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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Peco Foods, Inc., Respondent.	OSHRC Docket No. **15-1094**

Appearances:

LaTasha T. Thomas, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

Stephen J. Carmody, Esquire, Brunini, Grantham, Grower & Hewes, PLLC, Jackson, Mississippi
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act). Peco Foods, LLC. (hereinafter Peco) is a food production company. Beginning on February 12, 2015, Occupational Safety and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) Ronald P. Hynes conducted an inspection of Peco at 3701 Kauloosa Avenue in Tuscaloosa, Alabama. Based upon CSHO Hynes's inspection, the Secretary of Labor, on June 5, 2015, issued a Citation and Notification of Penalty to Peco alleging a serious violation of 29 C.F.R. § 1910.133(a)(1) for failure to provide eye protection to employees working on its debone line. The Secretary proposed a penalty of $4,590.00 for the Citation. Peco timely contested the Citation. Both the violation and penalty are at issue.

A hearing was held in this matter on October 29, 2015, in Birmingham, Alabama. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 C.F.R. §§ 2200.200-211. The parties filed post-hearing briefs in this matter on December 14, 2015.[1]

For the reasons that follow, Item 1 of Citation 1 is affirmed and a penalty of $4,590.00 is assessed.

Jurisdiction

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 10). Peco also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 10). Based upon the evidence of record and the stipulation of the parties, I find the Commission has jurisdiction of this action and Peco is an employer covered under the Act.

Background

Peco is a food production company. At its Tuscaloosa, Alabama, facility it processes chickens for resale utilizing both permanent and temporary workers (Tr. 18, 58). Peco hires its temporary workers through Onin, a temporary employment staffing agency (Tr. 58). In addition to supplying workers, Peco uses Onin for training and translation services, as some of its workforce does not speak English (Tr. 85-86). Although not identified in the record, Peco employees at the Tuscaloosa facility are represented by a union.

The area that was the subject of the inspection in this matter was the debone line at the Tuscaloosa facility. The debone line is depicted in Exhs. C-4; C-4a; C-4b; C-4c; C-4d; C-4e; C-4f; R-7; and R-8. It is a two-sided production line. Employees stand on either side of the line 2 to 3 feet apart (Tr. 70-71). The first employee on the line removes the whole chicken (which has been plucked and eviscerated) from the conveyor belt and places it on a cone (Tr. 21). Each successive employee performs some action on the chicken. Employees make cuts with knives (Tr. 22); trim unusable parts such as fat and bone with scissors (Tr. 71); and pull parts off the

[1] To the extent either party failed to raise any arguments in its post-hearing brief, such arguments are deemed abandoned.

chicken by hand (Tr. 70). Work is performed slightly below chest height and at arm's length in front of the employee (Tr. 71; Exhs. C-4a; C-4b; C-4c; C-4d; C-4e; and C-4f). A trough of warm water runs down the center of the line (Tr. 72). Employees use the water to warm their hands because the line is in a refrigerated area (Tr. 71). Attached to the trough at each work station is a knife holder (Tr. 73; Exh. R-14). Each work station also has a knife sharpener located above the employee's head (Tr. 24).

Employees working on the debone line wear protective equipment. Each wears a gown over street cloths, cut-resistant gloves and sleeves, hearing protection, a hair net (and beard net where applicable), an apron, and rubber boots (Tr. 21). Although used in other parts of the facility, employees on the debone line do not wear eye protection. According to unrebutted statements made by employees to CSHO Hynes, employees are provided safety glasses by Onin, but are prohibited from wearing them on the debone line by Peco (Tr. 53-54, 60; Exh. C-2, p. 2).

On February 12, 2015, the Secretary initiated an inspection of Peco's Tuscaloosa facility after the company reported an incident that resulted in an employee injury (Tr. 16). The facts surrounding the incident are largely not in dispute. An employee suffered a laceration to the eyelid while working on the debone line as he attempted to pick up a chicken that had fallen from the cone (Tr. 67, 91). The employee reached down to retrieve the chicken with the knife still in his hand (Tr. 67-68, 91). As he lifted the chicken up, he struck himself in the eye with the knife tip, cutting his eye lid (Tr. 17, 68, 91). He was hospitalized for treatment of the injury (Exh. C-1).

Peco has rules directed at safe use of knives and scissors. Those rules require, among other things, an employee is to place the knife in the knife holder when "not cutting chicken." (Exh. R-12; R-13; Tr. 91). The injured employee was disciplined for violation of that rule immediately following the incident (Tr. 68, 92; Exh. R-11). He was also retrained on the rule (Tr. 68-69, 93; Exh. R-12).

The record contains evidence of only one other incident in which an employee on the debone line suffered an eye injury in the past 6 ½ years (Tr. 102-103).[2] That incident occurred in

[2] Peco argues in its brief only one other injury has occurred in the past 40 years. This is based on testimony from Sylvia Prince, the superintendent for second processing, that she could only recall one other incident in her 40 years with the company (Respondent's brief at pp. 2, 12). Peco's records of recordable injuries do not date back 40 years.

2013. According to records of that incident, blood from the chicken splashed into an employee's eye causing irritation (Exh. R-5). The employee's eye had to be cleaned at the nursing station (Tr. 28).

CSHO Hynes[3] was assigned to conduct the inspection. He went to the facility where he conducted an opening conference, spoke with the union representative, interviewed employees, and observed employees on the debone line (Tr. 18-19; Exh. C-2, p. 2). CSHO Hynes testified he observed employees working on the debone line exposed to splatter of fluids, blood, and chicken parts, including skin, cartilage and bone splinters (Tr. 20, 24, 27). He also testified employees were exposed to potential eye injury from the knives used on the debone line (Tr. 20, 27). Photographs of the debone line taken by CSHO Hynes show splatter from the chickens throughout the area (Exhs. C-4a; C-4b; C-4c; C-4e; C-4f; C-4g; Tr. 24). None of the employees on the debone line were wearing any type of eye protection. CSHO Hynes observed one employee in the area, not working on the debone line, wearing safety glasses (Tr. 25; Exhs. C-4e; C-4h). CSHO Hynes conducted a closing conference onsite with Stephen Johnston, the human resources director, Tim Daniel, the plant manager, and Amber Dunkling, the safety and health manager, on the day of the onsite inspection (Exh. C-2, p. 6). He held a second closing in May, 2015, via telephone (Exh. C-2, p. 6). According to his report, CSHO Hynes discussed the need for eye protection on the debone line in both closing conferences (Exh. C-2, p. 6).

Peco based its decision not to require eye protection for employees on the debone line on several job hazard analyses. In 1998, Peco had an analysis of the physical demands of the debone line conducted by ISR, a service of the DCH Health System[4] (Exh. R-1). This document does not address struck by hazards to the eye or face. The record also contains a document entitled: "C- Personal Protective Equipment: Hazard Assessment and Certification Form." (Exh. R-4). This document is dated June 18, 2013, and is signed by Alex Watter, the day shift occupational nurse, and Stephen Johnston (Exh. R-4). The document contains conclusions reached by Peco about the hazards encountered in various job locations and the required personal

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Peco presented documentary evidence going back 6 ½ years. I find the documentary record more reliable evidence of injury rate than Ms. Prince's memory of the past 40 years.

[3] CSHO Hynes has been a CSHO for approximately 18 years. Prior to his employment with OSHA, CSHO Hynes served on active military duty for 21 years (Tr. 14-15). He holds a Bachelor's Degree in industrial technology (Tr. 15).

[4] The record does not contain any details regarding this service.

protective equipment. Finally, in March of 2015, following the incident and the OSHA inspection, Amber Dunkling conducted a job hazard assessment of all the jobs in the plant (Tr. 96, 111). She did so by observing all the positions and reviewing the prior job hazard analyses (Tr. 96). Ms. Dunkling concluded no changes to the previous personal protective equipment requirements were warranted (Tr. 97; Exh. R-2; R-3). Ms. Dunkling testified she observed no "flying particles" come in contact with employees on the debone line (Tr. 99). She testified Peco uses debone floor attendants that wet the area to ensure there are no flying particles (Tr. 100). She also testified employees are trained to be precise in cutting techniques to reduce the chance of particles flying toward their faces (Tr. 100-101).

Following receipt of the Citation in this matter, Ms. Dunkling also conducted an "experiment" in which she had the three plant occupational nurses gather data on splatter to goggles worn by randomly selected employees on the debone line (Tr. 103-104). Employees wore the goggles for an hour, after which the nurses counted the number of "specks" on the goggles (Tr. 106). No bone or solid matter was observed by the nurses (Tr. 106). Rather, the nurses observed and recorded "Drops. Where liquid had hit." (Tr. 106). According to Ms. Dunkling's summary of that experiment, 19 specks were observed across 45 employees' goggles (Exh. R-6).

As a result of his inspection CSHO Hynes recommended a serious citation alleging a violation of 29 C.F.R. § 1910.133(a)(1) be issued to Peco for failure to ensure the use of eye protection on the debone line. CSHO Hynes concluded employees on the debone line were exposed to struck by hazards associated with the knives used on the line, as well as flying fluids and particles from the chicken. CSHO Hynes's recommendation was based in part on his experience observing other chicken processing plant debone lines. According to his testimony, employees on the debone lines at Alatrade in Albertville, Alabama, and Pilgrim's Pride wear eye protection (Tr. 29-30).

Peco timely contested the citation. Peco contends no eye protection is required under the standard because employees were not exposed to a hazard. Peco argues the express language of the standard does not cover hazards associated with the knives and company work rules protect against such hazards. Peco argues there are no other hazards to the face or eye to which employees on the debone line are exposed. Peco raises the affirmative defenses of employee

misconduct, greater hazard, and infeasibility. Peco argues use of safety glasses is infeasible because those glasses fog up in the refrigerated area. Peco also argues use of clear safety glasses poses a food safety hazard.

Analysis

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Secretary alleges Peco violated the standard at 29 C.F.R. § 1910.133(a)(1). That standard states:

> The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

The Citation states:

> On or about 02/04/2105 – Debone area, the employer failed to require eye protection where employees were exposed to hazards from foreign objects such as, but not limited to, knives, chicken bone fragments, chicken fat and fluids coming from chickens being processed.

The Secretary alleges Peco's failure to ensure employees were using eye protection on the debone line violated the standard.

Applicability of the Standard

To establish applicability of the standard to the conditions at Peco's worksite, the Secretary has the burden to show employees were exposed to one of the eye or face hazards listed in the standard, necessitating the need for eye protection. The Secretary concedes the only hazard to which employees on the debone line at Peco were exposed is "flying particles." In a recent decision, the Commission held the Secretary's burden to establish applicability of § 1910.133(a)(1) "includes demonstrating that there is a significant risk of harm and that the

employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of [personal protective equipment]." *Wal-Mart Distribution Center #6016*, 25 BNA OSHC 1396 (No. 08-1292, 2015) (citations omitted). The Commission went on to hold "'evidence of industry custom and practice will aid in determining whether a reasonable person familiar with the circumstances would perceive a hazard, though it is not necessarily determinative.'" *Id. quoting GM Parts*, 11 BNA OSHC 2062, 2065 (No. 78-1443, 1984).[5] I find the Secretary has met his burden and, given the record as a whole, find the standard applies.

As is clear from the photographs submitted by both parties, work on the debone line is messy. Although the chickens have been eviscerated by the time they reach the debone line, there is still visible liquid on the product and in the area. Chicken skin and fat splatter is seen throughout the area. CSHO Hynes, who I found to be a credible witness[6], testified he observed splatter during the deboning processes (Tr. 20, 24). Although most of the employees' work is performed below face level, a knife sharpener is positioned overhead at each work station, requiring the employee to periodically reach overhead to sharpen his or her knife (Tr. 88). Peco has procedures in place for wetting the area "so that things don't fly around" as well as training on cutting away from the body to reduce splatter (Tr. 100). Finally, the experiment performed by Ms. Dunkling in August and September of 2015, shows drops of liquid fly toward the eyes of employees working on the debone line (Exh. R-6). I find the evidence establishes employees on the debone line are exposed to liquid splatter to the face and eyes.

I do not find sufficient evidence of employee exposure to bone shards, however. CSHO Hynes testified to seeing splatter, but was not sufficiently specific in his testimony to conclude that splatter included bone shards. His testimony regarding the potential for bone shards to be produced on the debone line was speculative. Although the preponderance of the evidence

[5] The 11th Circuit, the circuit in which the facility is located, has held, with one exception, an employer is generally required to provide "only those protective measures which the employer's industry would deem appropriate under the circumstances." *Florida Machinery & Foundry, Inc. v. OSHRC*, 693 F.2d 119 (11th Cir. 1982). The exception for any requirement beyond industry practice is where the employer has actual knowledge the hazard requires the use of additional protection.

[6] CSHO Hynes testified in a straightforward manner. He was not evasive or argumentative, even when having to concede certain points. His demeanor evidenced no bias.

establishes employee exposure to liquid splatter, it does not establish exposure to bone fragments or splinters.

The Secretary also alleges employee exposure to an eye hazard from the knives used by employees on the debone line. Although there may be a hazard associated with the use of the knives, including the hazard associated with possible dropping or slipping of a knife out of an employee's hand, I do not find the language of the standard can be read so broadly as to include those hazards. The standard is specific in its list of sources of eye and face hazards. I find none of those listed sources of hazards can be reasonably read to include a knife.

I find unpersuasive Peco's argument that liquid splatter does not fall within the dictionary definition of "flying particles." The standard contains no definition of "flying particles." The common meaning of "particle" is "a relatively small or the smallest possible discrete portion or amount of something." *Webster's New Collegiate Dictionary*. "Flying" is defined as "moving or capable of moving in the air." *Id*. A "flying particle" is, then, a small portion of *something* moving in the air. Peco does not urge a different definition of "particle"; rather Peco would have me read the term "particle" so narrowly as to include only solids. To do so, I would have to find a liquid is not *something*. I decline to do so and find liquid splatter falls within the hazards listed in the standard.

Contrary to CSHO Hynes's testimony that he observed splatter during his inspection of the debone line, Ms. Dunkling testified she observed no such splatter. Ms. Dunking made this observation as part of a reassessment of all jobs she performed after the OSHA inspection. Following this assessment, Ms. Dunkling created new forms specifying the personal protective equipment required for the job (Exhs. R-2; R-3). I give little weight to both Ms. Dunkling's testimony and the assessment documentation. Ms. Dunkling admitted a lack of experience (Tr. 98). The assessments appear to be after-the-fact justifications following an injury and notification from OSHA it would require eye protection for the debone line.[7] I also find Ms. Dunkling's testimony regarding her observations incomplete and incompatible with other evidence. Ms. Dunkling fails to explain why the observed drops on the goggles used during her

[7] For example, Ms. Dunkling made special note that "goggles are not required for this job" on her assessment. No such special note was required for the same conclusion reached in 2013 (compare Exhs. R-2 and R-3). Nor was any note included to explain the removal of the requirement for chemical gloves required under the 2013 assessment (Tr. 97).

experiment did not lead her to conclude employees were exposed to liquid splatter to the eye, given the evidence liquid reached an employee's eye area for more than half the tasks observed during only one hour of the shift. Rather, she only testified to her concerns regarding the wearing of goggles (Tr. 108).

The evidence establishes employees on the debone line are exposed to eye injury hazards created by flying particles.[8] The Commission has recognized "the eye is an especially delicate organ and … any foreign material in the eye presents the potential for injury." *Vanco Construction Inc*., 11 BNA OSCH 1058, 1060 (No. 79-4945, 1982), *citing Sterns –Roger, Inc*., 7 BNA OSHC 1919, 1921 (No. 76-2326, 1979). The Secretary has demonstrated a significant risk of harm. Having established the risk of harm, under *Wal-Mart*, the Secretary has the burden to demonstrate the employer had actual or constructive notice of the hazard for which personal protective equipment would be necessary. *Wal-Mart Distribution Center #6016*, 25 BNA OSHC at 1402. I find the Secretary has also met this burden.

The record contains unrebutted testimony that other chicken processing facilities use protective eye wear on the debone line (Tr. 29-30). According to CSHO Hynes, Alatrade has an online video depicting its debone line on which employees wear eye protection and he has personally observed eye protection worn at a Pilgrim's Pride facility (Tr. 29-30, 51). None of Peco's witnesses testified regarding their knowledge of industry practice. In conducting her hazard assessment, Ms. Dunkling did not consult other chicken processors and thus could not testify regarding industry practice. Additionally, Onin supplies the temporary workers with safety glasses (Tr. 53). Employees are prohibited by Peco from wearing that equipment on the debone line (Tr. 55). Although they bring them to the facility, Peco requires the Onin workers to place their safety glasses in a box (Tr. 59-60). Bryan Bradley, QA director for Peco, testified the company had determined the food safety hazard outweighed the benefit of wearing the safety glasses (Tr. 119). I find safety glasses are recognized in the industry as commonly used equipment for employees working on debone lines. Given the obvious nature of the hazard and

[8] Peco's 2013 hazard assessment recognized debone line employees were exposed eye and face hazards from vapors and gases, but required no personal protective equipment (Exh. R-4). The Secretary did not allege, nor present evidence of, a hazard to debone employees' eyes or faces from vapors and gases and I am constrained by the allegations contained in the citation.

the evidence of industry practice, I find the Secretary has established Peco had constructive knowledge of a hazard for which eye protection would be necessary.

In 2013, an employee on the debone line sustained a recordable injury to the eye due to blood splatter. Peco contends this paucity of incidents or low injury rate is insufficient evidence of actual or constructive knowledge, relying on *Wal-Mart* and cases cited therein. Although I agree with Peco the injury rate is low and, under Commission precedent, would provide insufficient basis to establish actual knowledge, the record contains other evidence of industry practice sufficient to establish constructive notice.

Considering the record as a whole, I find the Secretary has met his burden to establish employees on the debone line at Peco were exposed to an eye hazard of flying particles and the standard requiring eye protection applies.

Failure to Comply with the Standard and Employee Exposure to the Hazard

For the reasons discussed above, the record establishes employees on the debone line are exposed to hazards associated with fluids flying toward their face and eyes. It is undisputed employees on the debone line do not use eye protection. I find the Secretary has established Peco failed to comply with the terms of the standard and employees on the debone line were exposed to the hazard addressed by the standard.

Employer Knowledge

To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC at 1966 (the actual or constructive knowledge of an employer's foreman can be imputed to the employer). Actual knowledge refers to an awareness of the existence of the conditions allegedly in noncompliance.

Omaha Paper Stock Co., 19 OSHC 2039 (No. 01-3968, 2002). I find the Secretary has established Peco had constructive knowledge of the violative condition.

Peco was aware as early as 2013 blood could splatter into the eye of an employee working on the debone line. The record contains no evidence Peco took any action as a result of this incident to eliminate or even minimize the potential for such an occurrence in the future.

As previously noted, the fact that work on the debone line is messy is obvious to any observer. The Commission has held failure to recognize an obvious hazard does not relieve an employer of its obligation to provide protection. *Fleming Foods of Nebraska, Inc*. 6 BNA OSHC 1233, 1234 (No. 14484, 1977). The evidence also establishes Peco was aware that particles fly around the debone line, as it has procedures in place to attempt to minimize this (Tr. 100). Other employers in Peco's industry also recognize the need for eye protection for employees working on a debone line (Tr. 29-30). As the experiment performed by Ms. Dunkling demonstrates, a careful review of the process would have revealed employees were exposed to an eye hazard, necessitating protection.

I do not find Peco's failure to recognize the hazard establishes a lack of knowledge. As previously discussed, I give little weight to the after-the-fact assessment of Ms. Dunkling (Exh. R-2). I give little weight as well to the 2013 hazard assessment as neither of the individuals who conducted the 2013 hazard assessment were called to testify regarding the manner in which this assessment was conducted (Exh. R-4).[9] The only evidence of an assessment of the need for safety glasses before the OSHA inspection was the testimony of Mr. Bradley indicating a determination the food safety hazard outweighed the benefit to employee safety.

I find the preponderance of the evidence establishes Peco could have known of the need for eye protection with the exercise of reasonable diligence.

Classification

The Secretary alleges the violation was serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious

[9] Mr. Johnston was listed as a witness by Respondent and present in the courtroom but was not called to testify.

physical harm would result. As previously noted, the Commission has recognized any foreign material in the eye presents the potential for injury. Based on the evidence discussed herein, I find the Secretary has established a serious injury could result from having liquid splatter in an employee's eye while working on the debone line.

Based on the foregoing, I find the Secretary has met his burden to establish a prima facie case of a serious violation of 29 C.F.R. § 1910.133(a)(1).

Affirmative Defenses

Employee Misconduct

Peco raised the affirmative defense of employee misconduct. To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 24 BNS OSHC 2215, 2220 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). I find Peco's reliance on this defense is misplaced.

Peco argues the incident that precipitated the inspection was the result of the injured employee violating its rule prohibiting employees from having the knife in their hands during any operation other than cutting chicken. In so arguing, Peco demonstrates a misunderstanding of the defense as it would apply to a violation of the cited standard. The violative condition in this instant case is the failure to ensure the use of eye protection. The rule to which Peco points does not prevent the violative condition. Not only did Peco not have a rule requiring the use of eye protection, it prohibited employees on the debone line from wearing protective glasses provided to them by Onin. Therefore, Peco has failed to meet the first element of the affirmative defense of employee misconduct.

Infeasibility

Peco raises the affirmative defenses of infeasibility of compliance. In order to establish this defense, an employer must show (1) literal compliance with the terms of the standard is infeasible under the existing circumstances and (2) alternative protective measures were used or no feasible alternative measures are available. *Otis Elevator Co*., 24 BNA OSHC 1081, 1087

(No. 09-1278, 2013), *citing, Westvaco Corp*., 16 BNA OSHC 1374, 1380 (No. 90-1341, 1993). Peco argues compliance is infeasible because safety glasses fog up under the conditions on the debone line. I find Peco's evidence of infeasibility of using safety glasses insufficient to meet its burden.

To prevail in its defense of infeasibility, Peco must establish under the circumstances unique to the debone line, it is not possible for employees to use safety glasses. Sylvia Prince, the superintendent for second processing at Peco with oversight of the debone line, testified when she enters the debone area her prescription lenses fog up (Tr. 72). CSHO Hynes testified safety glasses are available with defogging capabilities (Tr. 123). Peco did not deny such glasses are available. Rather, Ms. Prince testified her glasses have "defog protection" but that it does not work (Tr. 79). I do not find Ms. Prince's testimony that her defog protection does not work sufficient to establish all safety glasses with defogging capabilities are ineffective.

It is undisputed employees in other areas of Peco's facility wear safety glasses and employees are permitted to wear their own prescription glasses in the facility.[10] Employees in the saw cutter position, working in proximity to the debone lime, are required to use safety glasses (Tr. 100; Exhs. C-4e; R-3; R-9). Peco presented insufficient evidence to explain why use of safety glasses was feasible for the saw cutter position but not the debone line. I find Peco has not met its burden.

To the extent Peco argues compliance with the regulation is infeasible because it would require violation of food safety standards or regulations, Peco has identified no such conflicting food safety standard or regulation.

Greater Hazard

As a final defense, Peco argues requiring employees to wear safety glasses poses a greater hazard than not wearing them. Peco's argument is two-fold. First, Peco argues because the glasses fog up in the refrigerated area of the debone line, employees' vision would be impaired and the risk of injury from tripping or cutting oneself would be increased. Second, Peco argues the potential hazard to the consumer created by potential for glass or hard plastic

[10] Peco has policies and procedures for preventing glass and brittle plastic from coming in contact with the food product which refers specifically to prescription glasses (Exh. R-10). A careful reading of this policy reveals Peco has no prohibition against employees wearing prescription glasses while working.

from the eye protection to get into the food outweighs the risk of harm to the employees' eyes from flying particles. I find Peco has failed to support either argument.

To prevail on a defense of greater hazard, an employer must prove (1) the hazard of compliance is greater than the hazard of noncompliance; (2) alternative means of protecting employees are available; and (3) an application for a variance would be inappropriate. *Trinity Industries Inc.*, 15 BNA OSHC 1985, 1986 (Nos. 89-2316 and 89-2317, 1992). In order to establish the first element of the employer's burden, it must show the hazard addressed by the standard is increased as result of compliance. *Russ Kaller, Inc.*, 4 BNA OSHC 1758 (No. 11171, 1976); *Cornell & Company, Inc*., 5 BNA OSHC 1018 (No. 9353, 1977).

As discussed above, Peco presented insufficient evidence of the unavailability of safety glasses with defogging capabilities. Moreover, Peco failed to establish the hazard created by fogged glasses was greater than the hazard of splatter in an employee's eye.[11] Peco presented no evidence of any recordable injury attributed to obstructed vision from fogged up safety glasses. Moreover, employees on the debone line wear cut resistant gloves to prevent the type of injury Peco speculates might occur. *See Building Products Company*, 5 BNA OSHC 1773, 1775 (No. 14240, 1977) (rejecting an employer's greater hazard defense to machine guarding violation where employer argued the guard would cause wood chips to be ejected toward employees eyes because employees could be protected with appropriate eye protection.)

Peco also argues food safety would be compromised by the use of safety glasses on the debone line. I am unaware of any Commission precedent upholding the greater hazard defense based on a hazard to the employer's customer or the public created by compliance with a standard. Nor do I find Peco has established facts sufficient to find the potential hazard to the customer exceeds the hazard to employees. Peco has, throughout its facility, employees using safety glasses and allows the use of prescription glasses. Other than having an increased number of employees using safety glasses, Peco has provided no explanation for why safety glasses worn by debone line employees is more likely to contaminate the food product than safety glasses worn by other employees. Peco presented evidence of only one incident in which an employee's

[11] I find the cases cited by Peco at p. 14 of its brief do not necessitate a different result as Peco did not present the type of evidence presented by the employers in each of those cases.

safety glasses came in contact with the food product. I find Peco has failed to meet its burden to establish the affirmative defense of greater hazard.

Penalty Determination

The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005). Section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

I find the gravity of the violation to be moderate. Although there are approximately 80 employees on the debone line exposed for the entirety of their shift, the likelihood of injury is low. This is evidenced by the low injury rate. The size of Peco's workforce was not made part of the record, but the number of employees on the debone line alone exceeded 80. Therefore, no reduction in the gravity based penalty for size is warranted. The record contains no evidence of Peco's prior OSHA history. Based on all these factors, I find a gravity-based penalty of $4590.00 is appropriate.

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:

Item 1, Citation 1, alleging a violation of 29 C.F.R. §1910/133(a)(1) is affirmed, and a penalty of $4,590.00 is assessed

SO ORDERED.

/s/

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

Date: December 18, 2015