UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ACTING SECRETARY OF LABOR, Complainant, v. LOUISIANA-PACIFIC CORPORATION, Respondent, And TYLER WALLACE, Affected Employee.	OSHRC Docket No. **21-1042**

DECISION AND ORDER

Attorneys and Law Firms

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JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Respondent Louisiana-Pacific Corporation ("LP") manufactures and cuts an engineered wood panel called an Oriented Strand Board ("OSB") at its mill in Thomasville, Alabama. Tyler Wallace, an affected employee of LP,[1] was injured while he was cleaning near the mill's #4 Trim

[1] Wallace, an affected employee, elected party status as permitted by Commission Rule 20(a). *See* 29 C.F.R. § 2200.20(a). Neither the Act nor the Secretary of Labor's regulations define an "affected employee." The Commission's rules define an "affected employee" as "an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations." 29 C.F.R. § 2200.1(e). *See also*, section 10(c) of the Occupational Safety and Health Act of 1970 ("Act"), which mandates "[t]he rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection." 29 U.S.C. § 659(c).

Waste Conveyor ("#4 conveyor") when his hand and arm were caught in the conveyor's ingoing nip point. The United States Department of Labor, through the Occupational Safety and Health Administration ("OSHA"), investigated the accident and subsequently issued[2] two citations to LP on September 8, 2021, for serious and other-than serious violations of the Act. 29 U.S.C. §§ 651–678. LP filed a notice of contest, which only contested "Citation 1, Item 1, and any subparts."[3] Therefore, only Citation 1 is pending in the Court. It alleges LP violated the machine guarding standard at 29 C.F.R. § 1910.212(a)(1) and proposes a $13,653 penalty. (Ex. J-7 at 6.)

The Secretary of Labor ("Secretary") subsequently filed a complaint with the Commission ("Court") seeking an order affirming the citation and proposed penalty at issue.[4] LP filed an answer raising the unpreventable employee misconduct defense. A bench trial was subsequently held and the parties filed post-trial briefs. Based upon the record, the Court concludes it has jurisdiction over the parties and subject matter in this case. (*See* Pretrial Order, Attach. C ¶ 1; *see also* Compl. ¶¶ I, II; Answer ¶¶ I, II.) Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings under section 661(j) of the Act. 29 U.S.C. § 661(j).[5] For the reasons indicated *infra*, the Court **VACATES** Citation 1.

[2] On March 11, 2023, Julie A. Su became the Acting Secretary of Labor and was automatically substituted as a party pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. For ease of reference, she will be referred to as the Secretary herein. The Secretary has assigned responsibility for enforcement of the Act to OSHA and has delegated her authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 8-2020, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020), *superseding* Order No. 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The Assistant Secretary has authorized OSHA's Area Directors to issue the citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

[3] Citation 2 alleged a grouped other-than-serious violation of the bloodborne pathogens standard at §1910.1030(f)(3) and §1910.1030(g)(2)(ii)(B) with no proposed penalty. (Compl., Ex. B.) Since Citation 2 was not appealed, in accordance with § 10(a) of the Act, it was deemed a final order by operation of law and is not subject to review by any court or agency. 29 U.S.C. § 659(a).

[4] Attached to the complaint and adopted by reference are Citations 1 and 2. (Compl., Ex. A, Ex. B.) Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d). However, as indicated *supra*, Citation 2 was not appealed and only Citation 1 is pending in the Court.

[5] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

II. BACKGROUND

LP uses a Trim Waste Conveyor System designed and manufactured by Teal Sales, Inc. to collect and discharge waste produced in the OSB structural panel manufacturing process. (Pretrial Order, Attach. C ¶¶2, 3.) The system operates nearly 24 hours per day, seven days per week, and an operator and utility employee are present on each shift. (Tr. 41.) One component of the system is the #4 conveyor, which collects trim, transports it along the belt, and discharges it. (Tr. 135, 151; Ex. R-24 [conveyor and unguarded ingoing nip point at time of injury], Ex. C-9, Ex. C-10 [view of conveyor after injury].) The #4 conveyor is a sliding belt conveyor, which means the belt runs in a continuous loop. (Tr. 136.) One end of the conveyor rotates under power and the unpowered lower or tail end holds the loop tight. (*Ibid.*) Trim from an upper conveyor drops onto the lower end of the #4 conveyor, which transports it up an incline. (Tr. 151.) The collected trim eventually ends up in a grinding machine. (*Ibid.*)

Trim waste sometimes falls off the #4 conveyor to the floor. (Tr. 152.) Since trim and dust are combustible and can also cause employees to trip or slip, LP employees frequently clean the area around the #4 conveyor. (Tr. 30, 42-43, 77-78.) In addition to an air hose located above the #4 conveyor's ingoing nip point, LP provides air wands, brooms, and rakes for employees to use while cleaning. (Tr. 81, 178; Ex. R-24, Ex. C-7, Ex. C-9, Ex. C-10 [showing location of red air hose].) Employees use the air hose and wands to blow dust off surfaces and would rake and sweep trim into piles and pick it up with their hands to dispose of it. (Tr. 81-82.) At the time of the accident, LP did not have a work rule requiring employees to use air wands, rakes, or other tools to clean trim around the #4 conveyor. (Tr. 186.) LP also did not have a rule prohibiting employees from using their hands to pick up trim near the conveyor. (*Ibid.*)

Early in the morning of May 19, 2021, LP Press Operator Tyler Wallace was cleaning for the second or third time that night to prevent dust from building up in the area around the #4 conveyor.[6] (Tr. 10, 79, 87-88; Pretrial Order, Attach. C ¶5.) Wallace had "already cleaned the

[6] Wallace began working at LP in August 2017 or 2018 as a press utility. (Tr. 76-77; Pretrial Order, Attach. C ¶7.) In that role, he cleaned the press, equipment, and floors with an air wand. (Tr. 76-77.) Thereafter, he was a press aide, which involved "[g]eneral clean up, blowing the press three times a shift, walking around inspecting equipment, mak[ing] sure everything sounds good and is running good," as well as conducting minor maintenance." (Tr. 78.) As a press operator, he ran and operated the inside part of the mill; made sure enough feed or flakes were in the dry bin to keep production running; put in recipes for products; conducted troubleshooting from monitor screens; and gave assignments to press aides. (Tr. 79-80.) He also conducted walkarounds to ensure equipment was clean and lent a hand with cleaning if staff were shorthanded. (Tr. 80.) Shift supervisor Tyler Garza, who was also Wallace's supervisor, testified that

rest of the saw line" and was "starting to pick up whatever trim [was] left over on the ground." (Tr. 86.) Wallace estimated he was about a foot from the #4 conveyor's unguarded ingoing nip point and "was squatting down just picking up the trim that [it] had in there" when he "lost [his] balance."[7] (Tr. 86-87, 88, 103; Pretrial Order, Attach. C ¶4.) He "reached out" to brace himself and his right hand was caught in an ingoing nip point, pulling his arm into the tail end of the conveyor, causing injuries. (Tr. 86, 89; Pretrial Order, Attach. C ¶6.) Wallace was the only witness to the accident. Garza testified he had never seen anyone squatting down against the conveyor or on their hands and knees around the conveyor to pick up trim. (Tr. 185.) Following the accident, LP installed an exterior guard around the ingoing nip point on the #4 conveyor. (Pretrial Order, Attach. C ¶8; Tr. 36, 152-53; Ex. C-7, Ex. C-9, Ex. C-10.)

Dain Keown, an OSHA Compliance Safety and Health Officer ("CSHO")[8] with OSHA Region 4 in Mobile, Alabama, led the agency's investigation and conducted the inspection.[9] (Tr. 27, 33.) CSHO Keown testified his inspection was limited to the accident and his investigation to the tail or lower end of the #4 conveyor. (Tr. 33-34.) Keown attended opening and closing conferences, conducted a facility walkaround with the plant manager, interviewed management and employees, took photographs and measurements, and reviewed LP's safety programs, including machine guarding and lockout/tagout (LOTO). (Tr. 34-35.)

Wallace testified that as a press operator at the time of the accident he would walk around the machinery to make sure it was clean and would clean the equipment when LP was understaffed.

LP did not have the saw line utility position filled at the time of the accident and this this role would have been responsible for cleaning around the #4 conveyor. (Tr. 189.)

[7] LP disputes that Wallace lost his balance as he was picking up trim. The company, relying on testimony from its biomechanics and accident reconstruction expert, contends he intentionally placed his hand in the opening and accidentally caught it in the ingoing nip point. (Resp't's Br. at 32; Tr. 221-22.) As discussed below, the Court can decide the case without addressing whether Wallace's contact with ingoing nip point was the result of an intentional or accidental movement towards the ingoing nip point.

[8] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d).

[9] CSHO Keown has a B.S. in Environmental Science/Industrial Hygiene from Western Kentucky University and has completed some graduate work at Marshall University. (Tr. 28.) He previously worked for the Commonwealth of Kentucky Natural Resource and Environmental Protection Cabinet. At the state agency, he inspected drinking water plants, wastewater plants, and industry point sources, as well as state oil and gas facilities. (Tr. 28-29.) He then worked as an industrial hygienist at the federal Mine Safety and Health Administration for two years. (Tr. 29.) His MSHA training included machine guarding and inspecting machines. (Tr. 30.) He transferred to OSHA's Mobile Area Office in 2009. (Tr. 31.) Since then, he has taken dozens of trainings and inspected 40-60 worksites per year, including dozens for machine guarding. (Tr. 31-32.) He estimated these inspections have led to at least two dozen machine guarding citations, including citations related to employer-reported amputation responses. (Tr. 32-33.)

(Tr. 80.) Wallace received training from LP supervisor Tyler Garza, who showed him how to clean with tools and pick up trim that posed tripping hazards. (Tr. 80-81, 176.) Garza testified he directed LP employees to use tools and implements rather than their hands to pick up trim near and around the conveyor, and that he never observed an employee break "the plane" around the ingoing nip point. (Tr. 178-79, 180.) Garza testified an employee would have to crawl under the catwalk or reach through the side of the #4 conveyor to contact the ingoing nip point, because it was impossible to do so facing conveyor from its end. (Tr. 183-84.)

Wallace admitted Garza told him not to put his hands near the equipment and was warned not to reach into pinch points or rotating equipment or "break the plane" around the ingoing nip point without using tools or locking out and tagging the conveyor. (Tr. 81, 104-05, 126, 178-79.) Nonetheless, Wallace admitted he would rake larger pieces of trim into piles and use his hands to dispose of them, that other employees used their hands to pick up trim and managers, and that he observed this practice. (Tr. 81-82, 84.)

Wallace testified he received lockout/tagout training and, although he did not lock out and tag machinery for general housekeeping, he did so for "work on [the #4 conveyor] or whenever something was stuck like in the equipment" and he needed "to get in there and get it out." (Tr. 82, 98-99, 177.) Wallace also locked out and tagged equipment when he needed to place his hand under or on top of the conveyor. (Tr. 100, 103.) Garza similarly testified that locking out and tagging the #4 conveyor was part of the process for removing a piece of trim waste that was stuck in the machine. (Tr. 182.)

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). The Act "establishes a comprehensive regulatory scheme designed 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.'" *Martin v. Occupational Safety & Health Rev. Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 147 (1991) (*quoting* 29 U.S.C. § 651(b)). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health

standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority, the standards at issue in this case were promulgated.[10]

The "Commission is responsible for carrying out adjudicatory functions" under the Act. *CF&I*, 499 U.S. at 144. Thus, "[t]he Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections." *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (*per curiam*). Therefore, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *CF&I*, 499 U.S. at 151.

Under the law of the Eleventh Circuit where the case arose,[11] "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *ComTran Grp., Inc. v. U.S. Dep't of Lab.*, 722 F.3d 1304, 1307 (11th Cir. 2013) (citation omitted). Among other things, LP asserts the Secretary failed to prove the noncompliance and exposure elements of her case. Alternatively, LP contends it is entitled to the affirmative defense of unpreventable employee misconduct. For the reasons *infra*, the Court concludes the Secretary failed to establish all the elements of her prima facie case.

Alleged Violation

In Citation 1, Item 1, the Secretary alleges that on or about May 19, 2021, LP violated § 1910.212(a)(1) when "[o]ne or more methods of machine guarding was not provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks[.]" (Compl., Ex. A). More

[10] As indicated *supra*, the Secretary delegated her authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health and the Assistant Secretary promulgated the Occupational Safety and Health Standards at issue.

[11] The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, LP's headquarters is located in Tennessee, which is in the Sixth Circuit, and the citation was issued in Alabama, which is in the Eleventh Circuit. Since both parties cited to Eleventh Circuit precedent in their briefs, the Court applies the Eleventh Circuit's precedent where the case is likely to be appealed.

specifically, the Secretary asserts LP "exposed employees engaged to caught-in and amputation hazards in that an ingoing nip point at the return roller of the #4 Trim Waste Conveyor was not effectively guarded while employees perform job tasks such as cleaning in and around the conveyor." (*Id.*) The cited standard mandates in relevant part that "[o]ne or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." 29 C.F.R. § 1910.212(a)(1).

Applicability

Section 1910.212 is titled "General requirements for all machines." The #4 conveyor is a machine and therefore covered by the standard and the return roller of the #4 Trim Waste Conveyor presented an ingoing nip point hazard with the potential to cause serious injury. And "LP does not contend that 29 C.F.R. § 1910.212(a)(1) is inapplicable to trim waste conveyor #4." (Resp't's Br. at 22.) Therefore, the Court concludes the cited standard applies.

Noncompliance

Section 1910.212(a)(1) is a performance standard. *Aerospace Testing All.*, No. 16-1167, 2020 WL 5815499, at *2 (OSHRC Sept. 21, 2020). This means the standard "identifies its objective but does not prescribe the means for or the specific obligations of the employer to comply with the objective." *C&W Facility Servs., Inc. v. Sec'y of Labor*, 22 F.4th 1284, 1287 (11th Cir. 2022). To determine whether LP complied with the machine guarding standard, the Court considers whether guarding over the tail end of the #4 conveyor "was required to protect employees from 'hazards such as those created by [the conveyor's] point of operation, ingoing nip points, rotating parts, [or] flying chips and sparks.' " *Wayne Farms, LLC*, No. 17-1174, 2020 WL 5815506, at *3 (OSHRC Sept. 22, 2020) (*quoting* 29 C.F.R § 1910.212(a)(1)).[12] An employee's injury alone does not establish an employer failed to comply with § 1910.212(a)(1). *Ibid.*)

"To make this determination, we consider whether, given 'the manner in which the machine functions and how it is operated by the employees,' they are exposed to a hazard." *Ibid.* (citation omitted.) "In order for the Secretary to establish employee exposure to a hazard she must show that it is reasonably predictable either by operational necessity or otherwise (including

[12] The parties do not dispute that the ingoing nip point at the roller end of the #4 conveyor was not guarded at the time of the accident. Rather, LP installed a guard over the nip point following the accident. (Pretrial Order, Attach. C ¶8; Tr. 36, 152-53; Ex. C-7, Ex. C-9, Ex. C-10).

inadvertence), that employees have been, are, or will be in the zone of danger.... the inquiry is not simply into whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable." *Latite Roofing & Sheet Metal, LLC v. Occupational Safety & Health Rev. Comm'n*, No. 20-14793, 2021 WL 4912479, at *3 (11th Cir. Oct. 21, 2021) (quoting *Sec'y of Labor v. Fabricated Metal Prod., Inc.*, 18 BNA OSHC 1072 (No. 93-1853, 1997).

"The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent." *RGM Constr. Co.*, 17 BNA OSHC 1229, at *5 (No. 91-2107, 1995) (citing *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976)). The Secretary alleges in the citation that LP exposed employees engaged in cleaning activities in and around the #4 conveyor to caught-in and amputation hazards at the ingoing nip point of the return roller at the tail end of the conveyor. (Ex. C-1 at 6.)

CSHO Keown testified that the unguarded ingoing nip point posed a hazard because it was rotating continuously and located in an "open area" where employees accessed the pneumatic air hose and cleaned. (Tr. 45.) According to Keown, LP's employees "have to be close to that nip point to do those cleaning tasks or access the air wand." (Tr. 47.) The Secretary echoes this testimony in her brief, arguing that LP employees "would be in the zone of danger when cleaning around the ingoing nip point at the roller end of the Conveyor and crossing near the ingoing nip point when moving under the nearby catwalk." (Sec'y Br. at 14.) LP contends the zone of danger is much more limited and argues the ingoing nip point is difficult to reach because it is approximately 16 inches above the ground and four inches inside the outer brackets of the #4 conveyor. (Resp't's Br. at 29) (*citing* Tr. 236-238; Ex. R-40, Fig. 14). The Court agrees with LP and concludes the record does not support the Secretary's overly broad definition of the "zone of danger."

The "zone of danger only includes areas that present 'hazards such as those created by . . . point of operation ingoing nip points, rotating parts, [or] flying chips and sparks.' " *Dover High Performance Plastics, Inc.*, No. 14-1268, 2020 WL 5880242, at *3 (OSHRC Sept. 25, 2020) (*quoting* 29 C.F.R. § 1910.212(a)(1)). Although the area around the #4 conveyor was open in that employees could freely walk and clean around it, the area surrounding the ingoing nip point that presented the hazard was difficult for employees to reach and to access. In fact, the opening

leading to the ingoing nip point was located 16 inches above the ground and was "about 13 inches [long] by 5 and a half inches" wide according to LP's expert, Dr. Erick Knox.[13] (Tr. 236-37; *see also* Ex. R-37 at 31, photographs 121, 122 (13-inch opening), at 32, photograph 125 [5-inch opening].) Further, as Knox testified, the ingoing nip point itself was located four inches inside the frame of the #4 conveyor's opening and behind the bolt around which the conveyor rotated and under the rubber conveyor. (Tr. 237-38; Ex. Ex. R-7, Ex. R-37 at 32, photograph 125 [nip point 4 inches inside opening].) Therefore, the Court concludes the zone of danger on the #4 conveyor is limited to the area surrounding the ingoing nip point within the opening, not the entire area surrounding the #4 conveyor. *See Dover*, 2020 WL 5880242, at *3 (because "hazards" require contact with the unguarded moving parts, the zone of danger is not the entire machine enclosure but rather the area surrounding the hazardous rotating part where contact may be possible); *see also Packers Sanitation Servs., Inc. v. Occupational Safety & Health Rev. Comm'n*, 795 F. App'x 814, 820 (11th Cir. 2020) (unpublished) (zone of danger is area "near" ingoing nip point).

Having concluded the zone of danger is limited to the area surrounding the ingoing nip point inside the #4 conveyor's opening, the Court looks to whether employee entry into this zone of danger was reasonably predictable given the #4 conveyor's normal operation. *See Wayne Farms*, 2020 WL 5815506, at *3. To determine whether entry into the zone of danger was reasonably predictable, the Court considers "the manner in which machine functions and how it is operated by the employees." *Rockwell Int'l Corp.*, 9 BNA OSHC 1092, 1097-98 (No. 12470, 1980). Employees did not perform manual work on or at the belt. Instead, the press operator responsible for ensuring the conveyor carried out its intended function (to move pieces of scrap and trim) worked from a conference room. (Tr. 57, 79-80.) Based upon the Secretary's allegations, therefore, the only issue is whether entry into the zone of danger, either through employees' cleaning activities or inadvertence, was reasonably predictable.

The Secretary contends entry into the zone of danger was reasonably predictable because, although LP provided tools to clean around the #4 conveyor, it did not require employees to use

[13] Dr. Knox works for Engineering Systems Inc. and was qualified as an expert "in the field of biomedical engineering and biomechanics, human factors and ergonomics." (Tr. 201-03.) The Court sustained the Acting Secretary's objection to LP's admission of Dr. Knox's report into evidence but allowed Dr. Knox to testify to his photographs contained in the report. (Tr. 212-13; Ex. R-37 [photographs], Ex. R-40 [report]). Dr. Knox used the photographs to opine as to Wallace's body and arm/hand position in the moments leading to Wallace's contact with #4 conveyor's ingoing nip point.

the tools or prohibit them from using their hands to clean and pick up trim from around the conveyor. (Sec'y Br. at 14.) Similarly, the Secretary asserts employees stand near the ingoing nip point to access the air hose, and loose trim and slippery conditions increase their likelihood of tripping and inadvertently entering the zone of danger. (Sec'y Br. at 14.) The Secretary contends courts have found exposure is reasonably predictable when employees clean around unguarded points of operation. (Sec'y Br. at 15) (*citing S. Hens, Inc. v Occupational Safety & Health Rev. Comm'n*, 930 F.3d 667, 680–681 (5th Cir. 2019); *Packers Sanitation Servs., Inc.*, No. 17-1376, 2019 WL 1417843, at *13 (OSHRC Feb. 11, 2019) (ALJ)). Further, according to the Secretary, LP's own machine guarding rule, which requires guarding for all ingoing nip points located seven feet or fewer feet above the floor, as well as its provision of tools and instructions, show the company recognized it was reasonably predictable employees would be exposed to hazards posed by the unguarded ingoing nip point on the #4 conveyor. (Sec'y Br. at 15-16) (*citing Pass & Seymour, Inc.*, 7 BNA OSHC 1961, at *2 (No. 76–4520, 1979)).

LP argues Wallace's entry into the zone of danger was not reasonably predictable because the machine was not normally operated in a way that anticipated such entry into the zone. (Resp't's Br. at 25) (citing *Wayne Farms*, 2020 WL 5815506, at *4); (Resp't's Br. at 28) (citing *Rolly Marine Serv. Co.*, No. 20-0208, 2021 WL 6424920, at *11 (OSHRC Nov. 22, 2021) (ALJ)). According to LP, it trained employees to lock-out and tag-out machines when conducting maintenance in the zone of danger surrounding the ingoing nip point, and supervisors had not observed employees crouch near the conveyor. (Resp't's Br. at 27.)

The Court concludes that notwithstanding the occurrence of the accident, entry to the area surrounding the ingoing nip point was not reasonably predictable. First, there is no evidence in the record that LP supervisors required LP employees to clean inside the #4 conveyor's opening, in the area surrounding the ingoing nip point, while the conveyor was operating. *See Wayne Farms*, 2020 WL 5815506, at *4 (testimony established new hires were instructed not to reach into machine to clean it). Keown testified that employees "worked around the area cleaning" and that "they will lock and tagout a system to do additional cleaning or to unstop jams." (Tr. 41-42.) Supervisor Garza testified the area around the ingoing nip point was "only cleaned out usually on a down day for" the #4 conveyor, and he confirmed that lockout/tagout was required to remove a lodged piece of trim or scrap from the conveyor. (Tr. 182, 185.) Wallace confirmed that he received lockout/tagout training and he was required to lock and tagout the conveyor if he needed

to remove a large scrap of trim. (Tr. 81.) Although Wallace testified that he saw employees cleaning near the ingoing nip point, he also said that "if [trim scrap] wasn't up underneath [the conveyor] or stuck in a belt or anything you can just walk right up to it and pick it up." (Tr. 84-85.) No other employees testified how they would clean around the #4 conveyor or that there was contrary practice. Taken together, this testimony from Wallace, Garza, and Keown does not show LP's employees cleaned in the zone of danger surrounding the ingoing nip point while the #4 conveyor was operating. Rather, it was employee practice to lockout and tag the machine when they needed to access the area around the ingoing nip point. *See Aerospace*, 2020 WL 5815499, at *5 (concluding it was not employee practice and therefore not reasonably predictable employee would circumvent guard and place fingers in the zone of danger). Therefore, the Secretary did "not establish the machine was normally operated" or cleaned "in a way that contemplated or anticipated such entry." *Wayne Farms*, 2020 WL 5815506, at *4.

Wallace testified that he inadvertently contacted the ingoing nip point. He said his hand was caught when, as he was squatting down to pick up trim, he lost his balance and reached out to brace himself from falling. (Tr. 86-87; Pretrial Order, Attach. C ¶¶4, 6.) But, as discussed *supra*, the location of the ingoing nip point four inches within the opening, the location of the air hose more than two and half feet above and out from the opening, and the fact that employees would lockout and tag the #4 conveyor to conduct more thorough cleaning all establish that it was not reasonably predictable that employees were, are, or will be inadvertently in the zone of danger. Although Wallace's contact with the ingoing nip point demonstrates it was "physically possible for . . . employees to reach into the [zone of danger], the mere fact that it was not impossible for an employee to get his hands into the [hazard] does not demonstrate that the employee was exposed to a hazard." *Armour Food Co.*, 14 BNA OSHC 1817, at *4 (No. 86-247, 1990); *see Packers Sanitation*, 795 F. App'x at 820 ("entry into the zone of danger must be 'reasonably predictable,' not merely theoretical").

According to the Secretary, the Fifth Circuit found in *Southern Hens* that "employee exposure was reasonably predictable where employees were tasked with clearing frequent jams of the conveyor, even though the employer provided tools to do so." (Sec'y Br. at 15) (*citing* 930 F.3d 667, 680–681). It follows, according to the Secretary, that "necessary cleaning near the Conveyor made it reasonably predictable employees such as Wallace would be exposed, even while using tools." (Sec'y Br. at 15.) But in *Southern Hens*, the Fifth Circuit also found the

Secretary established operational necessity because tools provided by the employer to clear the jams brought the assigned employee's fingers "within an inch or two of a nip point." *S. Hens*, 930 F.3d at 681.[14] Here, LP employees did not get nearly this close to the ingoing nip point as they cleaned such that they were in the zone of danger, and testimony establishes they were required to lockout and tag the #4 conveyor to remove trim scrap from the conveyor or clear jams. Further, the tools provided by LP did not bring employees into the zone of danger; if anything, they made entry into the zone of danger less likely. Inadvertent entry into the zone of danger while accessing the air hose was also not reasonably predictable. The air hose, according to Knox's measurements, was located 45 inches above the ground or 29 inches above the ingoing nip point. (Ex. R-37 at 34, photographs 133-36.) Employees reaching for the air hose would have placed their hands and arms nearly two and a half feet above the ingoing nip point, as well as even farther away from the frame of the conveyor.[15]

The Court also rejects the Secretary's argument that LP failed to comply with the standard because its internal rules demanded it guard the ingoing nip point.[16] LP's failure to guard the ingoing nip point amounts to a failure to follow its own rule; it does not establish noncompliance with § 1910.212(a)(1) or fundamentally change the Court's machine guarding inquiry, which is specific to the configuration of the machine, how it functions, and how employees operate it. *See ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993), *rev'd in part*, 25 F.3d 653 (8th Cir. 1994)*; Rockwell Int'l*, 9 BNA OSHC at 1097-98. As discussed *supra*, and regardless of LP's rule, the zone of danger was limited to the area around the ingoing nip point inside the #4 conveyor's roller end opening, and employee entry into this area was not reasonably predictable. For these reasons, the Court concludes the Secretary failed to establish LP did not comply with the standard.

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[14] Since the Fifth Circuit is not a circuit that the case can be appealed to, the Court notes that Fifth Circuit precedent is not binding but is only persuasive.

[15] The Court does not find that these measurements amount to guarding by distance. Rather, the measurements establish employees worked and cleaned far from the zone of danger, which was limited to the area surrounding the ingoing nip point, inside the conveyor's opening, such that entry was not reasonably predictable. *Cf. Packers Sanitation*, 795 F. App'x at 820 (unpublished) (employer violated machine guarding standard by using only a distance-based safety protocol rather than a physical guard because it was reasonably predictable that an employee would have inadvertently entered the zone of danger).

[16] According to the LP's internal machine guarding standard, "[a]ll machine hazards (point of operation, nip points, rotating/reciprocating or moving parts, etc.) located seven feet or less above the ground or working platform shall be guarded to prevent accidental contact." (Ex. J-4 at 2, ¶5.A.a.)

Exposure

Although the Court need not reach the exposure element of the Secretary's prima facie case, the Court briefly discusses it. "The Secretary can establish that the employees had access to the violative condition by showing that the employee was actually exposed to the cited condition or that access to the condition was reasonably predictable." *Latite Roofing & Sheet Metal, LLC v. Occupational Safety & Health Rev. Comm'n*, No. 20-14793, 2021 WL 4912479, at *3 (11th Cir. Oct. 21, 2021) (citation omitted). Here, the Secretary argues Wallace's injuries establish actual exposure to the hazard. (Sec'y Br. at 21) (*citing* Attach. C ¶6). LP, borrowing from its noncompliance argument, asserts it was not reasonably predictable Wallace would be in the zone of danger and therefore the Secretary has not established employee exposure to the violative condition. (Resp't's Br. at 29-31.) Although Wallace's injuries do not establish the noncompliance of the element of the Secretary's case, the Court agrees with the Secretary that they are sufficient to establish actual exposure. *See Aerospace*, 2020 WL 5815499, at *3 n.3.[17]

Knowledge

Eleventh Circuit "precedent demands 'evidence in the record of a specific, confirmed knowledge on [the employer's] part regarding a hazard warranting a [personal protective equipment] requirement.'" *C&W Facility*, 22 F.4th at 1288. Thus, "to hold an employer liable under a performance standard, the Secretary must prove either that the protective measure is industry custom or that the employer had 'actual knowledge that a hazard requires the use of some other or additional personal protective equipment.'" *Id.* at 1287–88 (citation omitted). Specifically, the Eleventh Circuit "require[s] both actual knowledge of the *hazard* and actual knowledge that the *hazard* requires the" protective measure. *Id.* at 1288 (citing *Cotter & Co. v. Occupational Safety & Health Rev. Comm'n,* , 598 F.2d 911, 915 (5th Cir. 1979);[18] *Owens-Corning*

[17] The Commission has recognized that although the noncompliance and exposure elements "overlap" they are not "identical." *Aerospace*, 2020 WL 5815499, at *3 n.3. To establish the exposure element of her case, the "Secretary must prove actual exposure to the violative condition or that access to the violative condition was reasonably predictable." *Id.*

[18] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. The Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). This body of precedent is binding unless and until overruled by the Eleventh Circuit en banc. *Id.* Further, the decisions of the continuing Fifth Circuit's Administrative Unit B are also binding on the Eleventh Circuit, while Unit A decisions are merely persuasive. *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377 (11th Cir. 2006).

Fiberglass Corp. v. Donovan, 659 F.2d 1285, 1290 (5th Cir. Unit B 1981); *S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Rev. Comm'n*, 659 F.2d 1273, 1285 (5th Cir. Unit B 1981)) (emphasis added).

The Secretary, however, contends she must only show that LP had " 'knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard.' " (Sec'y Br. at 22) (quoting *CWP Asset Corp.*, No. 17-1483, 2019 WL 2345446, at *8 (OSHRC Apr. 17, 2019) (ALJ) (emphasis in original)). The Secretary asserts LP had knowledge of the violative condition because statements from LP managers establish they knew the ingoing nip point was unguarded. (Sec'y Br. at 22.) LP asserts the Secretary did not carry her burden of proving that a LP employee, management or otherwise, knew that the #4 conveyor violated the machine guarding standard. (Resp't's Br. at 32.)

The Court notes the Secretary is essentially arguing the Commission's physical conditions test for the knowledge element of her prima facie case. However, as indicated *supra*, knowledge of the hazard, rather than the conditions that form the basis of the alleged violation, is the key inquiry in the Eleventh Circuit. To determine whether LP had actual knowledge that the ingoing nip point presented a hazard that required guarding, the Court considers whether there were "previous workplace accidents . . . , the extent to which employees demand protective equipment . . . , and the obviousness of the hazard." *C&W*, 22 F.4th at 1288 (internal citations omitted). For the reasons *infra*, the Court concludes the Secretary has failed to establish LP had actual knowledge that the #4 conveyor's ingoing nip point presented hazards and that machine guarding was necessary to protect its employees from these alleged hazards.

First, there is no evidence in the record of previous workplace accidents involving the #4 conveyor's ingoing nip point, involving any other part of the conveyor, or any other conveyor or ingoing nip point at the Thomasville mill.[19] Wallace testified that he had not heard about any accidents involving the ingoing nip point or conveyor. (Tr. 120-21.) LP's environmental, health and safety manager, John Philip Andrews, testified that he went through "the OSHA 300 logs from the time it was built until this year, [and] there had never been any other [accident] at the number 4 trim waste conveyor." (Tr. 196.) Therefore, the Court concludes this factor does not support an actual knowledge finding.

[19] Although Keown testified that LP had a serious violation within three years prior to Wallace's accident, he "was not sure" whether it involved a nip point. (Tr. 58.)

Further, employees did not demand LP guard the ingoing nip point or voice concerns that it was unguarded. Wallace testified that he did not believe the ingoing nip point needed to be guarded and he did not tell anyone it should have a guard. (Tr. 123.) He also testified he did not think the conveyor was dangerous and did not think he could contact the ingoing nip point. (Tr. 119-21.) Garza testified that he did not think the unguarded area where Wallace was injured was dangerous and that employees did not complain this was a dangerous area. (Tr. 184-85.) The Court concludes these facts also does not support an actual knowledge finding.

Lastly, the Secretary asserts LP management and employees actually knew the ingoing nip point lacked guarding, thereby establishing actual knowledge of the conditions forming the basis of the alleged violation. (Sec'y Br. at 22.) According to the Secretary, LP managers often walked by the unguarded ingoing nip point and their statements confirm they knew it was not guarded at the time of the accident. (Sec'y Br. at 22) (*citing* Ex. C-4 at 3, Ex. C-5). Although these statements establish LP knew the ingoing nip point was not guarded, they do not prove the obviousness of the alleged caught-in and amputation *hazards* posed by the unguarded ingoing nip point. The location of the ingoing nip point—four inches inside the conveyor's roller end opening—and the fact LP management and employees did not recognize the alleged hazards posed by the ingoing nip point, all establish that the alleged hazards were not obvious. Rather, the Court concludes these facts establish that LP did not know the alleged hazards required guarding. Thus, the Court concludes the Secretary has failed to establish LP's actual knowledge of the alleged hazards posed by the unguarded ingoing nip point under Eleventh Circuit precedent.

As indicated *supra*, the Secretary can also meet the heightened knowledge requirement by proving the protective measure— in this case, guarding the ingoing nip point on the #4 conveyor—is industry custom. However, the Secretary does not attempt to make this showing and instead asserts the "diversity of these types of conveyors" in terms of length, facility configuration, and products produced, "makes any meaningful comparison difficult." (Sec'y Br. at 16-17.) Therefore, as LP argues, and the Court agrees, the Secretary did not prove the unguarded ingoing nip point on the #4 conveyor was known to be hazardous in the industry or that it was industry custom to install additional guarding on similar sliding belt conveyors. (Resp't's Br. at 24-25.) Thus, the Court concludes the Secretary has also failed to prove LP's actual knowledge of the alleged

hazards presented by the #4 conveyor's ingoing nip point. [20] Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Citation 1, Item 1, is **VACATED** and no penalty is assessed.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: July 21, 2023
Atlanta, GA

[20] LP asserts it is entitled to the affirmative defense of unpreventable employee misconduct. (Answer, Affirm. Defenses ¶5; Resp't's Br. at 32.) Because the Secretary failed to establish her case in chief, the Court declines to address it.