No. 22-60466

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DARLING INGREDIENTS, INCORPORATED

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; MARTIN WALSH, SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

BRIEF FOR THE SECRETARY OF LABOR

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CERTIFICATE OF INTERESTED PERSONS

Darling Ingredients, Inc. v. Occupational Safety & Health Review Commission; Martin J. Walsh, Secretary, United States Department of Labor
No. 22-60466

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Darling Ingredients, Inc.
- Juliana C. Gaige, Jackson Lewis, P.C., Counsel for Darling Ingredients, Inc.
- Kristina T. Brooks, Jackson Lewis, P.C., Counsel for Darling Ingredients, Inc.
- Cynthia L. Attwood, Chairman, Occupational Safety and Health Review Commission
- John X. Cerveny, Executive Secretary, Occupational Safety and Health Review Commission
- John B. Gatto, Administrative Law Judge, Occupational Safety and Health Review Commission
- U.S. Department of Labor
    - Martin J. Walsh, Secretary of Labor, Petitioner
    - Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health
    - Seema Nanda, Solicitor of Labor
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- Matthew K. McClung, Attorney, Atlanta Regional Solicitor's Office
- Joshua Turner, OSHA Area Director

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary requests oral argument because he believes oral presentation of the issues would be helpful to this Court's disposition of the petition for review.

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STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA) enforcement proceeding before the Occupational Safety and Health Review Commission (Commission). The Commission had jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. § 659(c).

Commission Administrative Law Judge (ALJ) John B. Gatto issued a decision that was docketed with the Commission on May 25, 2022. Darling Ingredients, Inc. (Darling) filed a petition for discretionary review with the Commission on June 14, 2022. The Commission did not direct review, and the decision became a final order of the Commission on June 24, 2022. Darling filed its petition for review with this Court on August 19, 2022, within the sixty-day time period prescribed by the OSH Act. 29 U.S.C. § 660(a). This Court has jurisdiction over this appeal pursuant to section 11(a) of the Act, 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

1. Whether the ALJ correctly concluded that Darling violated provisions of OSHA's lockout/tagout standard requiring an employer's lockout/tagout procedures to outline specific procedural steps or techniques to control hazardous energy where step 6 of Darling's machine-specific lockout/tagout procedure for the hydrolyzer contained a vague instruction to "relieve internal pressure" when in fact the company expected employees to stop and wait until the pressure fully released before beginning maintenance work on the machine.

2. Whether the ALJ correctly concluded that Darling had actual or constructive knowledge of its lockout/tagout procedures where Darling created, implemented, reviewed, and revised its own lockout/tagout policy and procedures.

3. Whether the ALJ correctly affirmed the characterization of the violations as repeat where OSHA issued Darling a prior citation under the same provisions of the lockout/tagout standard involving substantially similar hazards, and that citation became a final order of the Commission.

4. Whether the ALJ correctly concluded that Darling waived the affirmative defense of unpreventable employee misconduct where Darling failed to brief or offer specific evidence in support of the defense before the ALJ, and if not waived, whether the defense would fail on the merits given that employee misconduct did not cause the company to have non-compliant LOTO procedures.

STATEMENT OF THE CASE

I. Procedural Background

This case arose from an incident in which three employees were severely burned (and two ultimately died from their injuries) at Darling's chicken-rendering facility in Byram, Mississippi (the Mississippi plant) on August 10, 2020, while performing maintenance work on a machine called a hydrolyzer. On August 13, 2020, after the employer reported the incident to OSHA, OSHA Assistant Area Director Joshua Turner inspected the Mississippi plant. Tr. at 27; Dec. at 1; Ex. R-1 at 1, 6-7.[1] As a result of the inspection, on February 9, 2021, OSHA issued

[1] This brief will use the following abbreviations for documents listed in the Certified List of record excerpts (Certified List): Tr. (hearing transcript, listed in Volume 1 of the Certified List); Ex. C- (Secretary's Exhibits, listed in Volume 2 of the Certified List); Ex. R- (Darling's Exhibits, listed in Volume 2 of the Certified List); Dec. (ALJ Decision, listed as item 35, Volume 3 of the Certified List); PH Br. (Darling's Post-Hearing Brief, listed as item 33, Volume 3 of the Certified List); D. Tr. (Transcript of Secretary's Deposition of Darling Ingredients).

Darling a citation alleging repeat violations of two provisions of OSHA's lockout/tagout (LOTO) standard, 29 C.F.R. §§ 1910.147(c)(4)(ii) and 1910.147(c)(4)(ii)(b), for failing to clearly and specifically outline procedural steps and techniques to relieve pressurized steam in the hydrolyzer. Dec. at 5-6; Ex. R-1 at 6-7. Darling had previously violated the same standards on April 7, 2020, and the citation for those violations became a final order of the Commission on June 18, 2020. Dec. at 9; Ex. C-5 at 6, 7.

After a hearing on the merits, the ALJ issued a decision on May 6, 2022, affirming both repeat violations and assessing a penalty of $75,092. Dec. at 11. On June 14, 2022, Darling filed a petition for discretionary review with the Commission. *See* Certified List at 3. The Commission did not direct review, and the ALJ's decision became a final order of the Commission by operation of law on June 27, 2022. *See id.*; 29 U.S.C. § 661(j). Darling filed its petition for review with this Court on August 19, 2022.

II. Statutory Framework

Congress enacted the OSH Act in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The OSH Act's goal is to prevent occupational injuries and deaths. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). To achieve that goal, the OSH Act authorizes the Secretary of Labor to promulgate and enforce

mandatory occupational safety and health standards. 29 U.S.C. §§ 652-66. OSHA enforces the OSH Act by inspecting workplaces and issuing a citation when it believes that an employer has violated a standard.[2] 29 U.S.C. § 658. A civil penalty may be proposed for each violation of an occupational safety and health standard. 29 U.S.C. § 659(a). Violations are characterized as willful, repeat, serious, or other-than-serious, and the characterization affects the maximum penalty that can be assessed for the violation. *See* 29 U.S.C. § 666(a)-(c).

Employers may contest citations before the Commission, an independent tribunal not within the Department of Labor or otherwise under the direction of the Secretary. *Martin v. OSHRC*, 499 U.S. 144, 147-48 (1991); *see also* 29 U.S.C. §§ 659, 661. Initially, an ALJ appointed by the Commission adjudicates the dispute. *Id.* §§ 659(c), 661(j). The full Commission may review the ALJ's decision. *Id.*; 29 C.F.R. § 2200.91(a). Any person adversely affected or aggrieved by a final order of the Commission may petition the appropriate court of appeals for review of the order. 29 U.S.C. § 660(a).

[2] With limited exceptions not relevant here, the Secretary has delegated his authority and responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

III. Statement of Facts

A. Darling's Procedures and Prior LOTO Citations

Darling is an animal-rendering company that operates several pet food plants throughout the United States. Tr. at 26-27, 74-75; Dec. at 2. The Mississippi plant is a chicken-rendering facility, and its process involves using a hydrolyzer to break down chicken feathers with pressurized steam, similar to a pressure cooker. Tr. at 26, 82-83. Periodically, material inside the hydrolyzer will accumulate and create a blockage that prevents pressure from releasing through the machine's vents and stops the machine from processing the chicken feathers. *Id.* at 78. Corporate Safety Manager Wayne Stansberry testified that, in order to return the machine to full function and remove the material creating the blockage, an operator must remove the bolts from the "cleanout" flange to manually remove the accumulated material after the pressure has dissipated. Tr. at 86, 90-91; Dec. at 3. When a blockage occurs, operators must relieve trapped pressure by opening the pressure relief valve, or "shuttling the gates" by opening and closing gates in succession. *Id.* at 78-80; Dec. at 3. The Mississippi plant has two hydrolyzers, designated A and B, and hydrolyzer B functions as a backup system when pressure in hydrolyzer A cannot be neutralized in order to remove the blockage. Tr. at 81-82; Dec. at 3.

At the time of the citation, Darling's corporate safety office, headed by Stansberry, oversaw company-wide safety operations. Tr. at 70, 74. Darling has a

company-wide LOTO policy, as well as a standardized LOTO procedure format for individual plants to customize with their own plant-specific procedures. *Id.* at 96-97, 117; Dec. at 6. The Mississippi plant, using the corporate LOTO procedure format, implemented a machine-specific LOTO procedure for hydrolyzer A, which includes the following step:

> 6. Make all of the following sources of stored energy (capacitors, flywheels, springs, pressure lines of hydraulic/steam/air/water/grease) safe by relieving pressure, restraining, disconnecting, or discharging:
>
> a. Relieve internal pressure.

Ex. R-4 at 2; Tr. at 38 (emphasis in original); Dec. at 7. The machine's operating manual also instructs operators to relieve all internal pressure prior to doing any maintenance on the machine. Tr. at 88, 124. Darling's LOTO procedure for hydrolyzer A contains no instructions or steps explaining what it means to "relieve internal pressure" after the normal procedures—opening the pressure relief valve and shuttling the gates—are ineffective. *Id.* at 102, 103, 125; Ex. R-4 at 2. Stansberry testified that "there are no steps" because "if you've got internal pressure . . . you cannot accomplish step number 6. There are no procedures that are applicable." *Id.* at 102, 125. Thus, where the procedures say to "relieve internal pressure," employees are in fact supposed to stop and wait for the pressure to release fully. Nor does the hydrolyzer A LOTO procedure contain any express prohibition on attempting to relieve internal pressure beyond those methods, or

require operators to stop and wait for the machine to cool down. Tr. at 103, 124-25; Dec. at 7; Ex. R-4 at 1-3. Instead, Stansberry testified the knowledge that employees should not proceed with maintenance or servicing on the hydrolyzer until it is "cooled down" is a "very standard, well known and understood hazard" that is "passed down from the maintenance manager to the maintenance supervisors to the maintenance employees themselves." Tr. at 114. Upon reaching step six of the hydrolyzer A LOTO procedure, an employee purportedly "would already know that he could not get rid of the pressure." *Id.* at 93.

Darling last revised its hydrolyzer A LOTO procedure on May 13, 2019, after OSHA issued a citation to Darling's Tampa, Florida plant for having insufficient LOTO procedures. Tr. at 38-39, 117-18. In light of the Tampa citation, Darling sent a revised LOTO procedure format to all of its plants for immediate use. *Id.* at 117-18. Darling conducted its most recent annual review of the procedure on January 1, 2020.[3] *Id.* at 39, 59; Ex. R-5 at 1.

In May 2020, OSHA issued citations to Darling for its Kuna, Idaho facility's violation of § 1910.147(c)(4)(ii) and 1910.147(c)(4)(ii)(B), the same provisions at issue in the instant case. Dec. at 9; Ex. C-5 at 6, 7; D. Tr. at 46-48. OSHA cited

[3] The LOTO standard requires employers to conduct at least annual review of LOTO procedures. *See* 29 C.F.R § 1910.147(c)(6)(i). Darling's compliance with this provision of the LOTO standard is not at issue in the instant case.

the Idaho red meat plant, which predominantly processes beef, for its failure to have sufficiently specific LOTO procedures for a machine that uses pressurized air to push cow carcasses into a grinder. Tr. at 116-17. Specifically, AAD Turner testified that the Idaho facility was cited because its machine-specific procedures for the cited machine "did not clearly outline the scope, purpose and authorization, rules, techniques for locking out the machine." *Id.* at 42. AAD Turner testified that the purpose of the LOTO provisions at issue in both instances is to protect employees "[s]o that they're not exposed to the hazardous energy source or the potential hazardous energy source" and that the hazard created by a failure to have adequate procedures in place is that "it could result in a fatal incident or serious injury, life altering injury." *Id.* 36-37. Stansberry testified that, although different machines were at issue at the Idaho facility, both the hydrolyzer and the machine in Idaho "work[] on the same basic process." D. Tr. at 45-46.[4] Darling and OSHA entered into a settlement agreement in June 2020, and the citations and penalties as amended by the settlement agreement became a Commission final order by operation of law on June 18, 2020. Dec. at 9. Stansberry was personally involved in the abatement of the Idaho violation. Tr. at 9-10, 119.

[4] Although the Commission seems to have omitted the transcript of the Secretary's Deposition of Darling Ingredients from the Certified List, it was admitted into evidence during the hearing. *See* Tr. at 17-19.

B. The August 10, 2020 Incident Resulting in Fatalities and the Issuance of the Citation

On August 10, 2020, an employee was operating hydrolyzer A at the worksite when the hydrolyzer became clogged. *Id.* at 28, 77; Dec. at 3. The employee unsuccessfully attempted to shuttle the gates to release pressure within the hydrolyzer, and called his supervisor, Operations Manager Sam Badalucco, to notify him that the usual procedures had not resolved the clog. Tr. at 74-75, 77, 86; Dec. at 2, 3. Badalucco contacted the maintenance department, which sent a team of three maintenance workers to address the issue. Tr. at 28, 75, 77, 81; Dec. at 3.

The maintenance team—consisting of Terrance Fortenberry, Marcell Young, and William Jackson—double checked the normal procedures by opening the shuttle gate and then the manual pressure relief valve, but pressure remained trapped in hydrolyzer A. Tr. at 86; Dec. at 3. The team then de-energized the hydrolyzer's electrical circuits and isolated the steam valve. Tr. at 87; Dec. at 3. One of the three maintenance employees then began to loosen the bolts attached to a four-inch flange on the side of the hydrolyzer to let the trapped steam escape. Tr. at 28-29, 84-85; Dec. at 4.

After the employee loosened the bolts for approximately 30 minutes, the internal pressure caused the flange to burst open, and steam and hot material from

inside the hydrolyzer spewed out of the machine, covering the employees and causing severe burns. Tr. at 28-30; Dec. at 4. Jackson and Fortenberry were hospitalized and ultimately died from their injuries. Tr. at 30; Dec. at 4; Ex. R-11 at 3.

On August 13, 2020, AAD Turner initiated an inspection of the Mississippi plant after Darling informed the Jackson Area Office of the employees' hospitalization. Tr. at 27; Ex. R-1 at 6-7. As a result of the inspection, OSHA issued a citation alleging repeat violations of 29 C.F.R. §§ 1910.147(c)(4)(ii) and 1910.147(c)(4)(ii)(B). Ex. R-1 at 6-7. Darling contested the citation, and a hearing on the merits took place before the ALJ on February 2, 2022. Dec. at 2.

C. The ALJ's Decision Affirming the Repeat Citation

The ALJ issued his decision on May 6, 2022, affirming the citation and holding that the Secretary established *prima facie* violations of §§ 1910.147(c)(4)(ii) and 1910.147(c)(4)(ii)(B). *Id.* at 2. The ALJ determined that, although there was "no dispute that Darling had a LOTO policy in place as well as a separate procedure specific to the hydrolyzer," the Secretary established that Darling had not complied with the standard's requirements because Darling's procedures did not provide sufficiently specific information and procedural steps. *Id.* at 6-7. Specifically, the ALJ concluded that step 6 of the hydrolyzer A LOTO

procedure, which simply instructed employees to "relieve internal pressure," was insufficient and "erroneous," because "if there is still internal pressure when the employee gets to step 6, the employee cannot 'relieve [the] internal pressure.'" *Id.* at 7. The ALJ noted that "at a minimum, Darling could have, and should have, simply instructed employees at step 6 to stop and wait for hydrolyzer A to cool down until the pressure dissipates to a nonhazardous level before moving to the next step." *Id.* The ALJ rejected Darling's argument "that its 'LOTO Policy and Procedure must be read in conjunction with the hydrol[i]zer manual and the training provided on how to isolate the thermal energy,'" emphasizing that the standard requires Darling's documented LOTO procedure to encompass all of the required information. *Id.* at 6 (alteration in original).

The ALJ also concluded that the Secretary established Darling's actual or constructive knowledge of the violation. The ALJ rejected Darling's argument that "it did not know the maintenance workers were going to remove the flange while hydrolyzer A was under pressure," characterizing it as "a red herring." *Id.* The ALJ explained that the relevant question was instead whether Darling knew or should have known of the condition constituting the violation, which was "its failure to implement a LOTO procedure that met the requirements of the LOTO standard," or "that its procedure was deficient." *Id.* at 8-9. Because "Darling knew of the contents of its own LOTO procedure," and "knew it had recently been

cited for a similar LOTO violation," the ALJ concluded that the Secretary established the element of knowledge. *Id.* at 8.

Next, the ALJ determined that the Secretary properly characterized the violations as repeat and established a *prima facie* showing of substantial similarity between the Idaho violations and the current violations. *Id.* at 9. The ALJ rejected Darling's argument that the violations were not substantially similar because different equipment and "equipment-specific procedures" were at issue in the Idaho citations, noting that "the violations were substantially similar in nature" because "both violations were caused by the same hazard . . . Darling's failure to implement LOTO procedures that met the requirements" of the LOTO standard. *Id.* at 10. Accordingly, the ALJ concluded that the Secretary had established that the repeat violations were properly characterized. *Id.*

Finally, the ALJ concluded that, along with the other defenses raised in Darling's answer, Darling's defense of unpreventable employee misconduct was waived. *Id.* at 10, n.2. The ALJ noted that "Darling failed to offer any evidence in support of the affirmative defense of employee misconduct at trial and did not mention it in its post-trial brief, let alone point to any evidence in the record showing it had met its burden." *Id.* at 10. Accordingly, the ALJ concluded Darling waived the defense.

SUMMARY OF THE ARGUMENT

The ALJ correctly concluded that Darling violated the cited OSHA standard and properly affirmed the citation. The standard requires an employer to have documented LOTO procedures that clearly and specifically outline techniques and specific procedural steps to be utilized to secure machines and control hazardous energy, and the ALJ correctly determined that the instruction for employees to "relieve pressure," when in fact they were supposed to stop and wait for the pressure to release, lacked sufficient specificity. The ALJ also properly determined that Darling had knowledge of the violative condition—the insufficient LOTO procedures—because Darling's centralized corporate safety office created and regularly reviewed the procedures and was therefore aware of their contents.

The ALJ also correctly concluded that the citation was properly classified as repeated because Darling had previously committed substantially similar violations of the same standards in a different facility, and those violations had become a final order of the Commission. Finally, the ALJ did not abuse his discretion when he concluded that Darling waived the affirmative defense of unpreventable employee misconduct by failing to raise the issue before the ALJ, and did not offer or identify any evidence in the record in support of the defense.

ARGUMENT

I. Standard of Review

The ALJ's findings of fact must be upheld if they are "supported by substantial evidence on the record considered as a whole."[5] 29 U.S.C. § 660(a); *Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027, 1029 (5th Cir. 1989). The Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966) (internal quotation marks omitted); *see also Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 426–27 (5th Cir. 2001) (stating that the Court is bound by findings of fact supported by substantial evidence even if it "could justifiably reach a different result *de novo*"). The Court "will not reweigh the evidence or independently evaluate evidentiary conflicts." *Phoenix Roofing*, 874 F.2d at 1029. The ALJ's legal conclusions shall be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Trinity Marine Nashville*, 275 F.3d at 426-27.

[5] The Court applies the same standard of review to an unreviewed ALJ decision as it does to Commission decisions. *See J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1352, 1354 (11th Cir. 2000) (stating standard of review in case involving unreviewed ALJ decision); *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 108 (1st Cir. 1997) (for ALJ decisions not reviewed by the Commission, substantial evidence standard "applies with undiminished force" to ALJ's findings).

II. The ALJ Correctly Concluded that Darling's LOTO Procedures Violated the Cited Standards.

To prove a *prima facie* violation of an OSHA standard, the Secretary must show that (1) the standard applied to the cited condition; (2) the standard was violated; (3) employees were exposed to the violative condition; and (4) the employer knew or should have known about the violative condition through the exercise of reasonable diligence. *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016); *Sec'y of Labor v. Astra Pharm. Prods.*, No. 78-6247, 1981 WL 18810, at *4 (OSHRC Jul. 30, 1981).

OSHA's LOTO standard provides that an employer's LOTO procedures "shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance[.]" 29 C.F.R. § 1910.147(c)(4)(ii). The procedures must include, among other requirements, "[s]pecific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy[.]" 29 C.F.R. § 1910.147(c)(4)(ii)(B).[6] *See* Ex. R-1 at 6-7. Substantial evidence in the record demonstrates that Darling violated both cited provisions, and the ALJ correctly concluded that the Secretary established all four elements of

[6] The Secretary proposed a single penalty of $79,052 for both violations, due to their similarity. Ex. R-1 at 6-7, 8.

his *prima facie* case. Of these elements, only violation of the standard and knowledge are at issue in this appeal.

A. Darling Violated the LOTO Standard by Failing to Include Specific Procedural Steps and Techniques to Relieve Internal Pressure in Hydrolyzer A.

Item 1a alleges that on or about August 10, 2020, Darling violated 29 C.F.R. § 1910.147(c)(4)(ii) "in that [Darling's] procedures did not clearly and specifically address appropriate lockout, tagout procedures for steam trapped in hydrol[y]zer during clog removal." Ex. R-1 at 6. Item 1b alleges that, on that same date, Darling violated 29 C.F.R. § 1910.147(c)(4)(ii)(B) by failing to "clearly and specifically outline the steps for shutting down, isolating, blocking and securing" the hydrolyzer. *Id.* at 7. While it is undisputed that Darling had a written LOTO policy, as well as a LOTO procedure specific to hydrolyzer A, Darling's policy and procedures fall short of meeting the requirements of the LOTO standard because they fail to identify techniques and specific procedural steps to relieve internal pressure in the hydrolyzer after the routine methods were unsuccessful.

"In promulgating the standard, the Secretary retained the word 'specifically' to 'emphasize the need to have a detailed procedure, one which clearly and specifically outlines the steps to be followed.'" *Sec'y of Labor v. S. Hens, Inc.*, No. 17-0029, 2018 WL 2017592, at *5 (OSHRC Mar. 20, 2018) (ALJ) (quoting 54 Fed. Reg. 36644-01, 36670 (1989)), *aff'd, S. Hens, Inc. v. Occupational Safety &*

Health Review Comm'n, 930 F.3d 667 (5th Cir. 2019). "Overgeneralization can result in a document which has little or no utility to the employee who must follow the procedure." *Id.* (quoting Control of Hazardous Energy Sources, 54 Fed. Reg. 36644 (Sept. 1, 1989)). The Commission has recognized that "[b]ecause the purpose of the lockout procedure is to guide an employee through the lockout process," general procedures are not acceptable. *Sec'y of Labor v. Drexel Chemical Co.*, No. 94-1460, 1997 WL 93945, at *5 (OSHRC Mar. 3, 1997); *see also Sec'y of Labor v. Birdsboro Kosher Farms Corp.*, Nos. 16-1575, 16-1731, 2019 WL 5656486, at *8 (OSHRC Sept. 23, 2019), *aff'd*, 831 Fed.App'x. 516 (D.C. Cir. 2020). Accordingly, to be compliant with the standard, LOTO procedures must "inform the employee of the *specific* procedural steps to shut down and lock out a machine." *Sec'y of Labor v. Gen. Motors Corp.*, No. 91-2834E , 2007 WL 4350896, at *8 (OSHRC Dec. 4, 2007) (emphasis added).

There is no dispute that step 6 of Darling's LOTO procedure for hydrolyzer A did not include any specific procedures beyond the vague instruction to "relieve internal pressure[.]" Tr. at 38, 102, 103, 125; Ex. R-4 at 2-3; D. Tr. at 49-50. This vague instruction is plainly insufficient to meet the specificity requirement of the LOTO standard. *See, e.g., Sec'y of Labor v. Basic Grain Products, Inc.*, No. 12-0725, 2013 WL 6796497, at *10 (OSHRC Nov. 5, 2013) (ALJ) (finding "catch-all, generic language" such as instruction that stored energy "must be dissipated or

restrained by methods such as repositioning, blocking, bleeding down, etc." not specific enough to comply with LOTO standard). As the ALJ correctly concluded, the sixth step of the LOTO procedure for hydrolyzer A was incomplete because it did not instruct employees to stop and wait for the pressure to dissipate if the normal procedures were ineffective. Tr. at 114; Dec. at 7. Moreover, this step was not only lacking in specificity, but was also misleading. As the ALJ correctly noted, the active instruction to "relieve pressure" is erroneous and directly in conflict with the correct procedure, which is to take no further action until the pressure has fully dissipated. Dec. at 7.

Darling's claim that its LOTO procedure should be read in conjunction with the hydrolyzer maintenance manual or the training provided to employees also falls short of the standard's requirements. Opening Brief (Op. Br.) at 19-20; Dec. at 6. In *Sec'y of Labor v. Spirit Homes, Inc.*, the ALJ rejected an employer's argument that its LOTO procedures, in conjunction with the manufacturer's maintenance manuals for the machine at issue, were sufficient to fulfill the requirements of § 1910.147(c)(4)(ii) because the employer's written procedures failed to describe the procedures with specificity. Nos. 00-1807, 00-1808, 2002 WL 31163770, at *11 (OSHRC Sept. 30, 2002) (ALJ), *aff'd*, 2004 WL 1747117 (OSHRC Mar. 1, 2004). In addition, although Darling claims it was "well known" to its employees that they should stop and wait for hydrolyzer A to cool down when internal pressure

could not be relieved, the employees involved in this incident in fact disagreed regarding whether they should loosen the bolts before the pressure fully released. Tr. at 29, 85, 92, 114; Ex. R-11 at 1; D. Tr. at 50-51. In any case, employees' apparent knowledge of the need to stop and wait for the pressure to release at step 6 would not negate Darling's duty to establish and document the specific procedures and techniques to be used. Tr. at 114; Dec. at 7; *See Spirit Homes, Inc.*, 2002 WL 31163770 at *11 (employees' apparent understanding of proper LOTO procedures was not relevant to question of whether employer's written procedures were adequate under the LOTO standard). Accordingly, the ALJ correctly determined that Darling violated the requirements of § 1910.147(c)(4)(ii) and 1910.147(c)(4)(ii)(B) by failing to include specific instructions to stop and wait for pressure to dissipate in its LOTO procedures for hydrolyzer A.

B. Darling Had Knowledge of the Violative Condition Because Company Managers Created the Procedures and Were Therefore Aware of Their Provisions.

To establish the knowledge element of his *prima facie* case, the Secretary must show that the employer had either actual or constructive knowledge of the violation; that is, that the employer "knew of, or with exercise of reasonable diligence could have known of the non-complying condition." *Trinity Indus., Inc. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000). The Secretary need only prove that the employer had knowledge of the condition constituting the violation—here, the

insufficient procedures—and need not prove that the employer knew the conditions to be violative. *S. Hens, Inc.*, 930 F.3d 676 (5th Cir. 2019) (Secretary need only show employer's knowledge of condition constituting the violation, rather than knowledge of OSHA standard).

The record clearly shows that Darling was aware of its own LOTO procedures, because it created, reviewed, and even revised those procedures in the months prior to the incident at the Mississippi plant. Darling does not dispute that it developed the basic LOTO procedures to be used by all its plants. *See* Tr. at 97. Darling last revised the hydrolyzer A LOTO procedure at issue on May 13, 2019, after its Tampa plant was issued a citation for insufficient LOTO procedures, and sent the revised version to all plants for immediate use. *Id.* at 38-39, 117-18. In addition to creating multiple versions of the procedure, Darling was required to review LOTO procedures annually, and did in fact review the hydrolyzer A LOTO procedure on January 1, 2020. *Id.* at 39, 59; Ex. R-5 at 1. Additionally, in May 2020, just three months before the fatalities in this case occurred, OSHA issued citations to Darling for violations of § 1910.147(c)(4)(ii) and 1910.147(c)(4)(ii)(B), the same provisions at issue in the instant case, at the Idaho plant. Dec. at 9. Stansberry, in his role as Darling's Corporate Safety Manager, was personally involved the in abatement of the hazard at the Idaho plant, and would have been aware of the LOTO procedures in place in order to correct them.

Tr. at 119. These facts demonstrate that Darling was clearly well aware of its LOTO procedure for hydrolyzer A. *See Birdsboro*, 2019 WL 5656486, *10-11, *aff'd*, 831 Fed.Appx. 516 (D.C. Cir. 2020) (finding employer had actual knowledge of insufficient LOTO procedures where it was previously cited for violation of same LOTO provision requiring machine-specific procedures). The Secretary need not make any additional showing to prove Darling's knowledge of the violative condition. *See S. Hens, Inc.*, 930 F.3d 676.

Darling misstates the nature of the violation by arguing that the company was not aware of the maintenance team's decision to remove the flange while hydrolyzer A was still pressurized. *See* Op. Br. at 20. The departure from OSHA standards is the violation. *S. Hens,* 930 F.3d at 679. In this case, Darling departed from OSHA standards when it failed to have a sufficiently specific LOTO procedure for hydrolyzer A. Accordingly, whether Darling knew that one of the maintenance employees was removing the flange on hydrolyzer A at the time of the incident is irrelevant to the citations, and, as the ALJ concluded, a "red herring." Dec. at 6. Instead, the question is whether Darling had knowledge of its own LOTO procedures, and, as explained *supra* at 23, the company was well-aware of its own procedures.

III. The ALJ Properly Affirmed the Classification of the Citation as Repeated Because the Prior and Instant Citations Involved Substantially Similar Violative Conditions: The Lack of Required Specificity in Darling's LOTO Procedures.

"[W]hen the same standard is violated more than once, it is a repeated violation if there is substantial similarity of violative elements." *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir. 1981). The Secretary must therefore show the substantial similarity of the violative conditions associated with the past and instant violations of the same standard. *Id.* at 838. The employer then bears the burden of disproving the substantial similarity of the conditions, or proving any affirmative defenses. *Id.* For violations of the same specific standard, "rebuttal may be difficult since the two violations almost have to be substantially similar in nature in order to constitute violations of the specific standard." *Id.* at 837.

The Secretary properly classified the instant citation as repeated because Darling had previously violated the same provisions of the LOTO standard, §§ 1910.147(c)(4)(ii) and 1910.147(c)(4)(ii)(B), at the Idaho plant, and the prior and instant violations involved substantially similar violative conditions—a lack of specificity in Darling's LOTO procedures. Tr. at 39-40, 41-42; Ex. R-1 at 6-7; Ex. C-5 at 6, 7. Although the ALJ appears to have determined that the Secretary met his burden simply by showing that the citations were for violations of the same standard, *see* Dec. at 9 (quoting *Deep S. Crane & Rigging Co. v. Harris*, 535

F.App'x 386 (5th Cir. 2013) (unpub.)), without evaluating whether the Secretary had proved the substantial similarity of the conditions as required by this Court in *Bunge*, 638 F.2d at 837, any error was harmless because the violative condition in both instances was the lack of specificity in Darling's LOTO procedures for those machines.[7] *See id.* at 36-37, 41-42.

The purpose of the LOTO standard is to prevent the unexpected energization of machines during servicing or maintenance by requiring employers to specifically outline the steps employees must take to fully de-energization a machine, and prevent the machine from re-energizing unexpectedly, before performing servicing or maintenance work on the machine. Control of Hazardous Energy Sources (Lockout/Tagout), 54 Fed. Reg. 36644, at 36646-48 (Sept. 1, 1989). Dissipating residual energy is a critical part of this process because "unanticipated movement [of a machine or equipment being serviced] can be caused . . . by the release of residual energy within the machine or equipment." *Id.* at 36647. The specificity requirements in §§ 1910.147(c)(4)(ii) and

[7] If the Court finds that the ALJ articulated the incorrect standard, this error would, at most, warrant a remand to the Commission to apply the correct burden of proof, but not reversal. *See W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Comm'n*, 459 F.3d 604 (5th Cir. 2006) (remanding to Commission where ALJ incorrectly assigned burden of proof). Remand is not necessary, however, because the record clearly establishes that the prior and instant violations were substantially similar.

1910.147(c)(4)(ii)(B) are particularly critical because "[o]vergeneralization [in the employer's LOTO procedure] can result in a document which has little or no utility to the employee who must follow the procedure." *Id.* at 36670.

Thus, the hazard created by a failure to have an adequately specific LOTO procedure in place is that an employee may fail to take required steps that are not specifically described in the procedure, thereby exposing the employee to the hazard of the machine unexpectedly energizing or releasing stored energy during servicing or maintenance. Such a failure could result in death or serious injury to employees, as in fact occurred here. Tr. 36-37; 41-42; 59, 64.

In this case, although the *machines* at issue in the prior and instant violations were different—a "pneumatic air-powered" machine that "pushes cow carcasses" and a hydrolyzer that processes chicken feathers (Dec. at 10; Tr. at 16)—the *violative conditions*—the lack of specificity in LOTO procedures—were substantially similar.[8] Both violations involved a lack of specificity in the employer's procedures that created a risk of the relevant machine energizing or releasing stored energy unexpectedly during servicing or maintenance and seriously harming employees. *See* Ex. R-1 at 6-7; Ex. C-5 at 6, 7; D. Tr. at 44-45. As this Court explained in *Bunge*, the relevant factor is "the substantial similarity

[8] Regardless, Stansberry admitted that both machines "work[] on the same basic process." D. Tr. at 45-46.

of the *conditions* associated with the prior and instant violations of the same standard." *Bunge*, 638 F.2d at 838 (emphasis added). The differences in the type of equipment and animal product being processed are therefore irrelevant. *See Deep S. Crane & Rigging Co. v. Harris*, 535 F. App'x 386, 390 (5th Cir. 2013) (unpub.) (holding that a citation under OSHA's cranes standard was properly characterized as repeated even where the prior and subsequent violations involved different cranes because "both violations were caused by the same hazard: . . . [failure] to adequately train a crane operator").

Darling mischaracterizes the Idaho hazard as "the crush injury caused by the pneumatic arm" and the instant hazard as "the potential burn hazard involved in the subject incident." Op. Br. at 15.[9] Neither citation was for those potential injuries; instead, both citations were for violations of the same provisions of the LOTO standard, which require specific LOTO procedures to prevent injuries and death from the unexpected energization of machines during maintenance. Regardless of the type of injury likely to result from a violation, the violative conditions are substantially similar—the lack of specificity in Darling's LOTO procedures for the two machines involved in the prior and instant violations.

[9] Darling also improperly relies upon *Sec'y of Labor v. Angelica Textiles*, which was vacated by the Second Circuit. *See* Op. Br. at 19; *Scalia v. Angelica Textiles*, 803 Fed.Appx. 542 (2d Cir. 2020) (unpub.).

Nor do the different locations and supervisors establish that the underlying hazards were dissimilar, as Darling claimed before the ALJ. *See* Tr. at 16. The location of the workplace at which the violations occurred is not relevant, as employers receive adequate notice for a repeated violation even where (as here) the prior violation occurred at a different facility in a different state than the allegedly repeated violation. *See Sec'y of Labor v. Potlatch Corp.*, No. 16183, 1979 WL 61360, at *5 (OSHRC Jan. 22, 1979); *see, e.g., Wal-Mart Stores, Inc. v. Sec'y of Labor*, 406 F.3d 731, 737 (D.C. Cir. 2005) (prior citation for egress violations at a Wal-Mart store should have alerted controlling corporation of the need to take steps to prevent the second violation at a different store in a different state).

The "substantial similarity" test's focus on the workplace conditions and hazards involved in the violations stems from the purpose of the OSH Act's repeated characterization, which is to provide an enhanced compliance incentive where an OSHA citation informs the employer of specific hazards and associated working conditions that must be corrected. It is the employer's failure to correct similar hazards and working conditions, despite the heightened notice provided by the initial citation, that renders later violations repeated. *See Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982) (the OSH Act "imposes a burden on employers to discover and correct potential hazards prior to an OSHA inspection, and an even greater obligation to do so once alerted by a

citation and final order," and a repeated characterization is thus appropriate where "an employer fails adequately to respond to a citation"); *Potlatch*, 1979 WL 61360, at *4 (violation was properly characterized as repeated because the prior citation of the same standard gave the employer "adequate notice" that electrical equipment needed to comply with the standard); *Sec'y of Labor v. Austin Road Co.*, No. 77-2752, 1980 WL 10638, at *2 (OSHRC July 31, 1980) (a citation supplies "notice that [the employer's] safety regime is deficient" and creates an "obligation to prevent a recurrence of the violation"). Because the prior citation in this case provided Darling with heightened notice that LOTO procedures for all machines with multiple energy sources require specificity, and Darling nonetheless failed to provide the required specificity in its LOTO procedures for hydrolyzer A, the instant citation was properly characterized as repeated.

For all of these reasons, the record establishes that the violations were substantially similar, and the ALJ correctly concluded that Darling failed to disprove substantial similarity and properly affirmed the repeat characterization of the violations.

IV. The ALJ Did Not Abuse His Discretion by Concluding that Darling Waived the Affirmative Defense of Unpreventable Employee Misconduct, and Even if Not Waived, the Defense Fails.

An employer may defend against a violation by establishing the affirmative defense of unpreventable employee misconduct. *Sec'y of Labor v. PSP Monotech*

Indus., No. 06-1201, 2007 WL 5432286, at *4 (OSHRC Aug. 14, 2008). The burden of proof to establish the affirmative defense lies with the employer. *Sec'y of Labor v. Bill Echols Trucking Co.*, No. 1589, 1974 WL 3970, at *5 (OSHRC Feb. 20, 1974) (ALJ). To establish unpreventable employee misconduct, an employer is required to prove that it "1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered." *Angel Bros. Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir. 2021) (quoting *W.G. Yates & Sons Const. Co. Inc. v. OSHRC*, 459 F.3d 604, 610 n.7 (5th Cir. 2006)).

Darling argues that the ALJ "erroneously" concluded that Darling failed to pursue its defense of unpreventable employee misconduct, despite Darling's complete lack of briefing on the argument. Op. Br. at 23. The OSH Act mandates that "[n]o objection that has not been urged before the Commission shall be considered by the court[.]" 29 U.S.C. § 660(a). "Generally, if an affirmative defense is not timely raised, it is deemed waived." *Sec'y of Labor v. Dover Elevator Co.*, No. 89-626, 1990 WL 150345, at *1 (OSHRC July 2, 1990) (ALJ). Though Darling asserted the affirmative defense in its answer, and now points to "the unrebutted sworn testimony of Stansberry" which purportedly demonstrates the elements of the affirmative defense, Darling did not raise the defense in pretrial

pleadings, during the hearing before the ALJ, or in its post-hearing brief. *See* PH Br. at 14-21; Dec. at 10. Because the issue had not been briefed or argued below, the ALJ was well within his discretion to conclude that the affirmative defense was waived. *See Excel Modular Scaffold & Leasing Co. v. Occupational Safety & Health Review Comm'n*, 943 F.3d 748 (5th Cir. 2019), *cert. denied*, 141 S.Ct. 264 (2020) (holding it was not an abuse of discretion for ALJ to conclude that employer waived affirmative defense because although employer included the defense in its answer, employer did not include the defense in joint prehearing statement submitted to ALJ, did not mention the defense in its prehearing statement, and did not take opportunity to clarify its intention to raise the defense in meeting with ALJ on first day of hearing); *Sec'y of Labor v. Bardav*, No. 10-1055, 2012 WL 3642330, at *21 (OSHRC Jan. 27, 2012) (ALJ), *rev'd on other grounds*, 2014 WL 5025977 (OSHRC Sept. 30, 2014) (noting that failure to argue affirmative defenses originally pled in answer typically results in waiver); *Dover Elevator Co.*, 1990 WL 150345, at *1 (finding affirmative defense first raised in closing brief "untimely and prejudicial to the Secretary" where it was not briefed in earlier pleadings).

Even if Darling did not waive the affirmative defense of unpreventable employee misconduct by failing to raise it before the ALJ (it did), Darling has failed to present any evidence in support of the defense. Darling argues that it had

no reason to believe maintenance employees would engage in "prohibited conduct" by removing the flange, but this misstates the condition constituting the violations—insufficient LOTO procedures. Op. Br. at 23. The departure from OSHA standards is the violation, rather than the incident culminating in the fatalities. *See S. Hens,* 930 F.3d at 679 (5th Cir. 2019) (holding employee misconduct defense failed and employer misconstrued "the nature of the violation" where lack of lockout device was the actual violation, rather than employee failure to follow employer's rules). Darling was issued a citation for insufficient LOTO procedure, not the removal of the flange while the hydrolyzer was under pressure. *See* Ex. R-1 at 6-7.

Even if the flange had not been removed while the hydrolyzer was under pressure, and the accident had never occurred, the violation Darling was cited for would have still existed because Darling's LOTO procedures were insufficient. Darling has not explained how employee misconduct could have contributed to the company lacking sufficiently specific LOTO procedures for hydrolyzer A. *See Sec'y of Labor v. Henkels & McCoy, Inc.*, No. 18-1864, 2022 WL 3012701, at *9 (OSHRC July 21, 2022) (Commission rejecting employee misconduct defense where employer "focuses on the cause of the incident" rather than employer's own failure to properly maintain equipment, which was actual basis for the violation).

Accordingly, Darling failed to establish the defense of unpreventable employee misconduct.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and affirm the final order of the Commission.

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 30th day of November, 2022, I caused the foregoing brief to be electronically filed via the Court's CM/ECF system. I certify that I served of this brief electronically on all counsel of record through the Court's electronic filing system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedures 32(g) and Fifth Circuit Rule 32.2, I certify that the foregoing brief complies with the type-volume limitation prescribed in Federal Rule of Appellate Procedure 32(a)(7)(B). It uses Times New Roman 14-point typeface and contains 7,125 words.

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