United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Sanderson Farms, Inc., Respondent.	OSHRC Docket No. **15-1928**

Appearances:

Jean C. Abreu, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Darren Harrington, Esquire, Key Harrington Barnes, PC, Dallas, Texas
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Sanderson Farms, Inc. (Sanderson) operates a poultry processing plant located at 1111 North Fir, Collins, Mississippi. Following a reported injury, the Occupational Safety and Health Administration (OSHA) commenced an inspection of the worksite on July 1, 2015, with an additional site visit on July 29, 2015. As a result of the inspection, a Citation and Notification of Penalty (Citation) was issued to Sanderson on October 5, 2015. As amended, the Citation alleged a violation of 29 C.F.R. § 1910.212(a)(1) and proposed a $7,000.00 penalty.

For the following reasons, the Citation is vacated and no penalty is assessed.

JURISDICTION

The parties stipulated the Occupational Safety and Health Review Commission (Commission) has jurisdiction over this matter and Sanderson is an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act (the Act) (Stip. 1-2). Sanderson's principle place of business is in Laurel, Mississippi (Stip. 3). In its Answer, Sanderson admits the Commission has jurisdiction over this proceeding and acknowledges: "it is an employer engaged in a business affecting commerce as

these terms are defined in the Act." (Answer at 1). Based upon the parties' stipulations and the record, Sanderson is a covered business and the Commission has jurisdiction under the Act.

PROCEDURAL BACKGROUND

On October 5, 2015, the Secretary issued one serious Citation for a violation of 29 C.F.R. § 1910.212(a)(3) with a $7,000.00 penalty. OSHA received Sanderson's Notice of Contest on November 2, 2015.[1] The Secretary filed a timely Complaint and a Motion to Amend the Citation to allege a violation of 29 C.F.R. § 1910.212(a)(1), a different subpart of the same machine guarding standard initially cited.

Sanderson first filed a timely Answer and then filed a Motion for Summary Judgment. The court issued an Order Denying Respondent's Motion for Summary Judgment and Granting the Secretary's Motion to Amend the Citation on June 8, 2016. A hearing was held from July 18, 2016 to July 19, 2016, in Jackson, Mississippi. Both parties filed post-hearing briefs.

FACTUAL BACKGROUND

Sanderson operates a poultry processing plant where employees debone chickens on approximately eight "cone lines" (Stip. 5; Tr. 154, 162-63). Each cone line has a continuously moving conveyor with several "cones" approximately twelve inches apart (Tr. 39, 56; Exhs. C-2f, R-9). Employees stand on one side of the cone line making cuts on chicken carcasses as they come down the line (Exh. R-9; Tr. 56, 162, 261-62, 288). Opposite from where the employees stand, there is a splashguard running the length of the cone line (Exhs. C-2e, R-9; Tr. 55, 71, 232, 252, 255-56, 279). The splashguard had been installed to prevent chicken from falling on the floor (Tr. 72-73, 232, 251, 279). Prior to OSHA's first site visit, there was a gap of between one-quarter and three-quarters of an inch between the bottom of the splashguard and the conveyor belt (Tr. 47, 52-53, 252; Exhs. C-2c, C-2d).

Around 9:00 a.m., on June 29, 2015, most of the employees on one of the cone lines took a ten minute break (Tr. 163, 165). One employee declined to take her break and instead worked to catch up on chicken carcasses she did not have time to complete when the line was running (Tr. 163-65, 228; Stip. 6-7). After completing the catch-up work, the employee saw a piece of chicken stuck between the splashguard and the conveyor belt and attempted to remove it with her fingers (Tr. 155, 165, 167; Exhs. C-1, C-2a). As the conveyor belt moved along, one of her

[1] The Secretary does not allege that Sanderson's Notice of Contest was untimely.

fingers became trapped (Tr. 39, 155, 167; Exhs. C-1, C-2a). She screamed and another employee pushed an emergency button to stop the conveyor belt (Tr. 167, 226). At that point, the trapped employee pulled back her hand and realized her left index finger had been amputated (Tr. 167; Stip. 8). She promptly sought medical care with the aid of her co-workers[2] (Tr. 167; Stip. 8; Exh. C-1).

A few hours after this incident, Sanderson's Corporate Safety and Health Coordinator, Richard Ward, reported the accident to OSHA (Tr. 29; Exh. C-1). Two days later, on July 1, 2015, Albert Smith, an OSHA compliance officer CSHO, inspected the worksite (Tr. 31). During the course of OSHA's inspection, on July 25 and 26, 2016, Sanderson lowered the splashguard to eliminate the gap between the splashguard and the conveyor belt (Tr. 53-54, 235). On July 29, 2016, the CSHO again visited the worksite and viewed the cone line as modified (Tr. 31, 53; Exh. C-2e).

DISCUSSION

A. **Applicable Law**

For the Secretary to establish a violation of any OSHA standard, he must prove that: (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *See Astra Pharm. Prods., Inc*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving each of these elements by a preponderance of the evidence. *Id*.

B. **Applicability**

The cited standard requires the employer to provide one or more methods of machine guarding: "to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." 29 C.F.R. § 1910.212(a)(1). The guarding requirements apply to the moving parts of all types of industrial machinery and regardless of whether the hazards are created during production or non-production operations. *Ladish Co.*, 10 BNA OSHC 1235, 1237 (No. 78-1384, 1981); *Gen. Elec. Co.*, 10 BNA OSHC 1687, 1690 (No. 77-4476, 1982).

[2] The employee's finger was unable to be reattached by medical professionals.

Because § 1910.212(a) requires employers to guard against "hazards," without providing specific ways to do so, the Secretary must prove operating the machinery presented a hazard. *Landish*, 10 BNA OSHC at 1237; *Buffets, Inc.*, 21 BNA OSHC 1065, 1066 (No. 03-2097, 2005) (Secretary must establish the rotating parts presented a hazard). The fact it is possible for an employee to come into contact with a machine's moving parts is insufficient to establish a violation. *Id*. The Secretary must show employees are exposed to a hazard because of the way the machine functions and how it is operated.[3] *Id. See also Jefferson Smurfit Corp*., 15 BNA OSHC 1419, 1421 (No. 89-0553, 1991) (possibility of exposure to an unguarded nip point insufficient to sustain a violation).

The Citation, as amended, alleges Sanderson violated 29 C.F.R. § 1910.212(a)(1) because: "[o]ne or more methods of machine guarding was not provided to protect employees on the cone line from hazards created by the opening between the splash guard and the cone line." The Secretary contends in the Citation, this failure to guard resulted in an employee being "Exposed to an amputation hazard when performing tasks including, but not limited to, cleaning debris jammed between the splashguard and the cone line" on or about July 1, 2015.[4]

Sanderson implores the court to read the cited standard as not requiring guarding of the gap between the splashguard and the rest of the cone line (Sanderson's Brief at 8). Citing two machine specific guarding standards and a 2007 OSHA publication titled Safeguarding Equipment and Protecting Employees from Amputations (Safeguarding Publication), Sanderson argues OSHA has concluded gaps of the size present on the cone line are safe[5] (Sanderson's Brief at 8-9; Exh. R-8). It asserts the Secretary failed to establish it had noticed the small gap was a hazard and therefore the Citation must be vacated. *Id.* at 9.

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[3] Although this case can only ultimately be appealed to the D.C. or Fifth Circuit, Sanderson urges the Court to follow the approach in *Perez v. Loren Cook Co.*, 803 F.3d 935 (8th Cir. 2015) (Sanderson's Brief at 7-8). The Court finds the case neither applicable nor persuasive. In *Loren Cook*, the Eighth Circuit determined because 29 C.F.R. § 1910.212(a)(1) identifies specific hazards related to the regular use of the machinery (such as rotating parts), it was not applicable to a hazard stemming from the catastrophic failure of a machine. 803 F.3d at 940-41. In the instant matter, there is no allegation the hazard presented by the cone line was a result of a catastrophic failure.

[4] As initially issued, the Citation alleged this conduct violated 29 C.F.R. § 1910.212(a)(3), which requires point of operation guarding. Both the CSHO and Ward testified the gap between the splashguard and the rest of the cone line was not a point of operation (Tr. 102, 279-82). Thus, it appears the parties agree the initially cited standard is not applicable.

[5] The Safeguarding Publication was not timely identified as an exhibit by Sanderson but was admitted over the Secretary's objection (Ex. R-8; Tr. 98-99).

As noted above, the cited standard requires employers to protect employees from hazards in machine areas "such as those created by points of operation, ingoing nip points, rotating parts, flying chips and sparks." 29 C.F.R. § 1910.212(a)(1). The CSHO testified there were no hazards related to flying chips or sparks. He did not indicate whether a point of operation, ingoing nip point, or rotating part created any hazards[6] (Tr. 103). Although the video of the cone line appears to show rotating parts, the citation does not refer to these and the CSHO did not testify they should have been guarded (Exh. R-9). *See MB Consultants, Ltd. d/b/a Murray Chicken*, 25 BNA OSHC 1146, 1161 n. 11 (No. 12-1165, 2014) (Consol.) (ALJ) (declining to *sua sponte* amend citation to add struck by and entanglement hazards on a poultry cone line). In fact, the CSHO offered no explanation for what needed to be guarded on the cone line and did not understand why the Secretary amended the citation to allege a violation of § 1910.212(a)(1) (Tr. 101-3).

While the sources of possible hazards set forth in the cited standard is not exhaustive, the Secretary nonetheless must present evidence supporting his view of what the hazard was Sanderson needed to guard. Here, the Secretary merely alleges employees working on the cone line were exposed to a caught by hazard, without identifying if that hazard related to the conveyor, the splashguard, the gap, or something else (Secretary's Brief at 7.) When asked at the hearing what hazards he considered employees working on the cone line to be exposed to, the CSHO's response was unclear (Tr. 73). The transcript reads "[t]o a (unintelligible) hazard." *Id.* Neither party sought to correct the transcript nor did the Secretary present other evidence clarifying the testimony. The occurrence of the accident alone is insufficient to establish there was a hazard to which the cited standard applied. *See Ormet Corp.*, 9 BNA OSHC 1055, 1058 (No. 76-530, 1980) (vacating a citation of § 1910.212(a)(1) due to lack of evidence that a hand or arm could be pulled or caught in an unguarded area).

The Secretary also failed to establish Sanderson had sufficient notice of the standard's applicability to the gap between the splashguard and the conveyor. With generally worded standards, the Fifth Circuit has made clear: "[d]ue process requires employers be given reasonably clear advance notice of what is required of them." *Owens-Corning Fiberglass Corp.*

[6] Sanderson argues the CSHO indicated there was no point of operation hazard (Sanderson's Brief at 7). The CSHO's actual testimony was the gap itself was not a point of operation, ingoing nip point, or rotating part (Tr. 103).

v. Donovan, 659 F.2d 1285, 1288 (5th Cir 1981). Such notice may be provided by: (1) industry custom and practice; (2) the injury rate for the type of work; (3) interpretations of the regulation by the Commission; or (4) the obviousness of the hazard.[7] *Corbesco, Inc. v. Dole,* 926 F.2d 422, 427 (5th Cir. 1991).

The record contains no evidence about industry custom or practice. Nor did the Secretary present any evidence of past injuries or accidents which would have put the employer on notice the cone line required additional guarding. Indeed, Sanderson represents there were no injuries or other issues with the gap, such as gloves or fingers becoming stuck, prior to the accident which led to the CSHO's inspection (Tr. 224, 278-79).

As for Commission precedent, the Commission found 29 C.F.R. § 1910.212(a) applicable to conveyors and a judge applied it to a cone line at a poultry plant. *See U.S. Steel Corp.*, 5 BNA OSHC 2063, 2064 (No. 15500, 1977) (finding § 1910.212(a) applicable to a conveyor); *Landish,* 10 BNA OSHC at 1237 (same); *Ormet*, 9 BNA OSHC at 1058 (finding the standard applicable to a conveyor but finding no violation); *Murray Chicken*, 25 BNA OSHC at 1161 (ALJ) (finding the standard applicable to chicken leg splitter and a cone line at a poultry plant). However, none of these cases relate to a gap that was not a point of operation, ingoing nip point, or rotating part. *Id*. (Tr. 103.) Further, in the instant matter, the Secretary is not arguing the conveyor required a guard. He argues the gap needed to be guarded without presenting evidence as to what type of hazard the gap created (Tr. 73). Thus, the Court finds Commission precedent did not provide sufficient notice of 29 C.F.R. § 1910.212(a)'s applicability to the condition the Citation references.[8]

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[7] Neither the Fifth Circuit, nor the D.C. Circuit, has applied the rational of *Corbesco* to 29 C.F.R. § 1910.212(a). However, the Commission cited the case when vacating a violation of it. *Martin v. Miami Indus., Inc.*, 15 BNA OSHC 1258, 1263 (No. 88-671, 1991), *aff'd in pertinent part*, 983 F.2d 1067 (6th Cir., 1992) (unpublished). *See also E.I. Du Pont De Nemours & Co.*, 17 BNA OSHC 2110 (No. 96-0354, 1997) (ALJ) (applying *Corbesco* in a case appealable to the Fifth Circuit which involved a violation of 29 C.F.R. § 1926.212(a)(1)); *Wal-Mart Distrib., Ctr. No. 6016*, 25 BNA OSHC 1397, 1400 n.10 (No. 88-1292, 2015) (vacating a violation of a personal protective equipment standard for lack of notice), *aff'd in pertinent part*, 819 F.3d 200 (5th Cir. 2016) (not addressing the citation item the Commission vacated for lack of notice).

[8] Sanderson contends the cited standard does not apply because the hazard could have been remedied by removing the splashguard altogether (Sanderson's Brief at 8). Whether Sanderson could have complied with the standard by removing rather than lowering the splashguard is a question not before this Court and not relevant to whether there was a violation as the cone line existed at the time alleged in the Citation.

In terms of the obviousness of the hazard, Sanderson argues machine specific guard standards and the Safeguarding Publication indicate it did not need to guard the one-quarter inch gap (Sanderson's Brief at 8-9). The cited standard is contained within Subpart O-Machinery and Machine Guarding. Some of the standards within this subpart relate to specific types of machines, while others, including the cited standard, more generally address "machine areas." *Compare* 29 C.F.R. § 1910.212 (general requirements for all machines) *with* 29 C.F.R. § 1910.213 (woodworking machinery requirements). Neither the Secretary nor Sanderson alleges any of the standards in Subpart O relating to specific types of machinery apply here (Sanderson's Brief at 8-9). Instead, Sanderson argues a standard related to a certain type of guard on an abrasive wheel and one concerning power presses establishes a one-quarter inch opening is safe[9] (Sanderson's Brief at 8 *discussing* 29 C.F.R. §§ 1910.215(b)(9), 1910.217(f)(4)).

There is no dispute the cone line was not an abrasive wheel or a power press (Tr. 92, 94-95). What may be a permissible type of guarding for one type of machine or one aspect of its use is not acceptable for all machines or for all uses as the hazards likely differ. OSHA has adopted different standards for different types of machinery and imposes different requirements depending on how a machine is being used and what other precautions are taken. For example, in the abrasive wheel guarding standard, a one-quarter inch gap is permissible at the point of operation only when necessary and only if several safety other measures are in place, including other guards. 29 C.F.R. § 1910.217(c)(1). In the same way, the power press standard permits openings of a one-quarter inch in size only under certain narrow circumstances. 29 C.F.R. § 1910.217(c)(3)(iii)(f) ("Guards shall be used to protect all areas of entry to the point of operation not protected by a presence sensing device").

Sanderson also cites the Safeguarding Publication, which states for die presses, the employer must ensure the use of point of operation guards for openings of one-quarter inch or greater (Exh. R-8 at 22). In another section of the document concerning power press brakes, the

[9] Sanderson cites 29 C.F.R. § 1910.217(f)(4) in its brief (Sanderson's Brief at 8). That provision addresses overloading of power presses and does not refer to permissible gaps in guarding. 29 C.F.R. § 1910.217(f)(4). The court believes Sanderson may have intended to refer to Table O-10, which is referenced in 29 C.F.R. § 1910.217(c)(1), and relates to safeguarding points of operation (Tr. 87-88, 90-91).

document indicates a one-quarter inch opening can be permissible if the employer also implements other safeguards. *Id.* at 28.

Although not cited by Sanderson, the Safeguarding Publication makes clear OSHA's position that: "[a]ny machine part, function, or process may cause injury must be safeguarded"[10] (Exh. R-8 at 9). Because the Safeguarding Publication specifies what constitutes appropriate guarding depends on the machine's design (including what types of safeguards are in place) and how it is used, it does not establish OSHA has concluded gaps of one-quarter inch are permissible[11] *Id.* at 9, 22, 28 (Tr. 94-95).

However, while neither the machine specific standards nor the Safeguarding Publication, establish one-quarter inch openings are universally permissible, these things lend credibility to Sanderson's claim under Fifth Circuit precedent it did not have notice the one-quarter inch gap was a hazard to which the cited standard applied. *Corbesco*, 926 F.2d at 427. Melvin Butler, the supervisor of the cone lines, completed daily safety inspections but never identified the gap as a hazard[12] (Tr. 203-4; 232-33; Stip. 9). He acknowledged reaching over the line and into the gap to remove chicken would be dangerous, but, indicated he was unaware employees did this and expressed skepticism they would have time to do so given the rapid pace at which they were required to cut the chickens coming down the cone line[13] (Tr. 215-16, 218; Exh. R-9). *See*

[10] Sanderson also does not discuss the Hazards of Conveyors section, which sets out various hazards related to employees reaching into machine areas to free debris or jammed materials. (Ex. R-8 at 27-30.) This section does not indicate openings of any size are permissible. *Id.*

[11] In its brief, Sanderson also cites to Exhibit R-7, which was offered but ruled inadmissible (Tr. 86). Exhibit R-7 was not prepared by OSHA, has no bearing on worksites in Mississippi, and accordingly was found inadmissible under Fed. R. Evid. 401 at the hearing. *Id.* Although Sanderson indicates it is "Michigan OSHA's state plan guidance," it was not prepared by the Michigan Occupational Safety and Health Administration, the agency in charge of administering the Act in Michigan. In fact, it appears no governmental authority prepared or authorized the publication. Rather, it was published by a workers compensation insurance provider. *See* Michigan Municipal League, Workers' Compensation Fund, *http://www.mml.org/insurance/fund/*, last visited December 8, 2016. Particularly in light of the fact both the worksite and Sanderson's principal place of business are both in Mississippi, and the lack of any authentication of the document, consistent with the ruling at the hearing, the court finds Exhibit R-7 is inadmissible and not relevant to this matter (Tr. 86; Stip. 3-4).

[12] Other Sanderson employees also completed inspections regularly without identifying the gap as a hazard (Tr. 250-51, 307-8, 315).

[13] Sanderson also argues chicken in the gap had no value to the company and suggests it would not care if employees did not remove it (Sanderson's Brief at 5). However, although a piece of "chicken scrap" could not be sold, it could cause the line to shut down and thereby delay production (Tr. 158-59, 176, 219-20, 223-24).

Armour Food Co., 14 BNA OSHC 1817 (No. 86-0247, 1990) (discussing how difficult it would be for employees to come into contact with unguarded parts).

Ward, Sanderson's safety and health coordinator, also testified he was unaware of any hazard on the cone line and expressed similar skepticism employees would have time to reach across the line while it was moving (Tr. 236, 279, 285, 288). He viewed the splashguard not as a machine guard or something related to safety but solely as a means to keep product on the line[14] (Tr. 251). It was not intended to protect employees from a moving part and was not located at a point of operation (Tr. 251-52). Ward considered the gap to be too small to trap a finger or hand. (Tr. 255-56, 282-83.) He believed the employee was injured because she failed to don her gloves appropriately causing the tip of her glove to become trapped, leading to her injury[15] (Tr. 256).

The Secretary neither disputes this explanation for the injury nor provided evidence the gap was of a sufficient size to trap a finger when gloves were appropriately worn (or without any personal protective equipment). The Secretary does not allege Sanderson's personal protective equipment policies and procedures were deficient such that it could have been anticipated an employee would improperly don a glove. Likewise, the Secretary does not suggest Sanderson knew or could have known an improperly donned glove could become trapped in the gap.[16] In addition, there is no evidence Sanderson's overall pattern of inspecting for hazards was insufficient or it otherwise was capable of recognizing the hazard before the accident (Tr. 250-51, 278). While the Secretary need not prove how an injury occurred, or even that there was one,

[14] In her opening statement, the Secretary's counsel alleged Sanderson failed to properly install and maintain the splashguard and this resulted in a hazard (Tr. 19). However, no witness indicated the splashguard was a machine guard or provided evidence supporting the theory it had been improperly installed or maintained.

[15] Ward also indicated the splashguard was on the opposite side of where the employees stood (Tr. 254). In his view, employees did not have any contact with it (Tr. 255, 285, 288). However, two employees testified about workers routinely using their hands or scissors to remove product from the gap between the splashguard and the rest of the cone line (Tr. 159-60, 190-91, 263-64, 268-69).

[16] The standard takes into account the inability of humans to always follow every safety precaution. *See Brick & Block Co.*, 3 BNA OSHC 1876, 1878 (No. 4859, 1976) (noting, in connection with a violation of § 1910.212(a), that guarding is still required even if policies are set up to limit contact with machines). However, under Fifth Circuit precedent, the Secretary still had to show the employer had actual or constructive notice of applicability. *Corbesco*, 926 F.2d at 427. The Secretary failed to show Sanderson should have known its glove policies were deficient such that the gap presented a hazard. Sanderson was not cited for any training or personal protective equipment violations and the CSHO did not even ask the injured employee if she had been trained on how to wear the required gloves (Tr. 130-31).

for the cited standard to apply, he must show the gap presented a hazard the employer was capable of recognizing. *See Corbesco*, 926 F.2d at 427.

The evidence does not show Sanderson had the level of notice the Fifth Circuit requires. There had been no injuries and there was no evidence of industry customs. Nor has the Commission previously applied the standard the way the Secretary attempted to do so here. Finally, the Secretary did not show the hazard was obvious enough such that the employer should have known or inquired about guarding.[17] *Corbesco,* 926 F.2d at 427. *Cf. Ladish*, 10 BNA OSHC at 1238 (finding the hazard readily apparent). The Court therefore finds the Secretary has failed to establish the violation alleged in Citation 1, Item 1.

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:

Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1910.212(a)(1), is VACATED and no penalty is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia

Date: December 27, 2016

[17] While the accident provided sufficient notice, the Secretary does not allege there was any violation after the investigation commenced.