United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama Street, S.W., Building 1924, Room 2R90
Atlanta, GA 30303-3104

Secretary of Labor, Complainant, v. Mar-Jac Poultry MS, LLC, Respondent.	OSHRC Docket No. **21-1347**

Appearances:

Matthew McClung, Esq.
Office of the Solicitor, U.S. Department of Labor, Nashville, TN
For Complainant

J. Larry Stine, Esq., Sherifat Oluyemi, Esq.
Wimberly, Lawson, Steckel, Schneider & Stine, PC, Atlanta, GA
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Mar-Jac Poultry MS, LLC (Mar-Jac), processes poultry on two machines called eviscerators at its Hattiesburg, Mississippi, facility. On May 31, 2021, an employee tasked with cleaning chicken parts and viscera from the eviscerators and areas around them suffered fatal injuries when he was caught in one of the machines. Mar-Jac notified the Occupational Safety and Health Administration (OSHA) of the accident. Following an inspection and investigation by Compliance Safety and Health Officer Patrick Whavers and Jermaine Davis, an authorized representative of the Secretary who was training at the time, OSHA issued a Citation and Notification of Penalty (Citation) to Mar-Jac on November 22, 2021, alleging serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act).

Mar-Jac timely contested the Citation on December 7, 2021. The Secretary filed a Complaint on December 27, 2021, and Mar-Jac filed its Answer on January 11, 2022. The Secretary filed a Motion to Amend the Complaint and Citation on February 9, 2023, alleging the violations occurred on Line 2 of the evisceration plant. (Sec'y Mot. to Am. Compl. at 1-2.) The

Court granted the motion on February 13, 2023. (Order Granting Mot. to Am. Compl.) In Citation 1, Item 1, the Secretary alleges Mar-Jac violated 29 C.F.R. § 1910.145(c)(3) by allowing employees to place their "hands below rotating carousel of Meyn Maestro Eviscerator to remove chicken parts" without "post[ing] safety instructions warning employees of catch point and rotating parts hazards[, thereby] exposing employees to caught in hazards." (Citation at 6.) In Citation 1, Item 2, the Secretary alleges a serious violation of the machine guarding standard at § 1910.212(a)(1) by "allow[ing] employees to routinely place hands below the rotating carousel of Meyn Maestro Eviscerator to remove chicken parts, [thereby] exposing employees to caught in hazards." (Citation at 7.) The Secretary proposed a penalty of $13,653 for each item. (Citation at 8.)

For the reasons set forth herein, the Court affirms the violations as serious and assesses a $13,653 penalty for each item.

JURISDICTION AND COVERAGE

The Court held a hearing on February 15, 2023, in Hattiesburg, Mississippi. The Secretary filed her post-hearing brief on March 27, 2023, and Mar-Jac filed its post-hearing brief the following day. Mar-Jac admitted Commission jurisdiction over this matter pursuant to section 10(c) of the Act. (Compl. ¶1; Answer ¶1.) Mar-Jac also admitted it is an employer engaged in business affecting commerce under § 3(5) of the Act. (Compl. ¶2; Answer ¶2.) Therefore, the Court finds it has jurisdiction under § 10(c) of the Act and finds Mar-Jac is a covered employer under § 3(5) of the Act.

STIPULATIONS

The parties submitted the following stipulations as a joint pre-hearing statement:

1. An inspection of the Respondent's facility, located at Mac Jac MS, LLC 1302 James St. Hattiesburg MS, was conducted by OSHA in May 2021.
2. The Respondent is engaged in poultry processing.
3. The principal place of business of Respondent is at 1301 James St, Hattiesburg, MS 39401. Respondent had a place of employment at 1301 James St, Hattiesburg, MS 39401 on the dates of the alleged violations.
4. As a result of the inspection by Compliance Safety and Health Officer Patrick Whavers and Jermaine Davis, an authorized representative of the Secretary, the Respondent was timely issued a Citation and Notification of Penalty.

5. The Respondent timely contested the Citation and Notification of Penalty.

6. The cited standards apply to the Respondent.

(Joint Pre-Hr'g Statement at 5-6.)

BACKGROUND

Mar-Jac operates two Meyn-manufactured and installed eviscerators at its Hattiesburg poultry processing plant. (Tr. 133-34.) They run automatically, meaning employees do not operate them, although they can turn them off or lock and tag them out. (Tr. 139.) After a cut removes glands from chickens' tails, the birds, which are slit open, enter the eviscerator. (Tr. 61.) The eviscerator consists of two rotating parts, one holding spoons and the other holding cups. (Tr. 75.) On the first carousel, which involves the spoons, the chickens hang upside down from shackles around their legs with their backs facing the inside of the machine. (Tr. 62-63, 75.) Oval-shaped metal plates or guide bars between the shackles hold the chickens' hips in place. (Exs. R-1 at image 2, C-5, 6; Tr. 63.) The machine moves spoons down into the chickens, which move up. (Tr. 63.) At this point, the chickens move down, and now-embedded spoons pull up and dislodge the viscera. (Tr. 63-65.) In addition to the viscera, the eviscerators also remove the chickens' livers, spleens, and chest cavity contents during this process. (Tr. 67.) The viscera and other parts of the chickens end up in a second rotating part containing cups. (Tr. 75-76.) The cups cut the dislodged viscera and then drop them onto a pan below the carousel for disposal. (Ex. R-1 at image 8; Tr. 76, 163.) The cups and spoons both rotate clockwise, and there is a six to seven-inch gap between the rotating carousels. (Tr. 76-78.) The chickens move through the machine at a pace of approximately 175 birds per minute. (Tr. 72, 189.) At a typical processing facility, the pace is 144 birds per minute. (Tr. 72.)

Meyn installed Line 1 with doors around the eviscerator and warning stickers on the doors but did not install doors around Line 2 or place stickers on the machine. (Tr. 115; Exs. R-2, C-7.) The first sticker states: "DANGER: WATCH YOUR HANDS AND FINGERS" and has a pictograph of severed fingers. (Ex. R-2 at 578-79.) The second sticker states: "DANGER! Pinch Point: KEEP HANDS CLEAR WHILE MACHINE IS OPERATING: Will result in serious injury." (Ex. R-2 at 578-79.) The second sticker also has a pictograph of fingers being caught and severed in rotating parts. (Ex. R-2 at 578-79.) Employees can stop Line 1 and Line 2 either by pulling on or contacting a stop cord nearly surrounding the machines or pressing a stop button. (Tr. 42, 46, 72, 90; Exs. R-2 (Line 1), R-18, R-19 (Line 2).) Since the accident, the stop cord is located 18

inches above the pan.[1] (Ex. R-1 at image 4.) At the time of the accident, the cord was at least 6 feet above the facility floor. (Tr. 42-43, 158.) Employees used the cord to stop the machine if there was an issue with chickens on the line or to talk to supervisors. (Tr. 151, 161.)

The area around the eviscerator, especially Line 2, would get particularly messy, with "lots of water, parts of birds, maybe on the floor, fat, different things like that." (Tr. 139.) The deceased, B.B., was a floor person. A floor person engages in general housekeeping activities around the eviscerators while they are operating, including "washing the floors with a water hose, washing equipment during non-production time, and empting [sic] full trash cans." (Ex. 4; *see also* Tr. 137-38.) They are purportedly not allowed to touch the carcasses, but "they use squeegees, hoses, hooks, and since th[e accident] happened [Mar-Jac] gave them some claws to help pull the stuff out of the eviscerator machines." (Tr. 66-67.) On Line 1, they would sometimes open the doors "to get something unstuck from a drain underneath the pan." (Tr. 138.) Sanitation personnel, who do not include floor persons, deep clean the evisceration lines during the second shift. (Tr. 139-40.) Mar-Jac stops processing poultry during the deep cleaning. (Tr. 140.)

B.B. was working the night shift at the time of the accident. (Tr. 153.) He was working on Line 2 and Floor Person Joseph Conner was working on Line 1. (Tr. 144.) No one witnessed the accident, but Inspector 1, a consumer safety inspector from the U.S. Department of Agriculture's Food Safety and Inspection Service, testified she had observed B.B. reaching into the eviscerator, "pulling out guts and birds" that night. (Tr. 37.) Inspector 1 was in the breakroom when she "heard hollering" near the eviscerators. (Tr. 39.) When she stepped out, she saw B.B's "feet and he was hung up in the machine," which had stopped. (Tr. 39; Ex. C-4 (sealed).) The state medical examiner determined blunt force injuries caused B.B.'s death. (Ex. R-14 at 1.) Among other things, B.B. suffered cervical and thoracic spine fractures, fractures of his sternum and all ribs, lacerations to his lungs and liver, left arm fractures, and internal bleeding in his chest and abdominal cavities. (Ex. R-14 at 1-2.) A toxicology report obtained by the medical examiner indicated B.B. was under the influence of alcohol and drugs at the time of the accident. (Ex. R-15; Tr. 153, 157.)

Inspector 1 also testified she observed Mar-Jac employees "putting their hands in the machine, pulling out birds, guts that [were] wrapping up in the carousel . . . . [o]r if a bird got hung up in there," throwing off the machine's timing. (Tr. 31-32, 36.) She observed both floor persons

[1] There is no measurement in the record for the distance between the ground and the pan. From photographs, it appears to be roughly three feet off the ground. *See* Ex.1, images 28-30.

and supervisors reaching into the machine. (Tr. 32.) They reached for "the screw coming up toward the middle" and would also reach up "where those viscerals are hanging" and "dragging along" to pull them out." (Tr. 51; Ex. C-5.) She usually saw this practice while employees were standing on the front side and inside of the machine. (Tr. 52.) Although USDA inspectors were required to report safety concerns to Mar-Jac under a memorandum of understanding, Inspector 1 did not report employees reaching into the machine because "[i]f we observed management doing it, we was like what could we say to them." (Tr. 36.)

Inspector 2, also a consumer safety inspector from the USDA's Food Safety and Inspection Service, testified she observed employees using a three-foot metal pole with a hook at the end to remove viscera from near the pan's opening, but most of the time they reached into the machine with their hands. (Tr. 69.) She testified floor persons "mainly" engaged in this practice though supervisors and maintenance personnel also did so.[2] (Tr. 69.) Prior to the accident, employees would reach up and remove viscera hanging from the carousel, but this practice is no longer used, according to Inspector 2. (Tr. 69-70.) She also testified Mar-Jac supervisors, floor persons, and maintenance personnel would, prior to the accident, reach into the machine to remove whole chickens stuck or misaligned, which would cause the machine to misfeed the birds. (Tr. 70-71.) Supervisors, according to Inspector 2, observed floor persons engaging in this practice. (Tr. 71.) Similarly, she did not report employees reaching into the machine to management because "if supervisors are doing it, how am I going to get it changed." (Tr. 76, 93-94.)

Mar-Jac Human Resources Manager Letissha Hill testified Mar-Jac did not require floor persons to contact the eviscerator or its blades as part of their job duties, and company rules prohibited employees from putting their hands into operating equipment. (Tr. 138-39, 146; Exs. R-4 (floor person duties), R-6 (safety rules).) B.B. had acknowledged he read and understood these rules. (Ex. R-6.) Hill also testified company procedure for a stuck chicken involved a floor person reporting it to his supervisor, who would then report it to maintenance. (Tr. 161.) Maintenance, according to Hill, would stop the machine and the supervisor would remove the chicken. (Tr. 161.) Hill did not dispute employees reach into the area between the pan and the carousel to clean the pan or remove viscera and reaching in this area was not a violation of company rules. (Tr. 162.) She also said employees could reach into the carousel, although doing so violates company rules.

[2] Supervisors were clearly distinguishable from floor persons and identifiable by their blue coats. (Tr. 32.)

(Tr. 163.) Therefore, the hanging viscera were accessible by hand, but she was "not aware of [employees] doing that." (Tr. 166.)

In addition to its safety rules, Mar-Jac has safety trainings and a disciplinary program. The company conducted and B.B. attended a machine guarding training in June 2020 and a slip and trips training in February 2021. (Exs. R-10 (machine guarding), R-11 (slip and trips).) The company disciplined and terminated employees for violating its alcohol and drugs policy. (Tr. 163; Exs. R-12, R-13.) Hill testified Mar-Jac had not terminated or disciplined an employee for violating the rule prohibiting employees from putting their hands in the machine. (Tr. 163.)

At trial, the Court admitted out of court statements made by Mar-Jac Supervisor Trainee Martaze Hammond and Conner to OSHA following the accident, over objections from Mar-Jac. (Exs. C-9, 10; Tr. 108, 112, 114.) The Secretary attempted to subpoena Hammond but could not locate him, and Conner, who was under subpoena, failed to show for trial. (Tr. 111, 114.) Mar-Jac claimed their statements were inadmissible because the employees were unavailable to testify and none of the exceptions to the rule against hearsay set forth in Federal Rule of Evidence 804(b) applied. (Tr. 108-10.) The Secretary argued at trial the statements should be admitted under Rule 801(d)(2)(D), because they are opposing party statements made by employees on a matter within the scope of their employment. (Tr. 111.)

The Court briefly discusses the admissibility and import of these statements Mar-Jac employees gave to the CSHO. First, the plain language of Rule 801(d)(2)(D)[3] exempts from hearsay prior admissions made by a party opponent, such as Mar-Jac's Hammond and Conner, and therefore the Court need not reach the witness availability and exception analyses set forth in Rule 804(b). *See* Fed. R. Evid. 801(d)(2) advisory comm. note 1982 ("Admissions by a party-opponent are excluded from . . . hearsay on the theory that their admissibility in evidence is the result of the adversary system . . . ."). Further, under Rule 801(d)(2)(D), "[t]he Commission has held employee statements to compliance officers concerning work activities are admissible." *Manganas Painting Co.*, 21 BNA OSHC 1964, at *9 n.12 (citing *Regina Constr. Co.*, 15 BNA OSHC 1044, 1047 (No. 87-1309, 1991)).

Having determined the statements are admissible, the Court addresses the weight it should

[3] Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay: (2) An Opposing Party's Statement. The statement is offered against an opposing party and (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed. Fed. R. Evid. 801(d)(2)(D).

accord them. The Commission also has recognized a statement from an employee made out of court "inherently has less probative value than would the employee's own testimony and is not necessarily entitled to dispositive weight." *Cont'l Elec. Co.*, 13 BNA OSHC 2153, at *2 n.6 (No. 83–921, 1989). "Th[is] is because the judge has no opportunity to assess the credibility of the declarant and the opposing party has no chance to cross-examine." *Regina Constr.*, 15 BNA OSHC 1044, at *5. To determine whether an out of court statement is trustworthy, the Commission considers the following factors:

> (1) the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant's work about which it can be assumed the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted." *Id.* (citing 4 D. Louisell & C. Mueller, Federal Evidence § 426 (1980 & Supp.1990)).

Regarding Conner's statement, there is no evidence he felt pressure from Mar-Jac and his statement involved his work as a floor person, about which he was well-informed. Mar-Jac attempted to rebut his statement with testimony from Human Resources Manager Letissha Hill and exhibits regarding trainings and job duties, which suggested floor persons were not expected to place their hands in the operating machines as part of their job duties. However, Conner's statement was consistent with testimony from the USDA inspectors that both floor persons and supervisors engaged in this practice. For these reasons, the Court credits Conner's statement. Although the Court does not afford his statement the full weight of trial testimony, the Court finds it helpful to the extent it corroborates and expands upon testimony from other witnesses.

The Citation

Following the inspection and investigation, OSHA cited Mar-Jac for two serious violations of Section 5(a)(2) of the Occupational Safety and Health Act of 1970, and the standards thereunder found at § 1910.212(a)(1) and § 1910.145(c)(3). The Court will address the machine guarding standard first.

ANALYSIS

To prove a violation of a standard under section 5(a)(2) of the Act, the Secretary must establish "by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of

reasonable diligence." *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (lst Cir. 1982).

Machine Guarding

The Secretary alleges in Citation 1, Item 2:

> 29 C.F.R. § 1910.212(a)(1): Types of guarding. One or more methods of machine guarding were 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. Examples of guarding methods are barrier guards, two-hand tripping devices, electronic safety devices, etc.
> a) Evisceration, Line [2] - On or about May 31, 2021, the employer allowed employees to routinely place hands below the rotating carousel of Meyn Maestro Eviscerator to remove chicken parts, exposing employees to caught in hazards.

(Am. Compl. at 2.)

Whether the Cited Standard Applies

The parties stipulated § 1910.212(a)(1) applies to Mar-Jac. (Joint Pre-Hr'g Statement at 6.) A stipulation of fact is binding on the parties and the Court, but stipulations of legal tests and conclusions are not binding. *See Rathborne Land Co. v. Ascent Energy, Inc.*, 610 F.3d 249, 262 (5th Cir. 2010) (parties bound by stipulations as if they constitute a contract, and Court will only disturb them to prevent obvious injustice); *United States v. Navarro*, 54 F.4th 268, 274 n.3 (5th Cir. 2022) (Court not bound by stipulations as to questions of law). Here, whether the standard applies is a question of law. However, the Court agrees with the parties. Section 1910.212 is titled "General requirements for all machines." The eviscerator is a machine and therefore covered by the standard.

Whether Mar-Jac Violated the Standard

The cited standard, § 1910.212(a)(1), is a performance standard, "which means 'it states the result required . . . , rather than specifying that a particular type of guard must be used.'" Aerospace *Testing All.*, No. 16-1167, 2020 WL 5815499, at *3 (OSHRC April 15, 2020) (quoting *Diebold, Inc.*, 3 BNA OSHC 1897, 1900 (No. 6767, 1976) (consolidated), *rev'd on other grounds*, 585 F.2d 1327 (6th Cir. 1978)). "Performance standards 'require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them.'" *Aerospace Testing*, 2020 WL 5815499, at *3 (quoting *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007)). To determine whether Mar-Jac complied with the machine guarding standard, the Court considers whether guarding over the Line 2 eviscerator "was required to protect employees from 'hazards such as those created by [the eviscerator's] point of

operation, ingoing nip points, rotating parts, [or] flying chips and sparks.'"[4] *Wayne Farms, LLC*, No. 17-1174, 2020 WL 5815506, at *3 (OSHRC Sept. 22, 2020) (quoting 29 C.F.R § 1910.212(a)(1)).

The Secretary argues Line 2 posed a risk of serious harm or death due to the eviscerator's rotating speed, which would cause injury if it struck an employee. (Sec'y Br. at 9 (citing Tr. 72.) The rotating parts also posed a risk of death or serious harm, and the accident demonstrated this risk, as B.B. was caught between two rotating parts. (Sec'y Br. at 9.) Specifically, Exhibit C-4 shows how B.B. was caught and pulled into the machine by his hand or arm, and Conner's statement that the eviscerator had previously caught his sleeve confirms the caught-in hazard posed by the machine, according to the Secretary. (Sec'y Br. at 10; *see* Exs. C-4, C-1 at 3.) Mar-Jac argues its employees were not exposed to hazards requiring guarding, and the Secretary failed to identify with any specificity the rotating parts, nip points, and catch points to which employees were exposed. (Resp't Br. at 11.) Mar-Jac also argues the rotating carousel did not rotate against or near any other piece of machinery, and the Secretary failed to identify hazards in the space between carousel and pan. (Resp't Br. at 11.) Other potential hazards, according to Mar-Jac, were out of reach or protected: the counter-rotating gears were 9 feet above the floor, at top of machine; the vertical rotating shaft was only reachable with a tool; and cutting knives were behind plexiglass. (Resp't Br. at 12-13.) Mar-Jac also argues the emergency pull stop cable, which is a method of guarding and industry practice, surrounded the carousel, and other areas of the machine, such as guide bars, hooks, shackles, spoons, did not pose hazards. (Resp't Br. at 13.)

The Court finds the Secretary has established the existence of hazard. Although Mar-Jac correctly points out that many potential hazards are out of reach or protected, the Line 2 eviscerator's rotating carousels and speed at which the machine operated present a hazard to Mar-Jac employees. (Tr. 72.) Meyn, the manufacturer of the machine recognizes as much. One of the stickers on the Line 1 eviscerator states: "DANGER! Pinch Point: KEEP HANDS CLEAR WHILE MACHINE IS OPERATING: Will result in serious injury." (Ex. R-2 at 578-79.) This sticker also has an illustration of fingers being caught and severed in rotating parts. (Ex. R-2 at 578-79.) The Commission has recognized, in the context of a general duty clause citation, a manufacturer's

[4] The Commission has recognized that although the noncompliance and exposure elements "overlap" they are not "identical." *Aerospace Testing*, 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.*

warning decal on machinery stating employees can be seriously injured is evidence of the existence of a hazard. *Henkels & McCoy, Inc.*, No. 18-1864, 2022 WL 3012701, at *3 (OSHRC, July 12, 2022), *appeal docketed*, No. 22-13133 (11th Cir. Sept. 19, 2022).[5] Further, as the Secretary notes, Mar-Jac admitted during discovery it "recognizes that cleaning chicken parts from a Meyn Maestro Eviscerator while the machine is operating creates a risk of catch point/rotating parts hazard." (Ex. C-1 at 1.) Taken together, the Court finds the Secretary has established the Line 2 eviscerator's rotating parts presented caught-in hazards.

To establish exposure to a hazard required for noncompliance, the Secretary must "'show that it is reasonably predictable either *by operational necessity or otherwise (including inadvertence)*, that employees have been, are, or will be in the zone of danger.'" *Aerospace Testing*, 2020 WL 5815499, at *4 (quoting *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1073-74 (No. 93-1853, 1997)) (emphasis added by *Aerospace*). An employee's injury alone does not establish an employer failed to comply with § 1910.212(a)(1). *Wayne Farms*, 2020 WL 5815506, at *3. The zone of danger is the "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). It "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)).

The parties do not dispute the Line 2 eviscerator was not guarded at the time of the accident. The Secretary alleges Mar-Jac "allowed employees to routinely place hands below the rotating carousel of [the e]viscerator to remove chicken parts, exposing employees to caught in hazards." (Am. Compl. at 2.) Employees also reached into the machine to remove misaligned chickens lodged in the eviscerator and viscera hanging from the carousel itself. (Sec'y Br. 10-11.) The zone of danger, according to the Secretary, is therefore the area underneath and around the carousel. (Sec'y Br. at 10-11.) As noted above, Mar-Jac argues the Secretary failed to establish employees were exposed to hazards because the parts presenting hazards were either out of employees' reach or guarded by the stop cord.

The Court mostly agrees with the Secretary's characterization of the zone of danger but

[5] Mar-Jac's expert witness, Clyde Payne, referred to the § 1910.212(a)(1) as "a general duty clause violation of machine guarding" because "it doesn't delineate specific pieces of equipment that require guarding." (Tr. 184.)

finds it slightly too broad. The zone of danger does not include the entire open space between the pan and carousel, where there are no moving parts. (Exs. C-5, R-1 at image 7.) Rather, it is limited to the area surrounding the carousel, where the rotating parts and associated caught-in hazards are present. *See Dover*, 2020 WL 5880242, at *3 (Because "'hazards' require contact with the unguarded moving parts, the zone of danger does not include the entire enclosure of each machine" but rather "the area surrounding the [hazardous part] where contact may be possible.").

Having determined the zone of danger is limited to the area surrounding the rotating parts, the Court turns to whether employee entry into this zone of danger was reasonably predictable. *See Wayne Farms*, 2020 WL 5815506, at *3. To make this determination, 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). The Secretary argues it is reasonably predictable employees will enter the zone of danger because the record confirms they needed to reach into the machine, including the area below and surrounding the carousel, to clean viscera off the machinery. (Sec'y Br. at 11.) The record establishes employees regularly cleaned this area with their hands, and supervisors were aware of and even engaged in the practice, according to the Secretary. (Sec'y Br. at 10-11.)

USDA Inspectors 1 and 2 testified they observed Mar-Jac employees, both supervisors and floor persons, reaching into the operating eviscerator to pull out viscera hanging from or wrapped around the carousel and the guide bar, as well as chickens stuck in the machine.[6] (Tr. 31-33, 36, 69-71.) The Court finds their testimony credible. Floor Person Conner, who worked on Line 1 opposite B.B., confirmed this cleaning practice, which brought employees within the zone of danger because their hands, arms, and clothing were near the screw coming up from the pan to the carousel and the carousel itself. First, he said "they never stop the machine while I work," which confirms it is operating while floor persons clean it. (Ex. 10 at 1-2.) He also said he would "put [his] hand in the machine when the bird gets stuck in the Maestro" machine, including on the night of the accident, when he "had to stick [his] hand in the machine to get stuck chickens out ten times." (Ex. 10 at 1-2.) He was trained to put his hand in the machine and expected "to get all the

[6] Mar-Jac argues it is unclear from this testimony whether the eviscerator was operating when the USDA inspectors observed employees placing their hands in it to clean viscera and remove misaligned chickens. (Resp't Br. at 14-15.) The Court rejects this characterization of their testimony. Mar-Jac manager Hill testified chicken processing only stops during the second shift when sanitation personnel deep clean the evisceration line, not when floor persons clean in and around the machines. (Tr. 139-40.)

remains off the line by sticking [his] hand in the machine." (Ex. 10 at 2.) When he does so, "the machine catches" the sleeve of his coat. (Ex. 10 at 2.) He said he also "got snagged when we had thinner coats." (Ex. 10 at 3.)

The Court finds instructive the U.S. Court of Appeals for the Fifth Circuit's decision in *Southern Hens, Inc*., 930 F.3d 667 (5th Cir. 2019). There, the appeals court found employees had an operational necessity to enter the zone of danger because the employer assigned an employee to clear jams that frequently occurred on a conveyor and gave him a tool that was ill-suited to carry out the task. *Id.* at 681. While clearing the jams, the employee's fingers came within an inch or two of a hazardous nip point. *Id.* The appeals court found these jams caused a hazard and the tool did not eliminate exposure due to its weight and the frequency of the jams. *Id.* In this case, Mar-Jac purportedly assigned floor persons to clean only the areas around and underneath the eviscerators. However, the record establishes floor persons frequently cleaned in the zone danger, pulling viscera off the carousels to keep them clean and chickens off the carousels to prevent the machine from misfeeding birds. Supervisors also reached into the machines while they were operating. Similar to *Southern Hens*, these tasks brought employees close to caught-in hazards caused by the carousel and the rapid pace at which it operated. And although Mar-Jac provided hooks and claws to remove viscera from the machine, employees still used their hands to remove pieces the tools could not remove. Taken together, the Court finds it was reasonably predictable employees were in the zone of danger and therefore Mar-Jac failed to comply with the standard.

Mar-Jac also argues it complied with the standard because the industry recognized the safety stop cord around the machine was an appropriate measure. (Resp't Br. at 11, 13 (citing Tr. 186, 189).) The Court rejects this argument. The cord was located nearly six feet above the ground and three feet above the pan at the time of the accident. Although employees could reach the cord, its height allowed them to easily bypass it to enter the zone of danger and therefore it did not constitute an acceptable method of machine of guarding. *See Riverdale Mills Corp. v. OSHRC*, 29 F. App'x 11 (1st Cir. 2002) (unpublished) (trip wire, which was designed to stop machine's motion if a part of the operator's body entered the point of operation, did not prevent entry into point of operation or other hazardous area and therefore did not amount to appropriate guarding method). In any event, the Commission has recognized "[§] 1910.212(a)(1) is specific in its requirements. Accordingly, a reference to industry custom and practice is unnecessary." *Ladish Co.*, 10 BNA OSHC 1235, 1238 (No. 78-1384, 1981).

Whether Employees Had Access to the Violative Condition

To establish access, "the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is 'reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'" *S & G Packaging*, 19 BNA OSHC 1503, at *3 (No. 98-1107, 2001) (quoting *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1074, (No. 93-1853, 1997)). In addition to the noncompliance discussion *supra*, the Court also finds B.B's accident, injuries, and death establish actual exposure to the violative condition. *See S & G Packaging*, 19 BNA OSHC 1503, at *3 (Employee's "injuries establish actual exposure to the unguarded drive rollers."); *see also Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, at *3 (No. 90-2148, 1995) (employee's fall through a skylight established actual exposure to a fall hazard), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

Whether Mar-Jac Had Knowledge of the Violative Condition

To establish the knowledge element, "the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Cent. Fla. Equip. Rentals, Inc.*, 25 BNA OSHC 2147, at *8 (No. 08-1656, 2016) (citing *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015)). Under both Commission and Fifth Circuit precedent, an employer's supervisor's actual or constructive knowledge can be imputed to the employer. *Jersey Steel Erectors*, 16 BNA OSHC 1162, at *2 (No. 90-1307, 1993), *aff'd*, 19 F.3d 643 (3d Cir. 1994); *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 736–37 (5th Cir. 2016).

The Secretary argues Mar-Jac knew of the unguarded machine because it was visible to employees working in this area of the facility and therefore "open and obvious." (Sec'y Br. at 11.) This, according to the Secretary, is in contrast to the Line 1 eviscerator, which was fully enclosed by doors. (Sec'y Br. at 11.) Further, Mar-Jac knew its employees reached into the machine to remove hanging chicken parts and removed misaligned chickens without stopping the machine in full view of supervisors. (Sec'y Br. at 11-12.) Mar-Jac argues the Secretary failed to prove Mar-Jac knew or could have known of the violative condition because the company had no record of employees putting their hands in the machine while it was operating; no record of the machine catching employees prior to the accident; and no record of previous reprimands for reaching into the machine. (Resp't Br. at 14.) Mar-Jac also argues testimony from USDA Inspectors 1 and 2 does

not establish the machine was operating when employees reached in to remove viscera and chickens, and, even if it were operating, the inspectors did not report their concerns to Mar-Jac supervisors. (Resp't Br. at 14.)

Mar-Jac's argument it did not have knowledge of the violative condition because it was unaware of employee practices and the machine had never injured anyone is contrary to established Commission and Fifth Circuit precedent. The Secretary must only show the employer has knowledge "of the physical conditions constituting the violation, not of the specific OSHA regulation or of the probable consequences of the violation." *S. Hens*, 930 F.3d at 676 (citing *E. Tex. Motor Freight, Inc. v. OHSRC*, 671 F.2d 845, 849 (5th Cir. 1982) (per curiam)); *Cent. Fla. Equip.*, 25 BNA OSHC 2147, at *8. Here, the physical condition is the lack of guarding on the Line 2 eviscerator, and the Secretary has shown Mar-Jac at least should have known the machine was unguarded. The Commission has found an employer is aware of the physical conditions constituting the violation when the conditions are in the open, plainly visible to anyone walking by, and supported by photographic evidence in the record. *See S & G Packaging*, 19 BNA OSHC 1503, at *4. The unguarded machine at the Mar-Jac facility is located near the breakroom, where employees enter the plant. (Tr. 143.) The machine is a "very open piece of equipment," according to Mar-Jac's expert. (Tr. 182.) Photographs in the record also show its unguarded condition was open and plainly visible to Mar-Jac managers. (Exs. C-4, C-5.) As such, the Secretary has established Mar-Jac, with the exercise of reasonable diligence, should have known of the Line 2 eviscerator's unguarded condition.

Even if the Court were to entertain Mar-Jac's argument it did not have knowledge of the violative condition because it was unaware of employee practices and the machine had never injured anyone, the Court would nonetheless find the company failed to exercise reasonable diligence. Both floor persons and supervisors placed their hands into the zone of danger to remove viscera and misaligned chickens, yet Mar-Jac management failed to take reasonable steps to discover the practice. In fact, Floor Person Conner stated to OSHA his supervisor told him he would get fired if he failed to get all the chicken remains off the line by sticking his hand into the machine. (Ex. C-10 at 2.) Conner also stated a supervisor trained him to put his hand in a certain place in the carousel to avoid getting hurt. (Ex. C-10 at 2.) Mar-Jac's failures to discover its employees' practice of putting their hands in the operating machines also establish the company did not exercise reasonable diligence. *See Hamilton Fixture*, 16 BNA OSHC 1073, at *16 (No. 88–

1720, 1993) ("Where the alleged 'violations [were] based on physical conditions and on practices . . . which were readily apparent to anyone who looked,' they 'indisputably should have been known to management.'" (quoting *Simplex Time Record Co. v. Sec'y of Labor*, 766 F.2d 575, 589 (D.C. Cir. 1985))); *see also Gary Concrete Prods. Inc.*, 15 BNA OSHC 1051, at *5 (No. 86-1087, 1991) (discoverability of violative condition shows lack of reasonable diligence).

The Court finds the Secretary has established all elements of her burden of proof for Citation 1, Item 2.

Posting Safety Signs

The Secretary alleges in Citation 1, Item 1:

> 29 C.F.R. § 1910.145(c)(3): Safety instruction sign(s) were not used where there was a need for general instructions and suggestions relative to safety measure(s): (a) Evisceration, Line [2] - On or about May 31, 2021, the employer allowed employees to place hands below rotating carousel of Meyn Maestro Eviscerator to remove chicken parts. The employer did not post safety instructions warning employees of catch point and rotating parts hazards exposing employees to caught in hazards.

(Am. Compl. at 2.)

Whether the Cited Standard Applies

The parties stipulated § 1910.145(c)(3) applies to Mar-Jac. (Joint Pre-Hr'g Statement at 6.) A stipulation of fact is binding on the parties and the Court, but stipulations of legal tests and conclusions are not binding. *See Rathborne Land Co. v. Ascent Energy, Inc.*, 610 F.3d 249, 262 (5th Cir. 2010) (parties bound by stipulations as if they constitute a contract, and Court will only disturb them to prevent obvious injustice); *United States v. Navarro*, 54 F.4th 268, 274 n.3 (5th Cir. 2022) (Court not bound by stipulations as to questions of law). Here, whether the standard applies is a question of law. However, the Court agrees with the parties. As the Secretary correctly notes, Mar-Jac admits in its Answer it was engaged in poultry processing, which falls within general industry. (Sec'y Br. at 12 (citing Answer ¶3).)

Whether Mar-Jac Violated the Standard

There is no dispute the Line 2 eviscerator did not have a sign containing safety instructions. Further, Mar-Jac does not challenge the noncompliance element of the Secretary's case. *See V. Vitakraft Sunseed, Inc.*, 25 BNA OSHC 1176, at *16 (No. 12-1811, 2014) (ALJ) (finding noncompliance where it was undisputed no warning signs were posted in or around room containing hazardous dust). Further, the "need for general instructions and suggestions relative to

safety measure(s)" on the Line 2 eviscerator is established by the fact employees regularly placed their hands in the zone of danger to remove viscera and misaligned chickens. Therefore, the Court finds Mar-Jac failed to comply with the standard.

Whether Employees Had Access to the Violative Condition

The Secretary argues employees were exposed to both rotating parts and catch points, and Mar-Jac admitted employees reached into the area near the carousel and above the pan to remove viscera and misaligned chickens. (Sec'y Br. at 12 (citing Ex. C-1 at Req. for Admis. 9).) According to the Secretary, an exposure finding is also supported by testimony from USDA Inspectors 1 and 2, who said they observed Mar-Jac employees place their hands in the operating machine's zone of danger. (Sec'y Br. at 12 (citing Tr. 31-32, 70-72).)

Mar-Jac argues its employees are not exposed to hazards requiring the posting of signs. (Resp't Br. at 7.) Because the Secretary has not issued standards instructing an employer how to determine whether there is a need for safety instruction signs, Mar-Jac argues the Secretary must show the company "acted in an objectively unreasonable manner with respect to posting signs on the Line 2 eviscerator, which had been installed by Meyn without doors and on which no hazards have been identified." (Resp't Br. at 7.) Here, according to Mar-Jac, its actions were reasonable because there was no safety-related issue requiring signage as demonstrated by the Secretary's failure to define a hazard. (Resp't Br. at 8-9.)

Mar-Jac's arguments that its employees were not exposed to hazards and there was no safety-related issue requiring signs ignore evidence in the record and the manufacturer's view of its machine. As discussed above, employees, who routinely removed viscera and misaligned chickens while the eviscerator was operating, were exposed to caught-in hazards in the area above the pan, near the carousel's rotating parts. Meyn, the manufacturer of the eviscerators, also recognized the hazard posed by the operating machines, as its stickers warned employees to keep hands clear of the Line 1 machine to avoid serious injuries. (Ex. R-2 at 578-79.) Specifically, the warnings posted on Line 1 show Meyn recognized employee "access to the zone of danger was unobstructed" when employees placed their hands in the operating machine, which they often did. *Briones Util. Co.*, 26 BNA OSHC 1218, at *2 (No. 10-1372, 2016). Conner's statement to OSHA that his shirt sleeve regularly caught on the carousel confirms employees were exposed to a hazard. Even setting aside Meyn's warning and Conner's statement, B.B's accident, injuries, and death establish actual exposure to the violative condition. *See S & G Packaging*, 19 BNA OSHC 1503,

at *3; *see also Phoenix Roofing*, 17 BNA OSHC at 1079, *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996).

Similarly, the Court rejects Mar-Jac's arguments it acted reasonably with respect to safety instruction signs on Line 2. Regarding § 1910.145(c)(3), the Commission has stated "a broad regulation must be interpreted in the light of the conduct to which it is being applied and external objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *See J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993). The Court finds it was unreasonable for Mar-Jac to treat the machines differently. As trainee Davis testified, Line 1 had signs on it warning employees against the practice of placing their hands in the operating machine, but Line 2 did not have the same or similar signs although it operated the same way. (Tr. 115-16.) A Commission judge has, in the context of employer knowledge, rejected this reasonableness argument where signs containing similar warnings were posted in other parts of the same facility. *V. Vitakraft*, 25 BNA OSHC 1176, at *16 (ALJ) (employer was aware of the need for a warning sign near the dust room because a similar sign was posted for the hay room). Mar-Jac also argues it was not industry practice to place signs on the eviscerators. But this argument fails for much the same reason; industry practice is established by the very fact the manufacturer posted a warning sign for the same hazard on the same machine, which operated the same way and was in the same facility.

Whether Mar-Jac Had Knowledge of the Violative Condition

To establish knowledge, the Secretary must either establish the employer knew or, with the exercise of reasonable diligence, should have known of the physical conditions constituting the violation. *Cent. Fla. Equip.*, 25 BNA OSHC 2147, at *8. The Secretary argues Mar-Jac knew employees were working near the Line 2 eviscerator, which did not have warning signs. (Sec'y Br. at 12.) The Secretary again notes the Line 1 eviscerator doors displayed warning signs and a pictogram depicting pinch points and catch points. (Sec'y Br. at 13.)

Mar-Jac contends the Secretary failed to establish the company knew there was a need for signage on Line 2 and sets forth two arguments supporting its position. (Resp't Br. at 8-9.) First, Mar-Jac argues the Secretary is effectively asking the Court "to impute to Mar-Jac knowledge of the alleged necessity of signage from the fact" the other eviscerator was installed with signs. (Resp't Br. at 8-9.) But, according to Mar-Jac, the Secretary does not explain the content, purpose, or appropriateness of these signs. (Resp't Br. at 9.) Second, Mar-Jac argues, based upon manager

Hill's testimony, floor persons do not operate eviscerators and their job duties do not require them to place their hands in or near the machines while they are operating. (Resp't Br. at 9.) Mar-Jac also provides tools to help them keep the machines and areas around the machines free from debris, according to the company. (Resp't Br. at 9.) Lastly, Mar-Jac trains floor persons to keep their hands clear of moving machinery and no floor persons had been injured in the machines prior to the accident. (Resp't Br. at 9.)

The Court finds Mar-Jac, with the exercise of reasonable diligence, could have discovered the Line 2 eviscerator lacked safety instruction signs. The lack of a warning sign on the Line 2 eviscerator stands in stark contrast from the signs and pictograph on Line 1. Therefore, the physical condition, that is the lack of similar signs, was open, plainly visible to anyone walking by, and supported by photographic evidence in the record. *See S & G Packaging*, 19 BNA OSHC 1503, at *4. Mar-Jac asserts the Secretary is asking the Court to simply rubber stamp knowledge based upon the Line 1 signs and warnings. The Court does not take such a dim view of the Secretary's case and cannot ignore three crucial facts. First, the machines operated in the same manner and were cleaned in the same manner. Second, the machines presented the same hazard. And third, the warning signs and pictograph address the precise caught-in hazard posed by the rotating carousel. The Court similarly rejects Mar-Jac's argument it did not have knowledge of the violative condition because it provided tools to floor persons, instructed them to keep their hands clear of machinery, and did not require them to clean around the rotating carousel. The record establishes the eviscerators only stopped operating when sanitation personnel deep cleaned them. (Tr. 139-40.) Floor persons regularly cleaned and manually removed viscera and misaligned chickens from the eviscerators while it was operating. Supervisors also placed their hands in the machines while they were operating. The practice was not infrequent; it was pervasive. Mar-Jac's training, instructions, and provision of tools were inadequate to address the hazard. Therefore, Mar-Jac, with the exercise of reasonable diligence, could have discovered both the lack of signage and employee practice exposing them to the hazard.

The Court finds the Secretary has established all elements of her burden of proof for Citation 1, Item 1.

Unpreventable Employee Misconduct

Mar-Jac asserts the affirmative defense of unpreventable employee misconduct. To prove the defense, an employer must establish it had a work rule designed to prevent the violation; it

adequately communicated those work rules to its employees (including supervisors); it took reasonable steps to discover violations of those work rules; and it effectively enforced those work rules when they were violated. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, at *9 (No. 87-692, 1992); *see also W.G. Yates & Sons Const. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006). Mar-Jac makes two arguments regarding its affirmative defense. First, it claims the record establishes it has a comprehensive safety program, which it effectively communicated and consistently enforced. (Resp't Br. at 16 (citing Tr. 132-33, 144-46, 148-49; Exs. R-6, R-7, R-10, R-11).) And second, it claims B.B. was so intoxicated at the time of the accident, he was incapable of recalling his safety training or reading a warning sign. (Resp't Br. at 16.) The Secretary argues Mar-Jac "failed to show that its rules were effective, properly communicated, properly monitored, or enforced," because supervisors and employees were violating them by placing their hands in the machinery while it was operating, and the company did not make an effort to discover these violations or discipline these employees. (Sec'y Br. at 13.)

The Court agrees with the Secretary. Although Mar-Jac had rules forbidding employees from placing their hands in the eviscerator, both supervisors and floor persons engaged in the practice. (Ex. R-6 at 458, Rule 7.) In fact, Conner said his supervisor trained and expected him to place his hands into the operating machine to remove viscera and misaligned birds. (Ex. C-10 at 2-3.) The fact the rule was so flagrantly ignored by both supervisors and employees shows Mar-Jac did not "take[] reasonable steps to discover violations of those work rules" and did not "effectively enforce[] those work rules when they were violated." *Pride Oil Well Serv.*, 15 BNA OSHC 1809, at *9; *see also Gary Concrete*, 15 BNA OSHC 1051, at *7 (employer failed to establish UEM defense where, among other things, it failed to prove it had taken steps to discover safety violations).

Mar-Jac's argument B.B.'s intoxication amounts to unpreventable employee misconduct also must fail because it focuses on B.B's conduct rather than the hazardous condition and how employees regularly interacted with it. Again, the USDA inspectors observed both employees and supervisors placing their hands in the operating eviscerators, and their testimony is buttressed by Conner's statement he routinely placed his hands into the machine. There is no evidence in the record either Conner or the other floor persons and supervisors were intoxicated when they placed their hands in the zone of danger. For these reasons, the Court finds Mar-Jac has failed to prove its affirmative defense.

CHARACTERIZATION OF THE VIOLATION

The Secretary alleges both violations were serious. A serious violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k). "This does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result if an accident does occur." *ConAgra Flour*, 16 BNA OSHC 1137, at *7. Beginning with § 1910.212(a)(1), the Court agrees with the Secretary. Davis testified hospitalizations, amputations or death would likely result from employee exposure to the violative condition, which was the unguarded carousel. (Tr. 116-17.) He also testified the likelihood of serious injury was high. (Tr. 117.) The Court credits his testimony. As the fatal accident demonstrates, serious injury was the likely result of contact with the unguarded carousel. Employees, both supervisors and floor persons, entered the zone of danger to remove viscera and misaligned chicks, which exposed them to rotating parts and caught-in hazards. *See A.E. Staley Mfg. Co.*, 19 BNA OSHC 1199, at *19 (No. 91-0637, 2000) (consolidated) (finding certain rapidly rotating shafts posed entanglement hazards such that exposure would result in death or serious harm but affirming citation Item 51 as nonserious because hazard from slowly rotating horizontal shaft was minor), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002). Therefore, the violation of § 1910.212(a)(1) is properly characterized as serious.

Turning to the violation of § 1910.145(c)(3), Mar-Jac argues this citation item should be characterized as other-than-serious based upon decisions from Commission judges. (Resp't Br. at 10 (citing *Atco Structures, Inc.*, 14 BNA OSHC 1173 (No. 87–0223, 1989) (ALJ)).) An other-than-serious or non-serious violation may involve isolated or brief employee exposure to the hazard, a minor hazard, or a low probability of death or serious harm. *See A.E. Staley*, 19 BNA OSHC 1199, at *19 ("any injuries resulting from entanglement hazard would be minor" and therefore violation was not serious); *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, at *13 (No. 90-2775, 2000) (violations affirmed as other-than-serious because failure to file required injury reports could not result in a substantial probability of death or serious physical harm), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001); *Bethlehem Steel Corp.*, 10 BNA OSHC 1673, at *5 (No. 77-1807, 1982) (violation affirmed as non-serious finding because short term exposure did not rise to level of serious).

At the outset, the Court rejects Mar-Jac's argument its violation of § 1910.145(c)(3) is *per*

se other-than-serious due to previous Commission rulings. Commission judges have indeed held a violation of this standard can be characterized as serious or repeat. *See e.g.*, *Dillard Tex. Operating Ltd. P'ship*, 18 BNA OSHC 1801, at *6 (No. 98-0869, 1999) (ALJ) (finding a violation of the standard serious where "employees did not know how to open the dock door in the event of an emergency, and that there was a need for signage spelling out the means of egress"); *V. Vitakraft*, 25 BNA OSHC 1176, at *16-18 (ALJ) (affirming a repeat violation of the standard).

The Commission has long recognized "a non-serious violation is one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." *Crescent Wharf & Warehouse Co.*, 1 BNA OSHC 1219, 1222 (No. 1, 1973). The violative condition here is the lack of a safety instruction sign, and the Secretary has established a "direct and immediate relationship between" this condition and occupational safety. Regarding Item 2 discussed above, the accident clearly demonstrates the relationship between the lack of physical machine guarding on the Line 2 eviscerator and occupational safety such that an injury would result in death or serious physical harm. The Court draws the same connection for Item 1. Death or serious physical harm would result from failure to have and enforce a safety sign or instruction warning employees against placing their hands in the zone of danger. That is, had Mar-Jac placed a similar sign on the Line 2 eviscerator and enforced the warnings on both machines, employees would not have been exposed to caught-in hazards likely to result in death or serious physical harm. *See ConAgra Flour*, 16 BNA OSHC 1137, at *7. In addition to the unavoidable connection between serious injury and the lack of a safety sign, the Item 1 safety sign violation differs from the other-than-serious violations noted in the cases above. The hazard was not minor; employee exposure was neither isolated nor brief; and the probability of death or serious harm was not low. Further, unlike a violation for failing to report a previous injury, the presence of the sign could prevent future exposure to the hazardous condition if properly enforced. For these reasons, the Court finds the violation of § 1910.145(c)(3), Item 1 in the citation, is properly characterized as serious.

PENALTY DETERMINATION

The Commission considers "the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). Gravity, according to the

Commission, "is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc*., No. 00-1052, 2005 WL 696568, at *3 (OSHRC Feb. 25, 2005) (citation omitted); *see also Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at *9, n.3 (OSHRC April 27, 1973) ("Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors.").

The Secretary argues the proposed $27,306 penalty is warranted because the gravity is high. (Sec'y Br. at 14.) The Secretary, relying on testimony from Davis, asserts the proposed penalty should not be reduced because Mar-Jac had more than ten employees. (Sec'y Br. at 14 (citing Tr. 117).) Further, reductions for good faith and history are unwarranted because, as Davis testified, Mar-Jac did not have a good safety program and the company had several other citations for the facility. (Sec'y Br. at 14 (citing Tr. 117-18).)

The Court finds the gravity of the machine guarding violation is high. The USDA inspectors observed both supervisors and floor persons reach into the zone of danger to remove viscera and misaligned chickens. The night of the accident, according to Floor Person Conner, he stuck his hand in the machine ten times to remove "stuck chickens." (Ex. C-10 at 2.) Together, the inspectors' testimony and Conner's statement establish employees were regularly exposed to the violative condition. Although Conner had not been injured and employees had not previously been injured on the eviscerators, Conner testified his coat sleeves would catch on the machine. Furthermore, the accident illustrates the likelihood of serious injury and death employees faced in placing their hands in the zone of danger. The Court assesses a $13,653 penalty for Citation 1, Item 2, the violation of § 1910.212(a)(1).

Mar-Jac contends the penalty for the safety sign standard violation should be reduced to reflect its other-than-serious characterization. (Resp't Br. at 10.) For the reasons discussed above, the Court rejects this argument. The hazard was not minor, and employees were regularly exposed to it. An adequately enforced safety instruction signs warning employees not to place their hands in the operating machine could have prevented employee exposure to the hazardous condition. The Court finds the gravity of Citation 1, Item 1, the violation of § 1910.145(c)(3), is also high and assesses a $13,653 penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1910.145(c), is **AFFIRMED** as serious, and a penalty in the amount of $$13,653 is assessed.
2. Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1910.212(a)(1), is **AFFIRMED** as serious, and a penalty in the amount of $13,653 is assessed.

SO ORDERED.

/s/_____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: October 5, 2023
Atlanta, GA