corrected	$0.00
002	29 CFR 1910.106(e)(2)(ii)(b)	Corrected	$0.00
003	29 CFR 1910.1200(f)(6)	Corrected	$2,700.00
004a	29 CFR 1910.1200(g)(8)	Immediately upon receipt	$2,700.00
004b	29 CFR 1910.1200(h)(2)(iii)	Immediately upon receipt	$0.00
TOTAL		$5,400.00	

13. Respondent submitted a timely Notice of Contest, dated September 11, 2023, for the citations and penalties issued regarding Inspection No. 318264546, the Safety Inspection.

14. Respondent submitted a timely Notices of Contest, dated October 12, 2023, for Inspection No. 318264892, the Health Inspection.

15. Respondent submitted a timely Statement or Employer's Position dated October 4, 2023, for the citations and penalties issued regarding Inspection No. 318264546 (Safety Inspection), OSHANC Docket No. 2023-6575, which requested formal pleadings.

16. Respondent submitted a timely Statement or Employer's Position dated November 9, 2023, for the citations and penalties issued regarding Inspection No. 318264892 (Health Inspection), OSHANC Docket No. 2023-6590, which requested formal pleadings.

17. A complaint and an answer were timely filed in both above-captioned OSHANC docket numbers prior to consolidation.

18. The Safety and Health Inspection contests were consolidated for hearing.

19. Complainant stipulates to the authenticity and admissibility of Anne P. Weaver's sworn affidavit, and its attached exhibit, in lieu of her live testimony at the hearing. Ms. Weaver's affidavit is **Joint Exhibit 1**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

CURTIS G. MOORE
LAWRENCE D. HILTON
FISHER & PHILLIPS
227 WEST TRADE ST STE 2020
CHARLOTTE, NC 28202

By depositing a copy of the same in the United States Mail, by certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

MONIQUE NKETAH
STACEY A. PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602

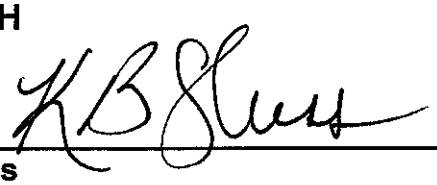
By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

via email.

THIS THE 25 DAY OF June 2025.

PAUL E. SMITH
CHAIRMAN



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