ORAL ARGUMENT SCHEDULED FOR NOVEMBER 16, 2011

No. 10-1362

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAYTON TIRE,
DIVISION OF BRIDGESTONE/FIRESTONE

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

FINAL BRIEF FOR THE SECRETARY OF LABOR

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RULE 28 CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(a) Parties and Amici: All parties, intervenors, and amici appearing before the Occupational Health and Review Commission and in this Court are listed in the Opening Brief for Petitioner Dayton, a Division of Bridgestone/Firestone, Inc.

(b) Rulings under Review: References to the rulings at issue appear in the Opening Brief for Petitioner Dayton.

(c) Related Cases: There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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STATUTES AND REGULATIONS

MISCELLANEOUS

GLOSSARY

ALJ	Administrative Law Judge, appointed by the Commission to hear and make an initial decision in contested cases. 29 U.S.C. § 661(j)
APA	Administrative Procedure Act
the Commission	the three-member Occupational Safety and Health Review Commission, an independent adjudicative forum for employers who contest citations issued by the U.S. Secretary of Labor. 29 U.S.C. §§ 659, 661. *See generally Martin v. OSHRC,* 499 U.S. 144 (1991)
CO	OSHA compliance officer
Dayton	Dayton Tire, a division of Bridgestone/Firestone, Inc.
LOTO	Secretary's Lockout Tagout Standard, 29 C.F.R. § 1910.147
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
OSHA	the Occupational Safety and Health Administration
OSH Act	the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678
the Secretary	the U.S. Secretary of Labor has delegated her responsibilities under the OSH Act to an Assistant Secretary, who heads OSHA (the terms "Secretary" and "OSHA" are used interchangeably herein)

JURISDICTIONAL STATEMENT

The Occupational Safety and Health Review Commission had jurisdiction over this enforcement proceeding pursuant to section 10(c) of the OSH Act, 29 U.S.C. § 659(c). The Commission issued a final order on September 10, 2010 that disposed of all of the parties' claims. Dayton Tire, a Division of Bridgestone/Firestone, Inc., filed a petition for review with this Court on November 5, 2010. This Court has jurisdiction pursuant to section 11(b) of the OSH Act, 29 U.S.C. § 660(b).

STATEMENT OF THE ISSUES

Whether this Court must set aside the Commission's decision affirming 98 separate willful violations of the Secretary's lockout/tagout safety standard and assessing a civil penalty of $1.975 million solely because of the Commission's delay in deciding the case.

Whether substantial evidence in the record as a whole supports the Commission's determination that Dayton willfully violated the Secretary's lockout/tagout standard.

STATEMENT OF THE CASE

On October 19, 1993, a Dayton employee was preparing a tire assembly machine to produce a different size tire when he accidentally tripped a limit switch that activated the machine and was fatally crushed between moving parts. The

Secretary commenced an investigation focusing on compliance with her lockout/tagout (LOTO) standard, 29 C.F.R. § 1910.147. On April 18, 1994, the Secretary issued a citation to Dayton alleging, as amended, 100 willful violations of the LOTO standard and proposing a $7,000,000 penalty. JA 29-86. Dayton contested the citation, and a hearing lasting 35 days was held before an ALJ.[1] R. at Transcript Volumes 1-36 ("Tr.")

The ALJ found 37 willful violations, 63 serious violations, and one other-than-serious violation. He assessed a total penalty of $518,000. JA 97-188 (R. at Pleadings Vol. 7, No. 185 ("ALJ D & O")).

Both Dayton and the Secretary appealed the ALJ's decision. JA 189-191. On review, the Commission vacated one item, reclassified all the violations as willful, and assessed a $1,975,000 penalty. Supplemental Appendix (SA) 1-46 (R. at Vol. 7, No. 211 ("Dec.")).

Dayton timely petitioned this Court for review of the Commission's decision. Venue in this Court is proper because any person adversely affected or

[1] Dayton routinely confuses this administrative proceeding with the separate district court action under 29 U.S.C. § 662 in which the Secretary alleged that conditions at the plant posed an imminent danger of death or serious physical harm and sought a restraining order to prevent such dangerous conditions. Brief at 2-3, 17-18, 23. Although the district court found no such imminent danger, *Reich v. Dayton Tire*, 853 F.Supp. 376 (W.D. Okla. 1994), it did not rule on the validity of the cited LOTO violations here.

aggrieved by an order of the Commission may file a petition for review here. 29 U.S.C. § 660(a).

STATEMENT OF FACTS

1. *Legal Framework*

a. *Statutory Background*

The OSH Act requires the Secretary upon investigation or inspection of a workplace to issue a citation with "reasonable promptness," but no later than six months following the occurrence of a violation. 29 U.S.C. § 658(a), (c). An employer then has 15 business days to contest the citation. 29 U.S.C. § 659(a). Upon doing so, the case goes to the Commission, an independent adjudicative body within the Executive Branch that serves as a neutral arbiter of disputes between the Secretary and employers who have received OSHA citations. 29 U.S.C. § 659(c); *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985); *Nat'l Ass'n of Home Builders v. OSHA*, 602 F.3d 464, 466 (D.C. Cir. 2010). Following a hearing, an ALJ issues a recommended decision, which becomes a final order of the Commission unless it reviews the ALJ decision. 29 U.S.C. §§ 659, 661(j). Unlike the deadlines for filing or responding to a citation, the OSH Act contains no provision establishing time limits for adjudication of the case by the ALJ or Commission.

The Commission is composed of three members appointed by the President and confirmed by the Senate. 29 U.S.C. § 661(a). Two Commission members constitute a quorum and official action can be taken only with the affirmative vote of two members. *Id*. § 661(f).

Three provisions of the Administrative Procedure Act are relevant. The "Ancillary Matters" section requires an agency "to proceed to conclude" "agency matters" "with due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 U.S.C. § 555(b). The judicial review section mandates that "the reviewing court shall [ ] compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Last, § 706(2)(A) and (E) – the arbitrary and capricious and substantial evidence provisions – delineate this Court's standard of review of Commission decisions.

Violations of OSHA standards are characterized as "serious," "other-than-serious," "willful," or "repeated." 29 U.S.C. § 666. A violation is willful if done "voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements." *E.g.*, *AJP Constr. Co. v. Sec'y of Labor*, 357 F. 3d 70, 74 (D.C. Cir. 2004). The classification of a violation as willful is a factual determination governed by substantial evidence review under 5 U.S.C. § 706(E); *AJP Constr. Co.*, 357 F.3d at 73.

b. *The Lockout/tagout Standard, 29 C.F.R. § 1910.147*

OSHA's lockout/tagout standard (LOTO) "protect[s] workers who perform maintenance or servicing operations on powered industrial equipment from the hazard of energy unexpectedly released from that equipment." *Intern. Union, United Auto., Aerospace, Agric. Implement Workers of Am., UAW v. OSHA* (*LOTO II*), 37 F.3d 665, 667 (D.C. Cir. 1994). Service and maintenance activities include setting up, adjusting, lubricating, cleaning, and unjamming machines, where the employee may be exposed to unexpected energization or startup of the equipment or release of hazardous energy. 29 C.F.R. § 1910.147(b).

The LOTO standard "essentially requires an employer to affix a 'lock' to an energy isolating device connected to the equipment ('lockout'), or, if the employer can prove its equal efficacy (or the equipment is unlockable), to place a 'tag' on the energy isolating device, warning employees not to operate the device or the equipment until the tag is removed ('tagout'). *LOTO II*, at 667. In particular, an employer is required under LOTO *inter alia* to develop and document energy control procedures as well as provide its employees with locks. 29 C.F.R. § 1910.147(c)(4)(i), (c)(5)(i). An employer must then conduct periodic inspections of its energy control procedures to ensure continued compliance with the standard. 29 C.F.R. § 1910.147(c)(6).

LOTO training is keyed to a worker's job duties. An employee who performs covered servicing or maintenance activities is an authorized employee. 29 C.F.R. § 1910.147(b). An authorized employee must receive training in the recognition of applicable hazardous energy sources, the type and magnitude of energy available in the workplace, and the methods and means necessary for energy isolation and control. 29 C.F.R. 1910.147(c)(7)(i)(A). An employee who operates, but does not service, a covered machine is an affected employee. *Id.* An affected employee need only be trained in the purpose and use of the energy control procedures so that he does not disturb an affixed lock or tag. 29 C.F.R. § 1910.147(c)(7)(i)(B).

The LOTO standard specifically addresses the situation here where an employer uses both its own employees and an outside contractor to perform service and maintenance. The onsite employer and the outside contractor must inform each other of their respective lockout or tagout procedures and the onsite employer must ensure that its employees understand and comply with the outside contractor's energy control program. 29 C.F.R. § 1910.147(f)(2).

The LOTO standard does not cover "normal production operations," namely, when the machine or equipment is "performing its intended production function. 29 C.F.R. § 1910.147(a)(2). Normal production operations are covered by OSHA's machine guarding standard. 29 C.F.R. 1910 Subpart O. However, when

equipment is maintained or serviced during normal production operations, the LOTO standard applies if the machine guarding standard fails to provide adequate protection or other effective protection cannot be provided, such when an employee must bypass a guard or other safety device. 29 C.F.R. § 1910.147(a)(2)(ii).

2. *Historical Facts*

a. *Job Duties of Dayton Employees*

At the time of the fatality in October 1993, Dayton employed 1,200 persons at its tire manufacturing facility in Oklahoma City, Oklahoma. SA 3; JA 102 (Dec. 3; ALJ D & O 5). The citations involve seven different types of machines that were part of Dayton's tire manufacturing process: (1) beadwinder machines, (2) second stage tire assembly machines ("TAMs"), (3) radial dopers, (4) curing presses, (5) banbury machines, (6) Dayton loaders and tread tubers, and (7) module machines. JA 29-86 (R. at Pleadings Vol. 7, No. 1).

Dayton employees worked on this equipment at two different stages in the manufacturing process: (1) before commencement of a production run or during a break in production to prepare the machines for the specific production process, and (2) during production by performing tasks necessary to keep the equipment functioning properly. SA 3 (Dec. 3).

With respect to pre-production tasks, Dayton employees were required to prepare the beadwinder machines, the TAMs, and the curing presses for their respective production operations. SA 3 (Dec. 3). To prepare the beadwinder machines for the production of different sizes of beads (the part of the tire that fits within the wheel rim), employees known as "operators" removed and installed various machine parts, including a metal rotating disc known as a "chuck" and a horseshoe-shaped part known as a "ply block." SA 3; JA 327-29, 335-41, 568-69 (Dec. 3; Tr. 3570-72; 3646-52; 6215-16). To prepare the TAMs for the production of different sizes of tires, employees known as "TAM size-changers" not only removed and installed several machine parts, but also made adjustments to the machinery and built "check tires"—a set of six tires produced for quality control purposes. SA 3; JA 103-06, 605-19 (Dec. 3; ALJ D & O 6-9; Ct. Ex. 4). And to prepare the curing presses for different sizes or types of tires, employees known as "mold/bladder changers" removed and installed the presses, which were comprised of numerous parts including large metal molds and inflatable rubber bladders. SA 3-4; JA 109-11, 605-619 (Dec. 3-4; ALJ D & O 12-14; Ct. Ex. 4). Whenever there were changes in bead size, the mold/bladder changers also removed and installed post cure inflator ("PCI") rings, which inflated and cooled the molded tires, and then mechanically transferred the tires to a conveyor. SA 4; JA 103-06, 605-19 (Dec. 4; ALJ D & O 6-9; Ct. Ex. 4).

During the course of production operations, Dayton employees were required to clean the radial dopers and replace certain parts of the beadwinder and module machines, as well as remove material that jammed the components of the module machines, tread tubers, Dayton loaders, and banbury machines. SA 4 (Dec. 4). Specifically, employees known as "radial doper attendants" periodically removed paint and lubricant that built up on various parts of the radial dopers. SA 4; JA 106-09, 605-19 (Dec. 4; ALJ D & O 9-12; Ct. Ex. 4). Employees known as "module operators" replaced certain worn parts of the module machines such as "grinding stones," which are round disks with sandpaper-like edges that rotate at high speeds, and removed tires that jammed various components of the machinery. SA 4; JA 102-03, 620-21, 226-34, 237-42, 244, 246-55, 259-63, 265-66, 270 (Dec. 4; ALJ D & O 5-6, 65-67; Ct. Ex. 9 (Jt. Ex. 1); Tr. 247, 249, 251, 266, 276-77, 353-54, 369, 417, 419-20, 443, 530, 538, 598, 633, 732-33, 761, 819, 845, 902-03, 931-32, 955, 1113, 1116, 1359). Operators of the beadwinder machines replaced large wire reels when wire ran out, broke, or was not the correct type. SA 4; JA 131-33, 330-32, 335-37 (Dec. 4; ALJ D & O 34-36; Tr. 3594-96, 3646-48). Employees known as "mill attendants" removed rubber that jammed various components of the Dayton loaders and tread tubers. SA 4; JA 150-53, 604, 306-17 (Dec. 4; ALJ D & O 53-56; Ct. Ex. 1 (stipulations 895-900); Tr. 2300-01, 2314-15, 2353-54, 2472-73, 2482, 2494-95, 2517). And finally, employees known as "belt

loaders" and "T-mix attendants" removed rubber that jammed various components of the banbury machines. SA 4; JA 155-59, 273-82, 284-86, 289-303, 747-54 (Dec. 4; ALJ D & O 58-62; Tr. 1921-25, 1974-77; 1980, 1986-87, 1992, 2048, 2051-52, 2116-17, 2140-41, 2151-56, 2159-60; C-153 at 11, 13, 16-17, 27-28, 79-80).

b. *Dayton's Contract with Ogden*

In 1969 – 20 years before LOTO was promulgated, Dayton contracted with Ogden Allied to perform plant maintenance in whole or in part . . . as and when requested by Firestone. SA 24; JA 737 (Dec. 24 n.13; C-109, Art. II). The contract did not define or otherwise describe Ogden's maintenance duties, and it expressly reserved to Dayton the right to perform any or all of the maintenance or any other work with its own personnel. SA 24; JA 737 (Dec. 24 n.13; C-109, Art. II).

Ogden performed major maintenance functions at the plant such as replacing engines. JA 578-91 (Tr. 6319-32). On occasion, Ogden was called to assist Dayton employees or would do the job itself when Dayton employees experienced difficulty completing some maintenance tasks. JA 576 (Tr. 6313). Dayton called Ogden for assistance in unjamming at the Banbury, tubing department, and module machines and in changing the chucks, ply blocks, grinding stones, dust scoops and brake pads of the white side wall grinder. JA 234-36, 243, 245, 256, 264, 267,

283, 570, 579, 583-84 (Tr. 361-62, 368, 447, 533, 852, 1040, 1134, 1981, 6303, 6320, 6324-25). There were, however, no uniform guidelines for determining when to seek out Ogden's assistance. JA 352-53, 383-84, 571, 576-77 (Tr. 4414-15, 4448-49, 6307, 6313, 6317).

c. *Dayton's Initial Response to LOTO Promulgation*

On September 15, 1989, two weeks after the LOTO Standard was promulgated, John Lepkowski, then-corporate safety director for Bridgestone/Firestone, sent a corporate-wide memorandum alerting all safety engineers to the requirements of the new LOTO standard and attaching a copy of the standard. JA 637-57 (C-84).

Philip McCowan, Dayton's senior safety engineer and the Dayton official responsible for company compliance with the standard, read Lepkowski's memorandum and the standard. SA 24; JA 354-55, 359 (Dec. 24; Tr. 4416-17, 4421).

McCowan had been safety manager since 1972, SA 24; JA 349 (Dec. 24; Tr. 4411), and had participated in the development of Ogden's energy control program. JA 377-78 (Tr. 4440-41). He knew that the standard's definition of service and maintenance included unjamming, setup, installing, adjusting, cleaning and making tool changes. JA 375 (Tr. 4438). And based on his experience at the plant, he was intimately familiar with the various jobs; SA 24-25; JA 352-54 (Dec.

24-25; Tr. 4414-16); in fact, he wrote every safe operating procedure for every job and machine in the plant. SA 25; JA 364 (Dec. 25; Tr. 4426).

McCowan knew that none of the pre-production job tasks described in subsection a. above could be performed while the equipment was operating. JA 373 (Tr. 4436). The beadwinder machine cannot make a bead while the chuck is being changed; the radial doper cannot perform its lubrication function while the clamp arms and spray nozzles are being cleaned; tires cannot be cured while the curing press undergoes a mold change; grinding stones cannot perform their grinding function while they are being changed. JA 370-71 (Tr. 4433-34). Similarly, he knew that the machines posed hazards to employees during their operation. JA 364 (Tr. 4426); C-27; *see also, e.g.*, C-42 (safe operating procedure for changing molds on curing press advising changer not to work on molds until machine is in manual); JA 763 (C-43 (safe operating procedure advising beadwinders to shut off power before attempting change chuck or block)).

Although McCowan thought that the standard was confusing, JA 374, 387, 392-93 (Tr. 4437, 4453, 4459-60), and he realized that it could affect the manner in which work was performed in the factory, JA 386-87 (Tr. 4452-53), he did not consult the Preamble to help him understand how the standard would apply to

Dayton's operations.[2] JA 355 (Tr. 4417). McCowan also realized that classifying an employee as authorized meant that the employee had to receive extra training so that he or she could perform lockout procedures. JA 357 (Tr. 4419). In determining how to apply the standard, however, his first point of reference on every job was the standard's exception for normal production operations. JA 374-76 (Tr. 4437-39).

McCowan classified all Dayton employees as affected, JA 351, 357 (Tr. 4413, 4419), which meant that they would not be exposed to unexpected energization. His rationale was two-fold: (1) Dayton employees who were performing their assigned tasks were, by definition, engaged in production; JA 373-74 (Tr. 4436-37); and (2) there should not be unexpected energization when an employee works alone or in close proximity to the power source. JA 374-75 (Tr. 4437-38). His explanation for classifying mold/bladder changers as affected is instructive:

> In the curing machine we had an employee whose sole job was to change the curing molds. We had another job whose employee was to change the bladders in the curing. And that job entailed that they opened the press up and turned off the power. The power is right by

[2] At his deposition McCowan stated definitely that he had not read the Preamble; during the hearing he stated that he could not recall having had ever read the Preamble. In explaining what he relied upon to make the determination that Dayton employees were affected and not authorized, he does not mention the Preamble.

> him. He's in full view and control of it. It's a normal production job for that employee, he does it numerous times, he does no other work and no one works around him.

JA 358-59 (Tr. 4420-21).[3] Accordingly, McCowan concluded that Ogden (not Dayton) "was required to implement the full gamut of LOTO procedures." SA 4; JA 395-96 (Dec. 4; Tr. 4463-64).

d. *The 1992-93 Warnings about LOTO Violations and Dayton's Response*

By 1992, Kelly Mattocks had replaced McCowan as the Dayton official responsible for OSHA compliance. SA 26-27 (Dec. 26-27). Although she never discussed with McCowan his conclusion that Dayton employees performed no covered servicing or maintenance, she perpetuated the decision. SA 26; JA 504-

[3] McCowan relied on the quoted rationale elsewhere. *See* JA 374-75, 389-91 (Tr. 4437-38 (mold/bladder changers not subject to unexpected energization because [t]hey had full control of the machine. It was a one-man machine); Tr. 4455-56 (relying on view that beadwinder set up is a one-man operation to say that unexpected energization should not occur because operator is in full, total control of that machine, and there's nobody else working on that machine around him); Tr. 4456-57 (relying on view that, for most part, TAM size change is one-man operation and changer is in full control and contact of that machine as basis for conclusion that there should not be unexpected operation of the machine)). Although in his testimony he stated that he believed that employees engaged in one-man operations near the controls were not subject to unexpected energization, the safe operating procedures he wrote indicate that he realized that such a circumstance did not prevent unexpected energization. *See* JA 381-382 (C-42 (safe operating procedure for changing molds directing employee not to start change until tag placed on machine); Tr. 4446-47 (explaining that purpose of tags on curing press is to warn others not to start machine)).

06, 532-33 (Dec. 26; Tr. 4929-31; 4986, 4994). Accordingly, Mattocks hired John Lepkowski, the former corporate safety director, to provide Dayton employees only affected level LOTO training. SA 27; JA 399-402, 521 (Dec. 27; Tr. 4510-11, 4514-15, 4946). As part of that training, in August 1992, Lepkowski showed Dayton employees a videotape on lockout/tagout. JA 503, 512 (Tr. 4923, 4937). Tony Carr, vice-president of the Dayton's union local, viewed the videotape during a training session and became concerned that some of Dayton's employees were exposed to the same hazards in performing their jobs as the employees depicted in the videotape. SA 27; JA 403-05 (Dec. 27; Tr. 4527-29).

Carr expressed his concerns to Lepkowski, specifically noting his belief that employees working as mold/bladder changers, TAM setup personnel, and module operators should be classified as authorized. SA 27; JA 405-07 (Dec. 27; Tr. 4529-31). In response, Lepkowski accompanied Carr and Mattocks to the final inspection department where they watched the modules operate; they went to the curing department and observed the curing press operate; and they observed TAM setup operations. JA 408-09, 411 (Tr. 4533-34, 4537). After observing the machinery and equipment involved in these three jobs, Lepkowski recommended to Mattocks and Carr that they seriously consider classifying those jobs as authorized. SA 27; JA 410 (Dec. 27; Tr. 4535).

A few months later, in December 1992, Robert B. Walker, corporate manager of safety, health and industrial hygiene, sent a memorandum to all Bridgestone/Firestone safety engineers describing LOTO compliance problems and directing them to review their LOTO practices:

> Please revisit your plant's practice regarding this very important, fundamental safety procedure. Remember, this standard has been in effect for over two years, so you will have little defense for non-compliance in the event of an OSHA citation, and OSHA is aggressively enforcing this standard.

JA 691; SA 27-28 (C-91 (Walker Memorandum); Dec. 27-28).

In response to the Walker Memorandum, Mattocks checked with production supervisors to verify that Dayton employees' job functions had not changed since McCowan's original determination had been made to classify all Dayton employees as affected rather than authorized. SA 28; JA 528 (Dec. 28; Tr. 4970). She did not review the operation of the machines nor try to determine whether the original determination was correct. SA 28; JA 512-15, 529 (Dec. 28; Tr. 4937-40, 4971). Mattocks stated that Dayton was kind of in a unique situation because it had an outside contractor for some service and maintenance activities whereas other plants may have their own employees performing these functions. JA 520 (Tr. 4945).

On February 12, 1993, Iowa OSHA issued a citation for serious violations of the LOTO Standard to a Bridgestone/Firestone facility in Des Moines, Iowa.[4] JA 721-25 (C-92). On March 1, 1993, Bridgestone/Firestone distributed a copy of this citation to all of its other tire assembly plants along with a memorandum from C.R. Ramsey, vice president of human resources. SA 24 (Dec. 24 n.14). The memorandum stated:

> I ask that you share this information with your plant managers and have them review all of the specific violations (attached) and

[4] The Iowa plant was cited for the following LOTO violations:

> (1) 29 C.F.R. 1910.147(c)(4)(i) -- for not providing procedures to control hazardous energy for banners, tubers, calenders, banbury, curing press and tire building machines.
> (2) 29 C.F.R. 1910.147(c)(5)(i) -- for not providing locks, tags, chains, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware to employees observed changing molds in the curing press.
> (3) 29 C.F.R. 1910.147(c)(5)(ii) -- for not singularly identifying lockout devices and tagout devices.
> (4) 29 C.F.R. 1910.147(c)(6)(i) -- for not conducting an annual or more frequent inspection of the energy control procedure to ensure that the procedure and requirements of this standard were followed.
> (5) 29 C.F.R. 1910.147(c)(7)(i) -- for not providing adequate training to employees working on the curing presses, banners, tubers, calenders, saws and banburies.
> (6) 29 C.F.R. 1910.147(f)(2) -- for not signing an agreement to assure an exchange of LOTO programs with an outside employer of servicing personnel engaged in activities at the facility.

JA 722-25 (C-92).

> implement countermeasures to correct similar deficiencies; and
> establish methods to maintain compliance in the future.

JA 727; SA 24 (C-93 (Ramsey Memorandum); Dec. 24 n.14)). The memorandum further advised that under OSHA law, if similar violations were cited in other plants, such violations could be subject to a repeat citation and an increased penalty. JA 727; SA 24 (C-93; Dec. 24 n.14).

In May 1993, OSHA began an inspection of the Dayton plant pursuant to an employee complaint of ergonomic hazards. SA 29; JA 421-23 (Dec. 28; Tr. 4625, 4628-29). During the inspection, OSHA industrial hygienist Faye Kearney pointed out a number of specific LOTO hazards to Mattocks. SA 29; JA 425-26, 437-38 (Dec. 29; Tr. 4633-34, 4645-46). She specifically pointed out employees at risk of injury due to unexpected energization or start up as they unjammed rubber in the Banbury department; changed reels on the beadwinder; cleaned the cabinet of the radial doper; changed molds of the curing press; changed the chuck and grinding stones on the module machine; and unjammed rubber in the tubing department. JA 429-30, 453-54, 432, 434, 437, 456, 460-61 (Tr. 4637-38, 4693-94, 4640, 4642, 4645, 4696, 4700-01). Mattocks responded that Dayton employees were production employees, and not performing servicing and maintenance, and therefore did not need to lockout or tagout their equipment. SA 29; JA 427, 437, 527, 539 (Dec. 29; Tr. 4635, 4645, 4965, 5007). At one point, Mattocks told

Kearney that it was OSHA that was confused about the [LOTO] standard. JA 412 (Tr. 4563). Kearney completed her ergonomic hazards inspection and referred her LOTO concerns to an OSHA safety specialist. SA 30; JA 472, 636 (Dec. 30; Tr. 4719; C-19).

On October 18, 1993, Robert Julian, a TAM size changer, suffered fatal injuries when his head was crushed between a bandbuilder and the grab assembly; he had been making an adjustment on the M-6 TAM when he inadvertently tripped the limit switch that caused the bandbuilder to move to the grab assembly. JA 123, 623-25 (ALJ D & O 26; C-17). A committee of Dayton officials and union representatives investigated the accident. JA 623-25 (C-17). Union representatives' recommended implementation of lockout/tagout procedures to prevent similar accidents in the future. JA 413 (Tr. 4568). Robert Walker, corporate head of safety, recommended to Mattocks that she reexamine whether LOTO should apply to the entire TAM setup operation. SA 31; JA 600-01 (Dec. 31; Tr. 6432-33). Mattocks rejected the union recommendation and continued to insist that lockout was not necessary because Dayton employees were responsible for production operations. SA 31; JA 504-26 (Dec. 31; Tr. 4929-51). Instead, Dayton made engineering changes to the limit switch and to instructed TAM size changers to position themselves differently during grab adjustments. JA 625, 534 (C-17; Tr. 5002).

OSHA sent a compliance officer to investigate the accident and the lockout/tagout problems Kearney had already identified. SA 31; JA 530 (Dec. 31; Tr. 4975). Early in the course of the inspection, the compliance officer, George McCown, advised Mattocks that Dayton was in violation of the LOTO standard. SA 32; JA 530 (Dec. 32; Tr. 4975). Dayton continued to insist that its employees did not perform service and maintenance covered by the standard and that lockout/tagout procedures would not be used for their activities. SA 32; JA 531 (Dec. 32; Tr. 4976).

3. *Decisions Below*

a. *The OSHA Citation*

On April 18, 1994, the Secretary issued a citation to Dayton alleging, as amended, 100 willful violations of four different provisions of the LOTO Standard, 29 C.F.R. § 1910.147. JA 30-86 (R. at Pleading Vol. 7, No. 1).

Citation items one through six alleged that Dayton willfully violated 29 C.F.R. § 1910.147(c)(4)(i) by failing to develop, document, and utilize energy control procedures for seven different types of equipment in the six departments described above.[5] JA 33-34.

[5] Item 3 contained sub-items for two different machines in the curing department, the radial doper and the curing press.

Citation item 7 alleged that Dayton willfully violated § 1910.147(c)(5)(i) by failing to provide employees with locks, tags and other necessary equipment for isolating, securing, or blocking machines and equipment from energy sources. JA 35. Citation item 8 alleged that Dayton's failure to conduct or certify annual of the energy control procedures applicable to the equipment in its facility constituted a willful violation of § 1910.147(c)(6)(i) and (ii). JA 36-37.

Citation item 107 alleged that Dayton willfully violated 1910.147(d) by failing to utilize appropriate lockout procedures on the machine Julian was adjusting at the time he suffered his fatal accident. JA 86.

The remaining 91 citation items alleged that Dayton willfully failed to provide the training required by § 1910.147(c)(7)(i) to 91 employees authorized to perform servicing and maintenance activities covered by the standard. JA 37-86.

The Secretary proposed a civil penalty of $70,000 for each violation, for a total penalty of $7,000,000. JA 30-86. Dayton contested the citation and proposed penalty, and a hearing lasting 35 days was held before an ALJ.

b. *The ALJ D & O Affirming the Violations but Reducing the Classification and Penalty.*

The ALJ affirmed every single citation item. He found 37 willful violations, 63 serious violations, and 1 other than serious violation. He assessed a total penalty of $518,000. JA 187-88.

As for the willful characterization, the ALJ first determined that it could not be concluded that Respondent intentionally disregarded or was plainly indifferent to the standard as a matter of corporate policy throughout the Oklahoma City Location. JA 128 (ALJ D & O 31). The ALJ then recognized, however, that whether or not, as a matter of corporate policy, Respondent had the state of mind to intentionally disregard or be plainly indifferent to the requirements of the LOTO standard on a plant wide basis, he still had to decide whether each individual cited violation was willful or not. JA 128-29 (ALJ D & O 31-32).

In determining whether or not an individual item was willful, the ALJ focused solely on the Iowa citation. JA 128-31 (ALJ D & O 31-34). Thus, the ALJ affirmed as willful only items that involved the same type of machinery and equipment covered by the Iowa citation. JA 131, 145, 161, 165-66, 169-71 (ALJ D & O 34, 48, 64, 68-69, 72-73, 74). Citation items related to machinery and equipment not specifically mentioned in the Iowa citation were affirmed as serious. JA 185-86 (ALJ D & O 88-89).

Despite finding that every single cited item constituted a violation, and finding more than one-third of the violations to be willful, the ALJ reduced the proposed penalties by more than ninety-five percent. JA 180-186 (ALJ D & O 83-89).

c. *The Commission Decision Affirming the Violations, Reinstating the Willful Classification, and Increasing the Penalty.*

The Commission first rejected Dayton's many threshold challenges to the citation and standard including a void-for-vagueness challenge, infeasibility and inapplicability defenses, and improper per-instance citing. It further affirmed all but one of the citation items and characterized the affirmed items as willful. The Commission assessed a total penalty of $1,975,000.

Regarding Dayton's claims that the standard did not apply to it on the ground that no "unexpected energization" occurs, the Commission explained that term "unambiguously refers to potential of a machine or equipment to 'energize, start up, or release stored energy without sufficient advance notice to the employee.'" SA 6-7 (Dec. 6-7 *citing Reich v. Gen. Motors Corp.*, 89 F.3d 313, 315 (6th Cir. 1996) (LOTO standard's plain language unambiguously makes inapplicable "situation where an employee is alerted or warned that the machine being serviced is about to activate")). It then rejected as "unsubstantiated" Dayton's claims that its machinery moved too slowly and was too visible to cause injury. It found the ALJ's determination of potential injury from unexpected energization amply supported by the record evidence, which detailed the operation and servicing of the machines as well as past and potential injuries resulting from unexpected movement or start up. SA 8 (Dec. 8). The Commission further

pointed out that although some servicing activities were visible from control panels, the servicing employee, nearby employees or supervisors, or equipment malfunction could result in inadvertent activation or equipment movement. SA 9 (Dec. 9).

The Commission likewise rejected Dayton's argument that the energizations were not unexpected because servicing occurred in automatic mode or could only be performed while operating. SA 9 (Dec. 9). But maintenance in automatic mode, the Commission explained, is covered where the equipment, as here, lacks adequate guarding or the employee must remove or bypass such guarding to service it. SA 10 (Dec. 10). Finally, the Commission rebuffed Dayton's argument that because start-up was a multi-step process, energization could not be unexpected. The Commission noted record evidence establishing reenergization "in a matter of seconds" as well as the numerous specific examples of unexpected reenergization. SA 11 (Dec. 11).

The Commission next rejected Dayton's contention that its work fell within LOTO's minor servicing exception. Dayton's own job evaluation form for the beadwinder operator included "setting up," an activity expressly covered by LOTO. Additionally, Dayton did not employ equally effective protections as the exception requires: emergency stop devices and safety ropes would not prevent

inadvertent restarting and Dayton did not show whatever guarding existed would protect employees during servicing. SA 14-15 (Dec. 14-15).

The Commission next determined that the violations were willful. Based on the extensive record before it, the Commission found that "over a period of years, Dayton consciously disregarded the LOTO standard by operating its tire production line in a manner that was patently inconsistent with the requirements of the standard, and by failing to reexamine its violative practices despite receiving information and inquiries that should have led it to do so." SA 23 (Dec. 23).

In particular, it found "plainly erroneous," "unsupportable," and "strain[ing] credulity" Dayton's safety manager Phillip McCowan's initial conclusion that the LOTO standard did not apply to Dayton's employees, but rather covered only Ogden Allied, a contractor performing some of the maintenance at the plant. SA 24-26 (Dec. 24-26). According to the Commission, many job tasks performed by Dayton workers, as described in job evaluation forms prepared by McCowan, "squarely fell" within the LOTO standard; Dayton's contract with Ogden Allied did not "perfectly divide[]" between production and servicing and maintenance; and the contract itself gave Dayton the right to perform its own maintenance. SA 24-25 (Dec. 24-25). Moreover, a company-wide memo instructing McCowan to implement the LOTO standard explicitly advised that for work "during normal production operations" to be excepted from LOTO, OSHA's machine guarding

standard applied. But Dayton did not comply with the machine-guarding standard either. SA 25-26 (Dec. 25-26).

The Commission found further evidence of willfulness in five subsequent events, occurring in little over a year, where Dayton "ignored repeated and explicit warnings that it might be in violation of the LOTO standard," and disregarded specific corporate instructions to review the applicability of LOTO at the plant. SA 32 (Dec. 32). These included (a) a warning from a recently retired Bridgestone corporate safety officer that certain employees should no longer be classified as merely "affected;" (b) instruction from Bridgestone's corporate director of health, safety and industrial hygiene to revisit the plant's LOTO practices (because of problems with compliance in the company); (c) warning from an OSHA compliance officer of specific LOTO hazards and non-compliance; (d) a request from a joint labor committee to re-examine Dayton's LOTO's program following a worker fatality; and (e) notification from a second OSHA compliance officer of specific LOTO violations and "opportunities" to incorporate LOTO procedures generally. SA 27-32 (Dec. 27-32).

The majority last assessed the penalty. SA 34-37 (Dec. 34-37). Although recognizing the gravity of all the violations was high (because even momentary exposure to sudden unexpected energization could cause serious injury or death), SA 35 (Dec. 35), it nonetheless reduced the proposed penalty because Dayton had

no record of previous LOTO violations, many violations were related, and only one employee was exposed per training violation. SA 35-36 (Dec. 35-36). Thus for items 1-6, it assessed $25,000 each; for item 7 $15,000; for items 8a and b, $10,000; and $20,000 each for items 9-12, 14-17, 20-30, 32-48, 50-83, 86, 87, 89-98, 100-106, and 108. SA 36 (Dec. 36). The total penalty assessed was $1.975 million.

The dissenting commissioner agreed with the majority in all respects except he believed the equipment was not sufficiently dissimilar to warrant the issuance of separate violations under § 1910.147(c)(4)(i). SA 38 (Dec. 38). He also believed Dayton's management acted negligently, not willfully, and thus disagreed with the majority's willful classification. *Id*.

SUMMARY OF ARGUMENT

The Commission decision should not be set aside due to the delay in its issuance. The vindication of public rights, such as the right to safe workplaces, is far more important than punishing the Commission for any negligence in the performance of its duties. Moreover, the remedy for unreasonable delay under the APA is to file a mandamus petition with the courts of appeal to compel agency action. It does not provide for setting aside the action, when concluded. Dayton did not take advantage of this remedy and may not now benefit nor prejudice the Secretary from its own lack of diligence in protecting its right to a timely decision.

Indeed, the Commission is an adjudicatory body completely independent of the Department of Labor, and the Secretary neither caused the delay, nor possessed the power herself to remedy it. Finally, despite the delay, the relief ordered by the Commission – the payment of a nearly $2 million civil penalty – will have the intended deterrent effect on both Dayton's corporate parent (which is responsible for Dayton's actions) and the general public. Thus, the NLRA cases refusing enforcement of Board orders because the passage of time and changed circumstances have made the ordered injunctive relief senseless are entirely inapposite.

Regarding Dayton's second argument, the characterization of a violation as willful and the determination whether Dayton acted in good faith are questions of fact for the Commission to decide. The Commission carefully reviewed the extensive record and reached a reasonable determination, based on substantial evidence, that Dayton consciously disregarded the LOTO standard. The Commission found that both McCowan and Mattocks were aware that the standard applied to tasks performed by Dayton personnel and decided not to implement the standard's LOTO protections. Because the Commission's findings are supported by substantial evidence, this Court's highly deferential standard of review requires affirmance.

Dayton has it exactly backwards when it states the Secretary has a heavy burden to establish willfulness. Rather, it is Dayton that must now demonstrate that "no reasonable mind" could accept the Commission's willful classification of the violations. But Dayton does not do this. Instead, it largely asks this Court to weigh *de novo* the evidence, draw its own inferences, and make its own assessment of willfulness. But these functions are the Commission's preserve, not this Court's.

ARGUMENT

I. *The Standard of Review Is Highly Deferential.*

This Court must affirm the Commission's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081, 1084 (D.C. Cir. 2007). The factual findings of the Commission, "if supported by substantial evidence on the record considered as a whole," shall be conclusive. 29 U.S.C. § 660(a); *Fabi Constr. Co.*, 508 F.3d at 1084. Under the substantial evidence standard, the Court "must uphold the Commission's findings of fact as long as there is enough evidence in the record for a reasonable mind to agree with the Commission." *Fabi Constr. Co.*, 508 F.3d at 1084 (citations omitted). "The appellate court therefore does not review the evidence *de novo.* Even if the evidence is susceptible of two inconsistent inferences, the agency must be upheld if

a reasonable person could come to either conclusion on that evidence." *Pub. Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1485 (D.C. Cir. 1986); *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003) ("When the administrative decision adequately considers contradictory evidence, however, our standard of review does not permit a reviewing court to displace the Commission's choice between conflicting views, even if the court would have made a different choice in the first instance."); *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1305 (D.C. Cir. 1995 ("[W]e do not feel free to choose between competing inferences that can be drawn from essentially factual matters. It is up to the Commission, not us"). *See also National Eng'g and Contr. Co. v. OSHRC*, 45 F.3d 476, 481 (D.C. Cir. 1995) (even "thin" evidence is sufficient to support a determination of liability on the record as a whole).

Finally, the Court gives substantial deference to the Secretary's construction of the OSH Act and her regulations, "upholding such interpretations so long as they are consistent with the statutory language and otherwise reasonable." *A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1345 (D.C. Cir. 2002); *Nat'l Home Builders*, 602 F.3d at 468.

II. *The Commission Decision Should Not Be Set Aside Because of the Delay in Its Issuance.*

A. *The Courts Will Not Infer an Enforcement Bar in the Absence of a Statutory Provision Suggesting One.*

The "Ancillary Matters" section of the Administrative Procedure Act requires an agency "to proceed to conclude" "agency matters" "with due regard for the convenience and necessity of the parties or their representatives and within a reasonable time." 5 U.S.C. § 555(b). Dayton claims that because the Commission (which is completely independent of the Secretary) missed this time limit, its decision in favor of the Secretary must be set aside. The Supreme Court, however, has clearly rejected such simplistic thinking: "It misses the point simply to argue that the [action] date was "mandatory," "imperative," or a "deadline," as of course it was. . . But the failure to act on schedule merely raises the real question, which is what the consequence of tardiness should be." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157 (2003).

Regarding consequences for tardiness, the Supreme Court has been equally clear: "We have frequently articulated the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (citations omitted). The *Brock* court continued "[w]e would be most reluctant to conclude that every

failure of an agency to observe a procedural requirement voids subsequent agency action, especially where important public rights are at stake." Thus, "in the absence a specific provision suggesting Congress intended to create an enforcement bar, we decline to infer one." *Gen. Motors Corp. v. United* States, 496 U.S. 530, 542 (1990); *Barnhart*, 537 U.S. at 157 ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction"); *Brock*, 476 U.S. at 260 ("When, as here, there are less drastic remedies available for failure to meet a statutory deadline, court should not assume that Congress intended the agency to lose its power to act"); *Nat'l Petrochemical & Refiners Assoc. v. EPA*, 630 F.3d 145, 154-55 (D.C. Cir. 2010) .

B. *The Remedy for Unreasonable Delay is a Petition for Mandamus to Compel Agency Action, Not Vacatur of the Action Once Concluded.*

The APA, of course, does not provide for setting aside agency action unreasonably delayed.[6] Rather, it permits parties aggrieved by the delay to petition the courts of appeals to compel agency action. 5 U.S.C. § 706(1); *Action on Smoking and Health (ASH) v. Dep't of Labor*, 100 F.3d 991 (D.C. Cir. 1996); *Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 50, 76 (D.C. Cir. 1984).

[6] The OSH Act likewise contains no time limit for Commission adjudications or any remedy for undue delay.

Dayton, however, did not petition for mandamus. And now that the Commission has acted, Dayton's claim of unreasonable delay is moot. *Shoreham-Wading River Cent. Sch. Dist. v. U.S. Nuclear Reg. Com.*, 931 F.2d 102, 104 (D.C. Cir. 1991).

By foregoing its APA right to compel a decision, Dayton may not now benefit from its own lack of diligence.[7] It cannot sit idly by, hoping for a favorable outcome, and then complain of unreasonable delay after the Commission rules against it. *United States v. LA Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 ("orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction … Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice); *Marcus v. Director*,

[7] Dayton profited greatly from the Commission delay. It has not paid the $518,000 penalty awarded by the ALJ (or the $1.975 penalty issued by the Commission) and interest does not accrue until the case is over. Thus, it has had the use of $518k interest free since February, 1998. Assuming 5% interest compounded annually for 13.5 years (approximate present day), Dayton "earned" $482,887 on the unpaid penalty, or almost the entire amount due. Using the same measures and assuming the Commission decided the case two years after the ALJ decision, Dayton earned $1,486,333 on the unpaid Commission penalty of $1,975,000. If an 8% annual return is used, the interest earned would basically double over 5% (nearly $1 million and $2.8 million respectively). Figures generated by interestcalculator.org.

OWCP, 548 F.2d 1044, 1051 (D.C. Cir. 1976) ("It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process."). It is also unreasonable – and patently unfair – to require the Secretary to suffer prejudice because of the Commission's delay in rendering a decision in this case. The Commission is an adjudicatory body independent of the Department of Labor and the Secretary appeared before it as a litigant on an equal footing with Dayton.[8] *Cuyahoga Valley*, 474 U.S. at 6. The Secretary neither caused the delay, nor possessed the power herself to remedy it. Moreover, the Secretary's enforcement actions are brought to protect the rights of employees endangered by unsafe and unhealthy working conditions. *Id.* Setting aside the Commission's decision would deprive it and the underlying citation of any deterrent effect, and free Dayton of any penalty whatsoever for its 100 *undisputed* LOTO violations. There is simply no basis in law or common sense for punishing the Secretary and affected employees for the Commission's delay in issuing a decision. *See NLRB v. Int. Assoc. of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 725 (1984) ("The Board is not required to

[8] The Court should reject Dayton's inflammatory broadsides trying to link together the Secretary and Commission. Br. at 39, 41. The Secretary stands before the Commission just as Dayton – as an independent litigant before a neutral arbiter. Moreover, the payment of a civil penalty serves a deterrent purpose and the Secretary's enforcement goal of making safer workplaces. *Infra* at 38.

place the consequences of its own delay, even if inordinate, upon wronged employees").

C. *Even With the Delay, Enforcing the Commission Decision Will Have the Intended Deterrent Effect.*

The OSH Act establishes the important public right of a safe and healthy workplace to every working man and woman in the Nation. 29 U.S.C. § 651(b). To make workplaces safe, the Act directs the Secretary of Labor to promulgate health and safety standards and enforce them by inspecting workplaces, issuing citations to violators of her standards, and assessing fines for the violations. *Martin v. OSHRC*, 499 U.S. 144, 147 (1991). As a counterweight, the Act allows violators to have their citations adjudicated by an independent tribunal, the Commission. *Id*. at 147, 151.

Dayton is clearly wrong in arguing that the Commission's delay in issuing its decision renders enforcement of the citation pointless. Br. at 34-40. Affirmance of the Commission order will further important public rights, even with the delay and despite the closure of the Oklahoma City plant. Dayton's claim that affirmance can serve no possible purpose now because the cited facility is closed and there is no equipment there to abate is particularly wrongheaded. Br. at 36-39. First, nothing in the record or in Dayton's Brief indicates that Dayton Tire does not continue to manufacture tires using the same or similar equipment at other

plants, or might not engage in tire manufacturing operations in the future. An affirmed citation will become a part of Dayton's citation history and thereby help ensure Dayton's compliance with the Act generally, and particularly with respect to LOTO during servicing and maintenance of machinery used in other plants.[9]

The citation will also serve to deter violations at tire manufacturing facililties operated by Dayton's corporate parent. *See Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 591 (5th Cir.1980) (a division of a corporation is not a separate legal entity but is the corporation itself); *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir.1978) (same). A search of OSHA's publicly available inspection data reveals that since the ALJ decision 26 separate inspections (state and federal) of Bridgestone/Firestone tire manufacturing facilities have identified at least one safety violation.[10] Thus, there can be no dispute that safety at Bridgestone/Firestone tire manufacturing facilities can be

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[9] Even if Dayton's operations no longer include tire manufacturing, the citation will encourage Dayton's compliance with the Act generally since it will become a part of the company's "history of previous violations" and thus bear on the amount of the penalty to be assessed for any further OSHA violations. 29 U.S.C. § 666(j).

[10] We counted only closed inspections, *i.e.*, violations no longer in dispute. The inspections data is available at OSHA's website under its enforcement/inspection data tab. We searched using Bridgestone as the establishment and the SIC code of 3011 (tire manufacturing). The search was from March 1998 (one month following the ALJ decision) to the present. The Secretary requests the Court take judicial notice of these results. Fed. R. Evid. 201(b), (f); *compare* Br. at 39 (describing one of its tire manufacturing plants as an OSHA VPP star site).

improved, and affirming the Commission order will have its intended deterrent effect of raising greater concern about safety at Bridgestone. *See* JA 727-28 (C-93 (Bridgestone memo advising plants of LOTO violations in Iowa and urging them to "implement countermeasures to correct similar deficiencies")).

Second, even if Dayton were completely out of business, with no successor and no prospect of resuming tire manufacturing operations anywhere, the issue of the appropriate penalty for its *past* violations, standing alone, would give clear purpose to this enforcement action. *See Reich v. OSHRC (Jacksonville Shipyards)*, 102 F.3d 1200, 1202-03 (11th Cir. 1997) (OSHA civil penalty does not become moot in the usual sense because the employer ceases all operations and there is no reasonable prospect that violations will recur); *Atl. States Legal Foundation, Inc. v. Tyson*, 897 F.2d 1128, 1134 (11th Cir. 1990) (even where injunctive relief mooted by compliance, civil penalties are not moot when rightfully sought initially).[11] OSHA penalties act as "pocket-book deterrence." *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001); H.R. Conf. Rep. No. 101-964 at 688 *reprinted in* 1990 U.S.C.C.A.N. 2374, 2393 (explaining seven fold

[11] Dayton wrongly cites *Kent Nowlin Constr. Co. v. OSHRC*, 648 F.2d 1278, 1282 (10th Cir. 1981) for the proposition that the purpose of penalties for willful violations is to prevent a recurrence of similar violations. Br. at 37. The language it quotes (and improperly interlineates) from *Kent Nowlin* concerns a *repeated* violation, not willful one. Willful violators receive the biggest civil fines for the simple reason that they are the worst offenders – they commit the violations willfully.

increase in OSHA penalties was meant to deter violations and ensure adequate enforcement of the Act); *see also Coal Employment Project v. Dole*, 889 F.2d 1127, 1132 (D.C. Cir. 1989) (Mine Act civil penalties provide inducement for compliance with safety standards and deterrence that infrequent inspections cannot generate). *Accord Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 186 (200) ("A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.").

By "pocket-book deterrence," the Act encourages employers to comply with the Secretary's standards, knowing the penalty for violating the Act will directly affect their bottom line. Enforcement deterrence, therefore, works not simply on the particular cited employer, but on all employers who may be tempted to avoid their compliance obligations. And such general deterrence is essential for the success of the OSH Act because OSHA has nowhere near the resources necessary to regularly inspect the large number of workplaces it regulates. *Jacksonville Shipyards*, 102 F.3d at 1203.

The fact that Dayton was cited here under the Secretary's "egregious/willful" policy gives further significance to the penalty here. *See* OSHA Instruction CPL 2.80, *Handling of Cases To Be Proposed for Violation-By-Violation Penalties* (Oct. 21, 1990) (found on OSHA's website in the "Directives" section under "Law

and Regulations" heading). The goal of the egregious/willful policy is to create an effective compliance incentive for employers who may be inclined to ignore ordinary enforcement measures while at the same time conserving scarce enforcement resources: "The large proposed penalties that accompany violation-by-violation citations are not . . . primarily punitive nor exclusively directed at individual sites or workplaces; they serve a public policy purpose; namely, to increase the impact of OSHA's limited enforcement resources." *Id*. at sections G, G.1, G.2.a. Thus, egregious penalties, in particular, are designed to have an impact far beyond a single employer at a single facility. For these reasons, affirmance of the decision below will provide meaningful relief and further the objectives of the OSH Act.

D. *The Labor Relations Cases Dayton Relies on are Inapposite Because Changed Circumstances, Due to the Passage of Time, Made Enforcement of the Ordered Relief Senseless.*

The NLRA cases on which Dayton relies are plainly inapposite. In *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372 (2d Cir. 1990), *NLRB v. Mountain Country Food Store, Inc.*, 931 F.2d 21 (8th Cir. 1991), and *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002), changed circumstances that occurred during the passage of time made the ordered relief a “mock[ery of] reality,” “pointless,” “obsolete,” “unrealistic,” “unreasonable,” and contrary to the very labor policies they were supposed to promote. *Emhart*, 907 F.2d 379-80; *Mountain Country*, 931 F.2d at

22; *TNS*, 296 F.3d at 404.[12] Here, by contrast, both the injunctive and civil penalty portions of the Commission's retain their original purpose despite closure of the Oklahoma City facility. Dayton cites no relevant authority whatsoever to support its position that delay in circumstances presented here requires vacatur of the Commission's decision.

E. *Dayton Suffered No Prejudice from the Delay.*

Dayton makes several wholly unpersuasive arguments that it was prejudiced by the Commission's delay in deciding this case. Br. at 42-43. First it says it lacked "guidance regarding how to run its operations to comply with its alleged LOTO obligations." Br. at 42. But it is not the Commission's job to give employers guidance on complying with OSHA standards. That is the Secretary's function, and she fulfilled it here by providing advice during the ergonomics and LOTO inspections (which advice was flatly rejected by Dayton's Kelly Mattocks) and by providing abatement guidance in the citation itself. If Dayton was truly perplexed, it could have sought further assistance from OSHA, which maintains an

[12] Dayton wrongly contends these cases support a *per se* rule invalidating agency action solely because of delay, standing alone. Br. at 24-26. Rather changed circumstances undermining the ordered relief and/or prejudice to the defendant must be proved for judicial nonenforcement. *E.g.*, TNS, 296 F.3d at 403 ("denying enforcement of an order solely on the basis of delay is inappropriate") citing *NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local* 480, 466 U.S. 720, 725 (1984) (per curiam); *NLRB v. Aeronautical Industrial District Lodge No. 91*, 934 F.2d 1288, 1299-1300 (2d Cir. 1991) (explaining that in *Emhart* "enforcing the order . . . made little sense" due to changed circumstances).

office staffed with specialists for precisely this purpose. *See e.g.*, OSHA's compliance assistance homepage describing numerous assistance and outreach programs at http://www.osha.gov/dcsp/compliance_assistance/index.html.

Dayton next argues that the Commission's delay prevented a remand to the ALJ (who had retired in the interim) to resolve factual disputes. Dayton claims this is important because the Commission made its own adverse credibility determination that undercut Dayton's defense to willfulness. Br. at 43.[13] But Dayton was not entitled to a remand, either by right or custom. The Commission, not the ALJ, is the final agency factfinder, *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 834 (5th Cir. 1975), and it is not bound by ALJ credibility findings so long as its decision is supported by substantial evidence. *Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 30 (5th Cir. 1976). Accordingly, it is entirely within the Commission's discretion to remand or not. *C.J. Hughes Constr. Co.*, 17 BNA OSHC 1753, 1996 WL 514965 *3 (No. 93-3177, 1996) (Commission in as good a position to determine the facts where ALJ's credibility finding not based on demeanor or other factors observable by ALJ); *Metro Steel Constr. Co.*, 18 BNA OSHC 1705, 1999 WL 230871 *3 (No. 96-1459, 1999) (same, ALJ credibility

[13] The issue apparently concerns the conflict in testimony between Mattocks and C.O. Kearney about whether Kearney pointed out specific LOTO violations. The ALJ made no demeanor-based credibility determination regarding this conflict, which the Commission resolved by crediting Kearney's version of events as "specific, direct and corroborated by her actions." SA 30 (Dec. 30).

determinations must be clearly stated); *George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1999 WL 777768 *6 (No. 94-3121, 1999) (ALJ's failure to make credibility findings regarding witness testimony left Commission in as good a position as ALJ to determine the facts); *Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1995 WL 470251 *2 (No. 93-128, 1995) (declining to defer to ALJ's findings not based on demeanor or other factors observable by ALJ and resolving conflicts in testimony based on other record evidence); *Dover Elev. Co., Inc.*, 16 BNA OSHC 1281, 1993 WL 275823 *8 n.3 (No. 91-862, 1993) (because Commission is empowered to review record independently and make its own factual findings, it will decide factual issue itself); *All Purpose Crane, Inc*, 13 BNA OSHC 1236, 1987 WL 89117 *6 (No. 82-284, 1987) (Commission in as good a position as ALJ to resolve conflicts where ALJ does not rely on demeanor or other observable factors).[14]

Here, the Commission provided a completely legitimate rationale to resolve the factual disputes. *Infra* at 61 n.26. And that is all that is required for affirmance. Indeed, the ALJ's failure to make demeanor-based credibility findings in the first instance suggests his "living the case" provided no particular insight into those disputes.

[14] This string cite is not exhaustive, but does rebut Dayton's assertion, Br. at 57, that the Commission's "usual practice" is to remand factual disputes to the ALJ for resolution.

In sum, Dayton has demonstrated "no prejudice other than that attendant on the failure to confirm the liability that had been asserted years earlier." *C & K Coal Co. v. Taylor*, 165 F.3d 254, 259 (3d Cir. 1999) (refusing to find due process violation when agency took 23 years to determine responsible party for black lung benefits); *Amax Coal Co. v. Director, OWCP*, 312 F.3d 882, 887-88 (7th Cir. 2002) (16 year delay in litigation did not deprive coal company of due process). Under these circumstances, the delay, "albeit inexcusable," does not require setting aside the Commission decision.

F. *The Commission Delay was Deplorable, but the Court Should be Made Aware of Underlying Commission Structural and Staffing Problems.*

Unquestionably, the Commission delay here was excessive and deplorable. Structural and staffing problems at the Commission were factors here and have caused problems in issuing timely decisions generally. It appears, however, that the Commission is improving its record on timeliness.

The Court should recall that the Commission is composed of three members who are appointed by the President and confirmed by the Senate. 29 U.S.C. § 661. Confirmation difficulties, well known to the federal bench, likewise apply to the Commission. Consequently, the Commission is often not fully staffed with three Commissioners. For long periods then, it has had only one Commissioner, making

official action impossible, 29 U.S.C. § 661(f), and when there are only two Commissioners, they must agree or a stalemate results. *Id*.

Congress has recognized this staffing problem at the Commission. H.R. Rep. No. 108-486 (May 13, 2004) ("too often in the past the Commission has been unable to act because of vacancies in its membership, the lack of a working quorum, or a simple deadlock among its members"). The House Committee observed that for approximately one-third of its existence the Commission had less than 3 members. *Id*. at 5.[15] To cure this problem, legislation was proposed increasing the number of Commissioners to 5. H.R. 2729. But Congress failed to enact this provision.[16]

As Dayton points out, Br. at 29-31, two seated Commissioners have occasionally agreed to disagree and simply affirmed an ALJ decision ordered for review. But this is not the Commission's "common practice," as Dayton asserts, Br. at 30. It is the exception to the rule. *Compare Gen'l Motors Corp.*, 22 BNA OSHC 1019 (No. 91-2834E, 2007) (16 years from citation to Commission

[15] According to the Commission's website, the Commission was less than fully staffed for approximately 2/3 of the time it was pending review, from May, 1998 (when the case was fully briefed) until September 2010 (when the case was decided).

[16] To remedy systemic administrative tribunal delay, Congress has deemed final and allowed immediate court of appeals review of unduly delayed agency cases. *See* 100 Stat. 1321-219; *Director, OWCP v. Sun Ship*, 150 F.3d 288 (3d Cir. 1998).

decision); *Manganas Painting Co. Inc.*, 21 BNA OSHC 2043 (95-0103, 2007) (12 years) *rev'd by* 540 F.3d 519 (6th Cir. 2008); *Altor Inc.*, 23 BNA OSHC 1458 (No. 99-0958, 2011) (12 years); *Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286 (No. 00-1402, 2010) (10 years); *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356 (No. 02-1164 2011) (8½ years); *Southern Scrap Materials Co., Inc.*, No. 94-3393 (still pending after 17 years).[17]

However, the parties have no legal right to this procedure, and Dayton, in any event, did not ask the Commission for a summary affirmance in order to move the case along. In addition, if Dayton had petitioned the courts of appeal to compel agency action under the APA and obtained such an order, a summary affirmance would have been one of the options at the Commission's disposal.

III. *The Commission's Characterization of the Violations as Willful is Supported by Substantial Evidence*.

A. *Introduction – the Law of Willfulness*

A violation is willful when done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements. *E.g., Kaspar Wire Works*, 268 F.3d at 1127. Direct proof of willfulness is not required. *AJP Constr.*,

[17] The average (mean) time for a case on the Commission's docket was 46 months as of September 30, 2009. OSHRC *Performance and Accountability Report FY 2010*, at 4. Since that report, the Commission has made significant strides in clearing its docket of longstanding cases. Besides *Southern Scrap Materials*, the OSHRC has two ALJ decisions from 2008 pending review, four from 2009, and 29 cases from 2010 and 2011. *See* http://www.oshrc.gov/decisions/alj_pending.html.

Inc. v. Sec'y of Labor, 357 F.3d 70, 60 (D.C. Cir. 2004). For example, a violation may be willful where previous citations for the same or similar conduct alerted the employer to the need for corrective action. *A.J. McNulty & Co. Inc. v. Sec'y of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002) ("prior citations for identical or similar violations may sustain a violation's classification as willful"); *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1305-06 (D.C. Cir. 1978); *AJP Constr., Inc.*, 357 F.3d at 75 ("our cases clearly hold that evidence of an employer's failure to take corrective measures despite prior warnings and citations for similar violations provides a sufficient basis for sustaining a willfulness finding").

The existence of prior violations is not a prerequisite to finding of willfulness. *Kaspar Wire*, 268 F.3d at 1128; *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1423 (D.C. Cir. 1983) (willful violation does not require proof of specific aggravating factor, such as prior OSHA violations); *Conie Constr. Inc. v. Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995) (violation willful where employer knew of standard requirements but declined to follow believing condition was adequately safe); *Donovan v. Williams Enters.*, 744 F.2d 170, 180 (D.C. Cir. 1984) (an employer's awareness of [a] standard[] and his decision to forego compliance with it is a willful violation).

Thus, the failure to take appropriate action in response to warnings from an OSHA compliance officer regarding noncompliance has been sufficient to

establish willfulness. *Donovan v. Williams Enters.*, 744 F.2d at 180; *S.G. Loewendick & Sons*, 16 O.S.H. Cas. (BNA) 1954 (Rev. Comm'n 1994), *rev'd on other grounds*, 70 F.3d 1291 (D.C. Cir. 1995). Even recommendations or complaints from employees or consultants that go unheeded may establish an employer's willful state of mind; *A.E. Staley*, 295 F.3d at 1347 (refusal to fix conditions identified in internal audits); *AJP Constr.*, 357 F.3d at 73-74 (refusal to take corrective action on warnings from general contractor that subcontractor employees worked without fall protection).

However, a violation is not willful if an employer can establish it held a good faith belief that the violative condition conformed to the OSHA requirements. The test for good faith is an objective one: the employer's belief that it is complying with an OSHA standard must be a reasonable one. *A.J. McNulty*, 283 F.3d at 338; *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1262 (D.C. Cir. 2003); *Caterpillar, Inc. v. OSHRC*, 122 F.3d 437, 441-42 (7th Cir. 1997) (ineffective efforts at compliance must be "objectively reasonable"). An employer may not, therefore, turn a blind eye to avoid knowing what is taking place around him. *A.E. Staley*, 295 F.3d at 1353 (explaining doctrine of "willful blindness"). Consequently, it is not necessary to show that employer knew of specific non-compliant condition and chose not to correct it. *Id*. at 1351-52. Nor is the Commission required to accept at face value protestations of good faith. *AJP*

Constr. Co., 357 F.3d at 76 (rejecting employer's APA claim that regulations were "broad and exceedingly vague" and therefore lacked notice that it was noncompliant). The Commission may reasonably infer willfulness from the nature and magnitude of the violations that were committed. *Kaspar Wire*, 268 F.3d at 1128; *A.E. Staley*, 295 F.3d at 1352-53 (same).

Both the classification of a violation as willful and the question of good faith are factual determinations governed by substantial evidence review under 5 U.S.C. § 706(E). *AJP Constr. Co.*, 357 F.3d at 73; *A.J. McNulty*, 283 F.3d at 338.

B. *Substantial Evidence Supports the Commission's Finding that Dayton Consciously Disregarded the Standard.*

The Commission found that the "extensive record . . . reveals that over a period of years, Dayton consciously disregarded the LOTO standard." SA 23 (Dec. 23). Dayton's disregard began in 1989 when, following the promulgation of the LOTO standard, Phillip McCowan, Dayton's longtime safety manager, determined that not a single job task performed by Dayton's 1200 employees was covered by LOTO. SA 24-25 (Dec. 24-25). He reasoned that Dayton's contractor Ogden performed all covered servicing and maintenance, while Dayton's own employees performed purely production tasks. *See* 29 C.F.R. § 1910.147 (a)(2)(i) and (ii) (standard covers servicing and maintenance activities not "normal production operations"). The Commission found this neat and expedient division

of labor "plainly erroneous," "straining credulity" and unfathomable.[18] SA 25 (Dec. 25). The Commission's disbelief is supported by substantial evidence.

The Commission explained that many of the job tasks performed by Dayton workers, as described in job evaluation forms prepared by McCowan, "squarely fell" within the LOTO definition of "servicing and maintenance." SA 25 (Dec. 25). Moreover, given McCowan's intimate familiarity with plant operations from decades of experience working there, he could not have concluded that the Ogden contract, which was entered into 20 years before LOTO, "so perfectly divided" production and servicing\maintenance activities in accordance with LOTO. *Id*. That contract, furthermore, "belied" any purported division of labor by reserving to Dayton the right to perform its own maintenance. SA 25-26 (Dec. 25-26). Finally,

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[18] Dayton asserts that some of the regulatory terms at issue are ambiguous and that OSHA provided no meaningful guidance regarding them when the standard was promulgated. Br. at 46-47. Dayton, however, ignores the regulatory definitions of these terms as well as the preamble to the standard, which provided detailed guidance on their meaning. *Marshall v. Stoudt's Ferry Prep. Co.*, 602 F.2d 589, 602 (3d Cir.)("Although it may seem incongruous to apply the [statutory term] to the kind of plant operated by Stoudt's ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it -- the word means what the statute says it means"), *cert. denied*, 444 U.S. 1015 (1979). As we explain below, McCowan could not have believed that the standard did not apply to Dayton's employees based on the information before him at the time he made his decision (including the preamble for instance). *AJP Constr. Co.*, 357 F.3d at 76 (rejecting employer's APA claim that regulations were "broad and exceedingly vague" and therefore lacked notice that it was noncompliant).

the company-wide memo on implementing LOTO explicitly advised McCowan that to take advantage of the "normal production operations" exclusion, the protections of OSHA's machine guarding standard had to be utilized. SA 25-26; JA 638 (Dec. 25-26; CX 84).[19] But Dayton did not comply with the machine-guarding standard. Nonetheless McCowan took advantage of the exception. SA 25-26 (Dec. 25-26). Accordingly, the Commission reasonably found that McCowan was aware that Dayton employees performed covered servicing and maintenance activities and decided not to comply with the standard's LOTO requirements.[20]

Despite these obvious fallacies and inconsistencies in McCowan's decision making, Dayton attempts to prop up his testimony (which the Commission – the

[19] Dayton wrongly states that the memo "does not mention machine guarding at all." *See* JA 638 (CX-84, bullet point 1 (excluded "normal production operations . . . covered under OSHA's machine guarding standards")).

[20] Dayton is wrong that the Commission was required to accept Dayton's alleged *subjective* belief that the job tasks were not covered by LOTO. Dayton's citation, Br. at 55, of *Am. Wrecking Corp.*, 351 F.3d at 1263, for the proposition that testimony of a good faith belief must be accepted in the absence of an adverse credibility determination is inapposite. First, the Commission did make a credibility finding in determining that McCown's belief concerning the standard's application "strains credulity." Moreover, factfinders may disregard or reject testimony regarding subjective belief in any number of ways without making an explicit credibility finding regarding the professed belief. The issue came up in *Am Wrecking Corp.* only because the ALJ explicitly found some parts of the witness's testimony credible but not others.

final factfinder – rejected).[21] His asserted belief that one-man jobs involved no risk of unexpected energization is illogical and plainly contrary to the standard.[22] In

[21] Far from crediting McCowan's testimony, *e.g.*, Br. at 52, the ALJ found that the record is replete with instances wherein employees were exposed to the unexpected movement of the machine while engaged in the cited activities. JA 164 (ALJ D & O 67). The massive amount of evidence presented by the Secretary clearly established that the Respondent's employees were exposed to the precise hazards that the standard was intended to eliminate. *Id*. The ALJ also found that while McCowan's reliance on the Ogden contract precluded a willfulness finding on a "plant-wide" basis, it did not prevent a willful characterization for the individual job tasks cited here. JA 128 (ALJ D & O 31). He characterized McCowan's review as "not sufficiently thorough" to identify those Dayton job tasks that were covered by LOTO. *Id*.

[22] McCowan's explanation for classifying mold/bladder changers as affected is instructive:

> In the curing machine we had an employee whose sole job was to change the curing molds. We had another job whose employee was to change the bladders in the curing. And that job entailed that they opened the press up and turned off the power. The power is right by him. He's in full view and control of it. It's a normal production job for that employee, he does it numerous times, he does no other work and no one works around him.

JA 358-59 (Tr. 4420-21). McCowan relied on the quoted rationale elsewhere. *See* JA 374-75, 389-91 (Tr. 4437-38 (mold/bladder changers not subject to unexpected energization because [t]hey had full control of the machine. It was a one-man machine); Tr. 4455-56 (relying on view that beadwinder set up is a one-man operation to say that unexpected energization should not occur because he is in full, total control of that machine, and there's nobody else working on that machine around him); Tr. 4456-57 (relying on view that, for most part, TAM size change is one-man operation and changer is in full control and contact of that machine as basis for conclusion that there should not be unexpected operation of the machine)). Although in his testimony he stated that he believed that employees

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fact, one of the primary hazards LOTO is intended to prevent is the inadvertent activation of a machine by the employee who is servicing it, a hazard that is particularly likely when the employee is working near a control switch. 54 Fed. Reg. at 36646/2 (Example no. 5 in list of accidents that could have been prevented by compliance with the standard describes a case where an employee setting up a piece of equipment was killed after he accidentally activated the starting switch); 36649/1, Table IV (noting 20 workers who were injured after accidentally activating equipment they were servicing). Two accidents killed employees who were servicing machinery that was stopped but not deenergized. One employee was cleaning a piece of equipment; the other was changing the paddles on a mixer. In both cases, coworkers **accidentally** hit control switches activated the machines. 54 *Fed. Reg*. at 36646/2, examples 4 and 6. The third accident involved an employee who was killed when he accidentally hit a switch that activated a machine on which he was performing set-up operations -- an accident strikingly similar to the one that killed Robert Julian four years later. *Id*., example 5.

As these examples show, and as the preamble itself explains on the next page,

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engaged in one-man operations near the controls were not subject to unexpected energization, the safe operating procedures he wrote indicate that he realized that such a circumstance did not prevent unexpected energization. JA 381-82 (Tr. 4446-47 (explaining that purpose of tags on curing press is to warn others not to start machine)).

stopping a machine to perform service on that machine is not enough to protect the servicing worker. [A]n accident can still occur if there is an inadvertent activation of that machine or equipment. *Id*. at 36647/3. The inadvertent activation can be caused by an error on the part of the employee who is conducting maintenance or servicing activity, or by any other person. *Id.* Despite this clear guidance, Dayton continued to stop, but not deenergize its machines, to perform numerous activities covered by the standard.

McCowan's purported belief that the machinery itself could not be unexpectedly energized and activated so as to cause injury is further refuted by his own insistence that maintenance contractor Ogden was required by the standard to utilize lockout procedures when working on the same equipment. JA 362-63, 395-96 (Tr. 4424-4425, 4463-4464); *see also* JA 164 (ALJ D & O 67 (record replete with injuries to Dayton employees from unexpected start-up)). McCowan's explicit recognition that lockout was necessary to protect Ogden's employees when they serviced the equipment, JA 362-63, 377-78, 382-83, 395-96 (Tr. 4424-4425, 4440-4441, 4447-4448, 4463-4464), makes it particularly difficult to accept that he could honestly have believed that the same protection was not necessary for Dayton's own employees. Similarly, he knew that the machines posed hazards to employees during their operation. C-27; *see also, e.g.,* C-42 (safe operating procedure for changing molds on curing press advising changer not to work on

molds until machine is in manual);); JA 763 (C-43 (safe operating procedure advising beadwinders to shut off power before attempting change chuck or block)).

McCowan's second asserted rationale -- that some of the cited activities fell within the minor servicing exception -- likewise "strains credulity." SA 25 (Dec. 25). To fall within the exception, the minor servicing must occur during normal production operations. 29 C.F.R. § 1910.147 (a)(2)(ii)(B). However, all of the cited activities McCowan asserted were subject to this exception take place while the equipment is stopped, not while it is perform[ing] its intended production function. 29 C.F.R. § 1910.147(b) (definition of "normal production operations"). And there can be no doubt that McCowan knew that none of the operations at issue in this case could be performed while the equipment was operating. *See supra* at 12. The beadwinder machine cannot make a bead while the chuck is being changed; the radial doper cannot perform its lubrication function while the clamp arms and spray nozzles are being cleaned; tires cannot be cured while the curing press undergoes a mold change; grinding stones cannot perform grind while they are being changed. Most of the operations involved in this case, including changing wire reels on the beadwinders, cleaning clamp arms on the radial dopers, and changing grinding stones, dust scoops, break pads and chucks in the final

inspection department, also must be done *prior* to production runs.[23] SA 3-4 (Dec. 3-4). The fact that production takes place both before and after these operations does not affect this fact. Production is not taking place while they are being performed, and the entire reason for them to be performed is so that subsequent production can occur.[24]

The standard's preamble further demonstrates that McCowan could not have believed that the tasks performed by Dayton's employees were excepted from LOTO. As with unexpected energization, the preamble contains extensive pertinent discussion explaining the distinction between normal production operations and servicing and maintenance, and of the exception for minor servicing operations performed during normal production operations. The preamble explains that the exception is intended to encompass certain servicing operations which, by their very nature, must take place without deenergization, such as operational

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[23] Dayton has conceded that size changes on its TAMs and mold, bladder, and PCI ring changes on its curing presses do not fall within the exception. JA 194 (R. at Pleading Vol. 7, No. 201 at 52).

[24] McCowan's purported belief that activities "integral" for using the equipment were excepted as production activities, JA 352-53 (Tr. 4414-15), is likewise incredible. In promulgating the standard, the Secretary expressly explained that **[s]ervicing and maintenance activities** are necessary adjuncts to the industrial process. They **are needed to maintain the ability of all machines equipment or processes to perform their intended functions.** 54 Fed. Reg. at 36646/2-3 (emphasis supplied).

testing, as well as those few servicing activities such as repetitive minor adjustments or simple tool changes that do not expose employees to a risk of injury from unexpected activation. *Id*. at 36647/1. But the preamble emphasize[s] that this rule applies to cleaning and unjamming when an unexpected activation or release or energy could occur, the situation existing at Dayton's plant. It adds that the vast majority of servicing or maintenance activities can safely be done only when the machine or equipment is not operating and is deenergized. *Id*. at 36647/1-2.

These points are expanded upon in the Summary and Explanation of the Final Standard, where OSHA explains that the hazards machines present during normal production operations are addressed by the machine guarding standards, and that the LOTO rule applies to hazards that those standards do not protect against. *Id.* at 36661/2. Minor service operations, for purposes of the exception, are those that are inherent in the production process because the machine guarding standards . . . cover those operations. *Id*. at 36662/1. The exception applies when the servicing operation is routine, repetitive and must be performed as an integral part of the production process, . . . [and where] lockout or tagout . . . would prevent the machine from economically being used in production. *Id.* at 36662/2 as amended by 55 *Fed. Reg.* 38677, 38679/1.

The preamble provides examples explaining the scope of the exception. For example, if an employee using a table saw needs to remove a piece of wood that is jammed against the sawblade, this action takes place during' normal production operations even though it is not actually production, but is the servicing of the equipment to perform its production function. 54 Fed. Reg. at 36646/3. Whether the exception will apply, the preamble explains, depends on whether the servicing is performed in a way which prevents . . . exposure [to the unexpected activation of the sawblade], such as by the use of special tools and/or alternative procedures which keep the employee's body out of the areas of potential contact with machine components or which otherwise maintain effective guarding. *Id*. at 36646/3-36647/1.

Another example involves adjustments to a printing press while it is printing. The preamble explains that correcting for paper misalignments using remote control devices is part of the production process, and is subject to the machine guarding requirements. *Id*. at 36666/3. Similarly, the use of inch (or jog) devices will permit machine speed control for test purposes. *Id*. On the other hand, if the press experiences a paper jam, an employee may need to reach beyond the guard to clear the jam. The preamble explains clearly that [a]lthough the need to unjam the machine comes about during normal production operations, it is a

servicing activity which involves employee exposure to unexpected activation of the machine . . . and as such, is covered by the [lockout requirements]. *Id.*

As this latter example demonstrates, if the employee performing the operation in question is protected by machine guards or in some other way so that there is no exposure to activation of the machine or release of energy, lockout is not required. If, on the other hand, the employee must bypass machine guards, or work in an area where there are no guards or other safety features to provide protection from activation or energy release, lockout is required. It is precisely for this reason that corporate headquarters advised McCowan that to take advantage of the exception the machine-guarding protections had to be in place. JA 638 (C-84, bullet point 1). McCowan simply could not have believed that these provisions permitted him to categorically except all Dayton employees from LOTO.[25]

The Commission also found that McCowan's successor, Mattocks, was aware that the standard applied to Dayton employees and consciously disregarded its requirements. SA 33 (Dec. 33). The Commission based this conclusion on a

[25] Without elaborating the point, Dayton also contends its LOTO violations were not willful because only seven job tasks out of hundreds were implicated. Br. at 45. This Court in *A.E. Staley*, however, expressly rejected this argument: "First, the company contends that the 89 violations were too few to demonstrate plain indifference, as the equipment involved represented only a small percentage of all of the company's electrical equipment. That is not an adequate defense. Even a single violation of the OSH Act may be found willful, regardless of whether the workplace is otherwise safe." *A.E. Staley*, 295 F.3d at 1341.

series of events that occurred from August 1992 to November, 1993, in which Mattocks "ignored repeated and explicit warnings that it might be in violation of the LOTO standard," and disregarded specific corporate instructions to review the applicability of LOTO at the plant. SA 32 (Dec. 32). These events were: (1) former Bridgestone/Firestone safety director John Lepkowski's recommendation to Mattocks that she consider classifying employees performing mold changes on curing presses, size changes on TAMs and grinding stone replacements on module machines as "authorized" personnel; (2) corporate safety manager Robert Walker's memorandum to all Bridgestone safety engineers instructing them to "revisit" their plant's practice regarding LOTO and warning that there would be "little defense for non-compliance"; (3) OSHA industrial hygienist Faye Kearney's conversations with Mattocks during the 1993 ergonomics inspection in which Kearney identified specific machine tasks subject to LOTO and informed Mattocks of the need to reevaluate Dayton's LOTO program as it related to these tasks; (4) corporate safety manager Walker's request to Mattocks, following TAM size changer Robert Julian's death in October 1993, to reexamine the applicability of LOTO to Dayton's entire operation; and (5) OSHA compliance officer George McCown's conversations with Mattocks during the November 1993 LOTO inspection in which he reviewed with her the specific LOTO violations at issue. *See* Statement of Facts, *supra* at 14-20; SA 27-33 (Dec 27-33). Despite these events, in which

Mattocks was alerted to instances in which Dayton employees were performing operations, such as unjamming and cleaning energized machines, *expressly* subject to LOTO protections, she never independently examined her predecessor's flawed determination that Dayton employees were categorically exempt from LOTO requirements other than "affected" level training. Indeed, although Mattocks was unquestionably aware that OSHA considered the plant in violation of the standard in November, 1993, Dayton continued its policy of non-compliance for over five months after that. SA 32 (Dec. 32). The record therefore amply supports the Commission's conclusion that Mattocks's "steadfast refusal" to reevaluate the initial decision exempting Dayton employees from LOTO requirements amounted to an "obstinate" refusal to comply. *Id.* The Commission concluded that Mattocks, like McCowan before her, simply could not have believed that Dayton's job tasks were actually exempt. SA 32 (Dec. 32 ("[W]e have serious doubts that Mattocks actually could have compared the job tasks at issue here with the provisions of the LOTO standard yet not understood that the employees who engaged in these fell within the authorized category under the standard.")).

Dayton attacks the Commission's findings as to each of the five events, arguing that none of them individually and in isolation justifies the willful characterization. Br. at 55-60. However, the Commission reasonably concluded that the events considered as a whole showed a pattern of conscious disregard by

Dayton's safety managers of explicit LOTO-related safety warnings. SA 32 (Dec. 32).

Moreover, Dayton's arguments concerning the individual events lack merit. Dayton first claims that it acted reasonably in rejecting OSHA's position, clearly stated and explained during the two inspections of the Dayton plant 1993, that the job tasks at issue here were subject to LOTO requirements under the standard's plain terms. Br. at 55-58. During OSHA's ergonomics inspection between May-September 1993, Mattocks discussed LOTO issues with OSHA compliance officer Kearney "at least three times." SA 28 (Dec. 28). Kearney testified that during two walk-arounds she pointed out specific LOTO hazards involving several machine types, subsequently reiterated her concerns about LOTO compliance and the need for Dayton to reevaluate its LOTO program in a telephone conference call, and finally, voiced again at the closing conference her LOTO compliance concerns and her intention of referring those concerns to OSHA safety specialist. SA 29-30 (Dec. 29-30). The Commission thus concluded that CO Kearney had "specifically alerted Mattocks to possible LOTO violations involving Dayton employees"[26] SA

[26] Citing Mattocks' denial, Dayton challenges the Commission's finding that Kearney pointed out specific instances where LOTO protection was required. Br. at 57. However, the resolution of conflicting testimony is uniquely within the Commission's preserve as factfinder. Moreover, Dayton provides no basis for overturning the Commission's finding. First, Dayton is simply wrong in asserting (cont'd)

31 (Dec. 31). During the subsequent LOTO inspection, Mattocks reviewed with compliance officer McCown the specific LOTO violations at issue. SA 32 (Dec. 32).

Dayton asserts that the mere fact that an employer rejects OSHA's interpretation of a standard's requirements is not evidence of willfulness if the employer has a good faith opinion to the contrary. Br. at 56. However, it is well established that an employer's rejection of an OSHA compliance officer's explicit warning of a safety hazard is evidence of willfulness. *Donovan v. Williams Enters.*, 744 F.2d at 180 (failure to take appropriate action in response to warnings from an OSHA compliance officer regarding noncompliance sufficient to establish

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that the ALJ made a credibility assessment favoring Mattocks. Br. at 57 citing ALJ D & O at 29 (no such credibility finding) (JA 126); *see* SA 29 (Dec. 29 n.17 (recognizing no ALJ demeanor-based finding). Moreover, it was reasonable for the Commission to find Kearney's testimony more credible because it was "specific, direct, and corroborated by her actions." SA 30 (Dec. 30). Kearney testified regarding the specific LOTO hazards she identified and communicated to Mattocks. JA 424-37, 449-61 (Tr. 4632-45; 4689-4701). In addition, she requested and obtained information from Mattocks that suggest a response to these concerns. *E.g.*, JA 437, 791-92, 659-89 (Tr. 4645; R-241 ("management contends that Dayton employees are not performing any jobs that require machinery lock out"); C-90 (Dayton LOTO program)). Finally, Kearney took immediate, corroborating action, as the Commission observed. JA 438, 734, 791-92, 442, 479 (Tr. 4646 (included LOTO questions in questionnaire ("because of great concern about lockout/tagout hazards there at the facility"); C-96 (including LOTO training questions in questionnaire to Dayton); R-241 (preparing referral to LOTO specialist); Tr. 4653 (informing Dayton of referral to McCown); Tr. 4744 (OSHA area director testifying that compliance officers had discussed LOTO with Dayton management)).

willfulness). Moreover, the Commission found that neither McCowan nor Mattocks actually believed that the standard did not apply to Dayton's employees. SA 23 (Dec. 23 (Dayton consciously disregarded the standard's requirements)); SA 25 (Dec. 25 (McCowan's conclusion "strains credulity")); SA 33 (Dec. 33 (Mattocks either knew that McCowan's analysis was incorrect or deliberately chose to avoid such knowledge)).[27]

Dayton next argues that its failure to reassess the validity of McCown's interpretation following Mr. Julian's death was not unreasonable since Dayton's internal investigation found that LOTO was not relevant to the accident. Br. at 58. However, this finding, which was rejected by the union members of the accident investigation committee, is flatly contrary to the preamble. Mr. Julian's death from the unexpected energization of the TAM size changer he was adjusting is precisely the type of accident the standard was designed to prevent. *E.g.*, 54 Fed. Reg. at 36646/2 (Example no. 5 in list of accidents that could have been prevented by compliance with the standard describes a case where an employee setting up a

[27] Dayton also claims it was entitled to disregard Kearney's assessments because she was an only amateur regarding LOTO requirements. Br. at 56-57. OSHA's area director found her abilities sufficient to send a referral forward. More important, there is no evidence that Dayton was aware of her job status, other than as a compliance officer, and there is no evidence that Dayton disregarded her assessments on this basis. Rather, Dayton claimed that Kearney spoke in generalities only and that certain conversations in which Kearney communicated her LOTO assessments simply did not take place. The Commission found otherwise.

piece of equipment was killed after he accidentally activated the starting switch); 36649/1, Table IV (noting 20 workers who were injured after accidentally activating equipment they were servicing).

Moreover, Dayton's argument largely misses the point. The accident investigation team, including Bridgestone's corporate safety director Walker, thought that the accident warranted a through reexamination of Dayton's LOTO policy, and tasked Mattocks with "reexamining the application of LOTO to Dayton's entire operation." SA 31; JA 600-01 (Dec. 31; Tr. 6432-33). Mattocks, however, did not do so and simply reiterated McCowan's production/servicing dichotomy. SA 31; JA 524-25 (Dec. 31; Tr. 4949-50). Mattock's failure to take more than cursory steps to investigate the standard's application to Dayton's workers despite Walker's specific request to do so following Julian's death is part of a larger pattern of obstinacy concerning compliance with LOTO.

Finally, Dayton asserts that Mattocks responded reasonably to corporate safety director Walker's 1992 memorandum directing her and other Bridgestone safety personnel to "revisit" their plant's practice regarding LOTO, "a very important and fundamental safety procedure." Br. at 58-59. Dayton asserts that there was no reason for it to revisit its compliance program since Dayton was "unique" in having a servicing and maintenance contractor. Br. at 59. However, the clear thrust of the memorandum was to ensure Dayton's compliance with the

standard, both to avoid an OSHA citation and "of greater importance . . . lessen the risk to our associates." JA 691 (C-91). Thus, reevaluating whether Dayton employees actually performed servicing and maintenance activities as defined by the standard was clearly within the scope of Walker's direction to Mattocks. The Commission was entitled to infer that Mattocks' failure to comply amounted to a conscious disregard of the standard or plain indifference to employee safety.[28]

Although substantial evidence supports the Commission's finding of willfulness as it now stands, the record contains additional supporting evidence that the Commission erred in not considering, namely, the Ramsey memo, issued March 1, 1993. JA 721-27 (C-92 and C-93); *see supra* at 17 n.4 (describing LOTO violations at Iowa plant). The Ramsey memo notified Dayton of citations for violations of the lockout standard that had recently been issued to another Bridgestone/Firestone tire manufacturing plant, and directed Dayton to review

[28] Dayton also asserts that it properly ignored Mr. Lepkowski's recommendation to Mattocks and union representative Tony Carr that Mattocks seriously consider classifying certain jobs as "authorized" because Lepkowski did not observe the jobs being performed. Br. at 59; SA 27 (Dec. 27). However, Dayton does not deny that following an "affected level" training session conducted by Lepkowski, concerns were raised by Lepkowski and Carr to Mattocks whether certain job tasks performed by Dayton employees should be classified as "authorized." Conversations about these concerns were followed only a few months later by Walker's memorandum directing Bridgestone safety personnel to revisit their plants' compliance with LOTO. The Commission reasonably considered Lepkowski's warning and Walker's memorandum as related events, and Mattocks' failure to respond to either as evidence of a pattern of willful conduct. SA 27-28 (Dec. 27-28).

those citations and take steps to prevent similar violations. JA 727 (C-93). This memo and the accompanying citations provided notice to Dayton that a number of operations on tire-manufacturing equipment must be performed in compliance with the lockout standard, and that existing conclusions as to the applicability of the standard to tire manufacturing operations had been found to be incorrect. Indeed, the ALJ found that these citations by themselves constituted an adequate predicate for a willful finding for violations involving the same types of equipment at Dayton, namely TAMS, curing presses, and banbury. JA 129-30, 145, 161, 187-88 (ALJ D & O at 32-34, 48, 64, and 89-90).[29] *A.J. McNulty*, 283 F.3d at 338 ("prior citations for identical or similar violations may sustain a violation's classification as willful"); *Cedar Constr. Co.*, 587 F.2d at 1305-06; *AJP Constr., Inc.*, 357 F.3d at 75. The failure of Dayton personnel to undertake this review in any more depth than -- possibly -- assuring that its employees job descriptions had not changed since 1990 is strong evidence of Dayton's cavalier attitude toward its compliance obligations, an attitude that is the essence of a willful finding. *See Brock v.*

[29] The Commission refused to consider the memo and citations because no evidence was presented regarding Dayton's *response* to it. SA 24 (Dec. 24 n.12). First, Dayton's response (if any) is a distinct question from notice, or knowledge of similar violations, which the Ramsey memo clearly provided. Moreover, the failure to present evidence of any response falls on Dayton, not the Secretary, as it tries to support its contention of a good faith belief that LOTO did not apply. In any event, we know nothing had changed two months later when Kearney began her inspection.

Morello Bros. Constr., 809 F.2d 161, 164 (1st Cir. 1987) (employer need not be consciously aware that conduct is forbidden at the time he performs it [for a violation to be considered willful], but his state of mind must be such that, if he were informed of the rule he would not care); *Reich v. Trinity Indus.*, 16 F.3d 1149, 1154 (11th Cir. 1994) (OSH Act unambiguously forecloses discretion on the part of the employer to decline compliance with OSHA standard and proceed with an alternative program that it believes is equally safe).

The Commission thus reasonably concluded that Dayton, through McCowan and Mattocks, consciously disregarded the standard in willful violation of the Act. The record amply supports the Commission's factual findings as to Dayton's state of mind and provides no basis to set aside the Commission's decision.

CONCLUSION

The Court should affirm the Commission's decision.

Respectfully submitted.

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COMBINED CERTIFICATION OF COUNSEL

Undersigned counsel for the Secretary of Labor hereby certifies that:

1. The foregoing response brief for the Secretary of Labor complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,291 words, excluding the parts of the brief exempted by Fed. R. app. P. 32(a)(7)(B)(iii). In addition, the brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.

2. The foregoing response brief for the Secretary of Labor complies with electronic filing requirements of the Court's General Order on Electronic Filing dated March 18, 2009, because the text of the electronic copy is identical to the text of the paper copies, all required privacy redactions have been made, and a virus detection program (McAfee Enterprise Virus Scan, Version 8.0, updated October 24, 2011) has been run on the file containing the electronic brief and no virus was detected.

3. On October 24, 2011, a copy of the final response brief for the Secretary of Labor was served electronically through the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit on counsel of record, Jacqueline M. Homes and Andrew D. Roth. Eight paper copies of the brief were

also filed by hand (in the after-hours deposit box) with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit.

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