United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor,

Complainant

v.

Packers Sanitation Services, Inc.,

Respondent.

OSHRC Docket No.: **17-1376**

Appearances:

Amy R. Walker, Esq.
Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Travis W. Vance, Esq. and David I. Klass, Esq.
Fisher & Phillips, LLP, Charlotte, North Carolina
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Packers Sanitation Services, Inc., (PSSI) provides sanitation services for poultry processing facilities throughout the United States and Canada. On April 17, 2017, a PSSI employee sustained a serious injury to his right hand when it was caught in a processing machine at a Pilgrim's Pride facility in Gainesville, Georgia. A compliance safety and health officer (CSHO) of the Occupational Safety and Health Administration investigated the incident and recommended the Secretary cite PSSI for safety violations. On July 18, 2017, the Secretary issued a Citation and Notification of Penalty to PSSI, alleging two serious violations and one other-than-serious violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act).

Citation No. 1 alleges a serious violation of 29 C.F.R. § 1910.22(d)(1), for failing, in two instances, to ensure walking-working surfaces were maintained in a safe condition (Item 1), and of 29 C.F.R. § 1910.212(a)(1), for failing to guard a quill puller machine (Item 2). The Secretary proposes penalties of $9,054.00 and $12,675.00, respectively, for these items. Citation No. 2 alleges an other-than-serious violation of § 1904.40(a), for failing to provide copies of requested

records within four business hours (Item 1).[1] The Secretary proposes a penalty of $1,811.00 for this item.

PSSI timely contested the Citation. The Court held a hearing in this matter on March 12 and 13, 2018, in Atlanta, Georgia. The parties have filed briefs.

For Citation No. 1, the Court **AFFIRMS** Instance (a) of Item 1 and Item 2. Instance (b) of Item 1 is **VACATED**. The Court **AFFIRMS** Item 1 of Citation No. 2. The Court assesses penalties of $4,527.00 and $12,675.00, respectively, for Items 1 and 2 of Citation No. 1 and of $1,811.00 for Item 1 of Citation No. 2.

JURISDICTION AND COVERAGE

PSSI timely contested the Citation on August 2, 2017. The parties stipulate the Commission has jurisdiction over this action and PSSI is a covered employer under the Act *(Joint Prehearing Statement*, ¶¶ D.1-2; Tr. 13). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and PSSI is a covered employer under § 3(5) of the Act.

BACKGROUND

The Pilgrim's Pride facility in Gainesville, Georgia, is a "kill plant" where approximately one million chickens per week are killed and processed. Once the chickens are killed, they are transported to the picking room, where a machine called a quill puller removes the tail feathers from the chickens. The quill puller uses two rapidly rotating augurs to catch and pull out the feathers (Exhs. C-4a & C-5; Tr. 13, 22-23, 33, 182, 186).

Pilgrim's Pride employees work during the first two shifts of the day, processing chickens. PSSI employees work the third shift, cleaning the facility. The third shift begins at approximately 11:00 p.m. (Tr. 96, 100).

The April 17, 2017, Accident

At approximately 11:30 p.m. on April 17, 2017, a PSSI employee (Employee #1) was using a water hose to perform the initial rinsing ("the first knockdown") of the quill puller on Line 2 in the picking room. The first knockdown requires the employee to "take a water hose to hose off

[1] The Secretary originally cited PSSI for an other-than-serious violation of 29 C.F.R. § 1904.29(b), for failing to enter a recordable injury on the OSHA 300 log within seven days of receiving information that such an injury had occurred. The Court granted the Secretary's motion to amend the complaint to allege, in the alternative, a violation of § 1904.40(a) for this item. In his brief, the Secretary abandons his initial allegation PSSI violated § 1904.29(b). He argues only that PSSI violated § 1904.40(a).

the bigger pieces of feathers and chicken parts and such before a more in-depth sanitation process begins." (Tr. 37) The quill picker was running. As Employee #1 was hosing down the machine, the rotating augers caught the glove on his right hand and pulled it into the machine, resulting in the amputation of one of his fingertips. Employee #1 walked to the sanitation office and reported his injury to a PSSI coordinator, who drove him to a hospital emergency room. There were no witnesses to the accident (Exh. C-1).

The OSHA Inspection

CSHO Robin Bennett, who has worked at OSHA's Atlanta-East Area Office for 21 years, investigated the incident. She has conducted more than 1,500 inspections, including more than 100 inspections in poultry processing facilities. She had previously inspected the Pilgrim's Pride facility at issue four times (Tr. 17-19, 21-22). OSHA considers the poultry industry to be a high-risk industry for amputation injuries (Tr. 20) CSHO Bennett is the designated member of the poultry team for the Atlanta-East Area Office and has received "specific training on the regulations that pertain more so to [the] poultry industry." (Tr. 19) She last received specialized training in poultry industry safety in January of 2016 (Tr. 20).

CSHO Bennett's initial assignment was "to inspect not only the amputation but to expand into a comprehensive inspection." (Tr. 25) On April 25, 2017, eight days after the quill puller accident, CSHO Bennett and industrial hygienist (IH) Maria Martinez arrived at the Pilgrim's Pride facility at 4:30 p.m. and met with representatives of Pilgrim's Pride. PSSI employees were not present because the third shift would not begin for several hours (Tr. 25, 29). Bennett and Martinez left and returned to the facility around 9:00 p.m. and met with a group of PSSI managers (Tr. 29-30). Safety manager Caitlin Wilson acted as the primary spokesperson for PSSI. Her office is in Texas but she "happened to be on site during that week for another reason." (Tr. 30) Manager Cohan Sharp was also present, as well as three other PSSI employees who identified themselves as managers (Tr. 30-31). The managers agreed to permit Bennett and Martinez to inspect the quill puller but denied them permission to perform a comprehensive inspection (Tr. 101).

Bennett held an opening conference with the managers and discussed the April 17 accident. Caitlin Wilson told her Employee #1 was using a hose to perform the first knockdown on the quill puller while the machine was running, and he "had gotten too close to the machine, and one of his gloves had become caught in the machine and pulled his hand in." (Tr. 32) Neither Wilson nor any

of the other managers present told Bennett the quill puller should have been locked out in accordance with PSSI's lockout-tagout (LOTO) policy (Tr. 39). Instead, they told Bennett "there was a rule for employees not to put their hands in a running machine," and PSSI had implemented a "two-foot rule," requiring employees to stay at least two feet away from machines in operation (Tr. 39).[2]

The PSSI managers led Bennett and Martinez on a walk-around inspection to view the quill puller. As they walked through the picking room, Bennett observed several drains embedded in the floor. The drains had parts of their covers missing and did not fully cover the drains or did not have a cover at all (Exhs. C-3a, C-7, C-9, C-11, C-13; Tr. 40-47). Bennett recounted what happened when she and Martinez noticed the drains.

> [W]e observed two managers walking in front of us as they were leading us back to the machine. Maria and I both stopped. The two managers had already walked over the drains. We stopped and indicated to the managers we needed to go around the drains, because they were an easily observed hazard that we wouldn't expose ourselves to, so we requested a different way, a different route, to walk around to the machine.

(Tr. 48)

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[2] In its brief, PSSI attempts to cast doubt on the supervisory authority of Wilson, "whose job title and job duties are not in the record and whose knowledge of what occurs at the Facility is also not established. Rather, what is in the record is that she is based out of Texas and only happened to be onsite randomly." (PSSI's brief, p. 30) Bennett testified she met with five people at the Pilgrim's Pride facility who identified themselves as managers for PSSI, including Wilson. This establishes a prima facie case that Wilson and the other managers were who they said they were. It is up to PSSI to rebut the Secretary's case with evidence that Wilson's job title, job duties, and knowledge of what occurs at the Pilgrim's Pride facility were not accurately represented by the Secretary.

> It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise to the presumption that the testimony would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121 (1893). The Commission has also noted that when one party has evidence but does not present it, it is reasonable to draw a negative or adverse inference against that party, *i.e.*, that the evidence would not help that party's case. We deem such an inference to be appropriate here. Capeway's failure to present testimony from either of the two supervisory employees who were present during the inspection suggests that neither of them would have been able to contradict the testimony of either of the compliance officers.

Capeway Roofing Systems, Inc., 20 BNA OSHC 1331, 1342-1343 (No. 00-1986, 2003).

Bennett stated Wilson and the other managers work for PSSI. PSSI had it peculiarly within its power to produce any one of the five witnesses who could either corroborate or rebut Bennett's testimony. The Court infers from PSSI's failure to produce any of the purported managerial witnesses that their testimony would not aid its case. The Court finds Wilson, Cohan, and the other managers were supervisory personnel whose knowledge may be imputed to PSSI.

PSSI manager Malik Brown told Bennett he had been working at the Pilgrim's Pride facility for a year, and the drains had always been in the condition Bennett observed that day (Tr. 57). Wilson asked Bennett to stop questioning Brown about the drains because the issue was outside the scope of the inspection (Tr. 101). Bennett indicated the drains were in plain view in the room through which the managers were leading them. They proceeded to the quill puller where Bennett took measurements, photographs, and a video of the machine. She requested a copy of PSSI's OSHA 300 log of injuries. The copy PSSI provided to her did not have an entry for the April 17 amputation (Exh. C-2; Tr. 27-29).

Following her inspection, Bennett recommended the Secretary cite PSSI for two serious and one other-than-serious safety violations. The Secretary did so, giving rise to this proceeding.

VALIDITY OF OSHA'S INSPECTION

In its brief, PSSI argues the Court should dismiss the Secretary's case in its entirety because OSHA failed to inspect PSSI's "workplace." PSSI notes that 29 USC § 657 requires the Secretary "to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer" and conduct an inspection before he issues a citation. PSSI contends the Secretary failed to fulfill its obligation under the Act because CSHO Bennett and IH Martinez, as representatives of the Secretary, arrived at the Pilgrim Pride facility on April 25 before the third shift began, and the PSSI sanitation employees had not yet started work. "OSHA insisted on inspecting a Pilgrim's Pride workplace before PSSI had assumed control of the site. . . . Therefore, as OSHA never inspected PSSI's workplace, it could not issue citations to PSSI." (PSSI's brief, p. 22)

The Court finds no merit in PSSI's argument. PSSI cites no case law in support of this ill-conceived exercise in semantics. Its argument fails both in theory and in fact. First, nothing in the Act or OSHA case law requires employees to be actively working on a site at the time of an OSHA inspection for a location to be deemed a *workplace* of their employer. OSHA inspections sometimes occur when no employees are on site (for example, after a fatality at a highway construction site or other construction site causes a shutdown of work activity). The cited conditions (the inadequately covered drains and the unguarded quill puller) did not change between Pilgrim Pride's second shift and PSSI's nightshift. The picking room of the Pilgrim's Pride facility remained a workplace "where work is performed by an employee of" PSSI even when PSSI employees currently were not working the sanitation shift.

Second, even if PSSI's novel theory applied, the record establishes the company had employees at the site when Bennett and Martinez arrived the second time on April 25. The CSHO held an opening conference with five PSSI managers. They were present at a facility where PSSI employees work a regular shift daily. The Court presumes they were at the Pilgrim's Pride facility in the scope of their employment with PSSI. It is unlikely five managers from the same company would meet at a poultry processing facility at 9:00 on a Tuesday night for an activity unrelated to work. "[T]he Commission may draw reasonable inferences from the evidence[.]" *Fluor Daniel*, 19 BNA OSHC 1529, 1531 (Nos. 96-1729 & 96-1730, 2001) *(citing Atlantic Battery Co.,* 16 BNA OSHC 2131, 2159 (No. 90-1747, 1994)). Thus, PSSI had employees working at the facility at the time of the OSHA inspection. The inspected facility was PSSI's workplace within the meaning of the Act.

CITATION NO. 1

The Secretary 's Burden of Proof

"The Secretary has the burden of proving: (1) the applicability of the cited standard; (2) the employer's noncompliance with the standard's terms; (3) employee access or exposure to the violative conditions; and (4) the employer's actual or constructive knowledge of the violation." *Dana Container, Inc.*, 25 BNA OSHC 1776, 1779, n. 7 (No. 19-1184, 2015), *aff'd* 847 F.3d 495 (7th Cir. 2017).

Item 1: Alleged Serious Violation of § 1910.22(d)(1)

Alleged Violation Description

Item 1 of Citation No. 1 alleges:

> On 4/25/17, at the Pilgrim's Pride, Gainesville facility, in the Picking room, employees were exposed to trip hazards as drain covers were not maintained in a safe condition. Areas included:
>
> a – Areas at Line 2 were missing covers and some drain covers were too wide to provide safe crossing and had openings up to 7 inches.
>
> b – Areas around the Line 2 Quill Puller were not guarded with covers.

Section 1910.22(d)(1)

Section 1910.22(d)(1) provides:

> The employer must ensure . . . [w]alking-working surfaces are inspected, regularly and as necessary, and maintained in a safe condition[.]

(1) The Applicability of the Cited Standard

The cited standard is found in *Subpart D—Walking-Working Surfaces.* Section 1910.21(a) addresses the scope: "This subpart applies to all general industry workplaces. It covers all walking-working surfaces unless specifically excluded by an individual section of this subpart." Section 1910.21(b), the definition section, provides, "*Walking-working surface* means any horizontal or vertical surface on or through which an employee walks, works, or gains access to a work area or workplace location."

PSSI disputes the applicability of § 1910.22(d)(1) regarding Instance (b) (the drain underneath the quill puller) because "the drain was not in an area that was a walking or working surface." The Court considers this a dispute about the element of access, not applicability. The drain beneath the quill puller is embedded in the floor of the picking room, and the floor is a walking-working surface.

The Court finds § 1910.22(d)(1) applies to the conditions cited in Instances (a) and (b) of Item 1.

(2) The Employer's Noncompliance with the Standard's Terms

Instance (a): CSHO Bennett took photographs and measurements of two drains she determined were not maintained in safe condition. Exhibits C-3a, C-7, and C-9 show a 2-foot wide drain over which two covers are placed. The drain covers are rectangular metal grates with rods running lengthwise. The drain covers are not fitted next to each other but leave a gap of 7 to 10 inches (Tr. 42, 44). Exhibit C-11 shows a drain with a bent cover and a missing metal rod. The gap created by the missing rod was 7 inches (Tr. 46-47).

Instance (b): Exhibit C-13 shows the open drain underneath the quill puller. It has no cover (Tr. 61-62).

The Secretary has established PSSI failed to comply with the terms of § 1910.22(d)(1). The cited drains had inadequate covers or no cover at all, resulting in an unsafe condition.

(3) Employee Access or Exposure to the Violative Conditions

> To establish exposure, the Secretary must show that an employee was actually exposed to the cited condition or that access to the cited condition was reasonably predictable. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). . . . Reasonably predictable exposure is established by proving that "either by operational necessity or otherwise (including inadvertence) ... employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012)

> (citations omitted). Employees may come within the zone of danger "while in the course of assigned working duties, personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) ("'access,' not exposure to danger is the proper test"). The Secretary need not show it was certain that employees would be in the zone of danger, but he must show that exposure was more than theoretically possible. *Fabricated Metal Prods., Inc*. 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Phoenix Roofing*, 17 BNA OSHC at 1079; *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding that it was "'reasonably predictable' that an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

Calpine Corp., & Its Successors, 27 BNA OSHC 1014, 1016-17 (No. 11-1734, 2018).

Instance (a): During the walk-around inspection, CSHO Bennett observed PSSI managers Wilson and Sharp step over the drains, rather than walk around them (Tr. 56). They were leading Bennett and Martinez to the quill puller towards the back of the picking room. The path they took was the natural one an employee would take who was assigned to the quill puller.

> Q.: Did the route that required you to go over these drains, was that the most straightforward way to get to the . . . quill puller?
>
> Bennett: Yes.

(Tr. 48)

Counsel for PSSI attempted to discredit Bennett's appraisal of the hazard created when employees step over the drains. The Court finds the details she related regarding the way the managers stepped across the 2-foot wide drains to be well-observed and credible.

> Q.: Did you do any investigation, Ms. Bennett, as to what the average gait of a male or female employee is?
>
> Bennett: No, sir.
>
> Q.: Okay. So you wouldn't know if the drains are too wide to cause a tripping hazard?
>
> Bennett: Well, as I watched the managers kind of . . . it was an awkward, large step as they walked over it.
>
> Q.: Okay. So other than that alleged observation, you don't know if there was any actual -- you didn't do any other investigation as to determine whether or not the gait -- there was an issue of how far you had to step.
>
> Bennett: No, sir. I did not do an investigation as far as the average human gait. But I did observe them and the way they stepped over that drain.

(Tr. 137)

PSSI contends the circumstances of the walk-around inspection cannot be grounds for a violation of Instance (a) because it "occurred prior to PSSI completing the process to transition the picking room from production to sanitation. . . . PSSI placed orange cones on both sides of missing or broken drains prior to the shift beginning in order to alert PSSI employees to the hazard. Indeed, this is all that PSSI could do, as it does not own the drain covers for which it was being cited."[3] (PSSI's brief, p. 25) PSSI also repeats its argument that the picking room "was not yet PSSI's worksite, and there is no evidence in the record that Wilson or Sharp were exposed to the alleged hazard 'in the course of their assigned working duties.'" (*Id.*) The Court finds no merit in these arguments.

The record establishes PSSI employees working their regular shifts in the picking room were exposed to the unsafe condition during their assigned duties. Bennett testified manager Malik Brown told her the drains had been in the same condition for the year he had worked in the facility (Tr. 57). Employee #2 was the only witness to testify who worked in the picking room (Tr. 142-43). He agreed PSSI placed orange cones on either side of the faulty drains before the third shift began. He stated employees would arrive at the facility, clock in, and attend a safety meeting. PSSI supervisors would put the orange cones in place during this time (Tr. 152-155). The orange cones were meant "to get everyone's attention so they should be careful." (Tr. 155)

The orange cones did not prevent employees from stepping over the drains, and Employee #2 stated PSSI did not prohibit employees from doing so. He stepped over the drains at times. He stated, "The cones just told you to be careful. . . . That's why the cones were placed, for one to be careful when coming across any drainage area." (Tr. 157) He stated the drains were in the path of employees walking to their assigned work areas.

> Q.: [D]o you know whether you walked over this drain in this picture to get from . . . someplace you needed to go for work?
>
> Employee #2: Yes. One had to go over it when walking in that direction.

(Tr. 147)

[3] It is well-established an employer owes a duty to his own employees to protect them from a hazardous condition even if the employer did not create the condition. "[E]ach employer has primary responsibility for the safety of its own employees. Simply because a subcontractor cannot himself abate a violative condition does not mean it is powerless to protect its employees. It can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or in some instances provide an alternative means of protection against the hazard.... In the absence of such actions, we will still hold each employer responsible for all violative conditions to which its employees have access." *Grossman Steel & Alum. Corp.*, 4 BNA OSHC 1185, 1189 (No. 12775, 1975}.

Rob Lowe is PSSI's corporate safety director (Tr. 179). He agreed the orange cones were not intended to prohibit employees from stepping across the drains. The placement of the cones "alerts them of a hazard. They can determine on their own if it's safe to walk across it or not." (Tr. 279)

The Secretary has established it was reasonably predictable employees working in the picking room would have access to the unsafe drains. The orange cones placed by PSSI were not intended to prevent employees from stepping across the drains, but only to remind them to be careful when stepping across them. The Court finds Wilson and Sharp, as managers, were acting within the scope of their duties leading the CSHO and IH on the walk-around inspection. Furthermore, the alleged violation description of Item 1 states the violation occurred on April 25, 2017. PSSI had cleaned the picking room during the previous shift (beginning at 11:00 p.m. on April 24 and continuing into the early hours of April 25) and started the next shift on April 25 at 11:00 p.m. The PSSI employees working those shifts in the picking room were also exposed to the violative condition of the drains on April 25, 2017. Access to the violative condition is established for Instance (a).

Instance (b): CSHO Bennett testified the open drain under the quill puller created a hazard to employees assigned to doing the first knockdown.

> That employee will, again during the first knockdown, be around those areas, kind of climbing up and under the machines to get to the machine . . . so they would walk under this machine. . .. And it's typical when an employee's walking up under a machine, you have those overhead hazards as well, so you're not exactly looking at your footwork while you're doing that. So as they get up under there, that could have easily presented itself as a tripping hazard when they were doing this operation.

(Tr. 62) Bennett did not observe an employee performing the first knockdown on a quill puller, and she did not interview Employee #1 (Tr. 82, 105-06).

Corporate safety director Rob Lowe disagreed with Bennett's assessment of access to the open drain. He testified, "[I]t would be very difficult to cross this drain. There's too much equipment in the way." (Tr. 237) The statements of Bennett and Lowe represent the totality of the testimony regarding the drain at issue. CSHO Bennett took no measurements of the drain in relation to the quill puller. Exhibit C-13 is a photograph of a portion of the drain with parts of the quill puller visible above it. It is not clear from the angle of the photograph how accessible the drain is to anyone assigned to clean the quill puller, but it appears an employee would not be able

to step across it because of the machinery. Exhibit C-14, the video taken by Bennett, focuses on the point of operation of the quill puller and does not show the drain below it.

Employee #2, the only witness who worked in the picking room, did not testify regarding the reasonably predictable proximity of any of the sanitation employees to the drain. The Court concludes there is insufficient evidence to prove PSSI employees had access to the open drain under the quill puller.

Access to the violative condition is not established for Instance (b) of Item 1.

(4) The Employer's Actual or Constructive Knowledge of the Violation

"[W]here the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. . . . An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307–08 (11th Cir. 2013).

Bennett testified PSSI managers Wilson and Sharp had actual knowledge of the unsafe condition of the drains. Wilson was aware of the condition of the drains because she "would have had to have looked at the drains to not step on them. They are the width -- it's not normal to a regular gait, so it was wide enough that you would have to purposely step over them. . . . [Sharp] did the same thing. He stepped over the drains instead of [around] them." (Tr. 56)

Furthermore, it is difficult for PSSI to argue it had neither actual nor constructive knowledge of the violative condition when its corporate safety director testified the company started each work shift by placing cones on either side of the unsafe drains. "[O]ur drain policy is when we have an open or unattended drain, we have to place a -- and this could also be a damaged drain cover. We have to place an orange cone on both sides of the drain every four feet *to identify the hazard*." (Tr. 213) (emphasis added). This cone placement occurs nightly and is performed by supervisors.

> [O]ur supervisors walk the floor with a production supervisor. . . . At that point, we put out our orange cones. We prepare the area for sanitation for our employees to safely enter the area. . . We put out the orange cones *to identify, again, hazards*, and that can include drain covers that are broken, missing, that may not be present in the workplace.

(Tr. 214-15) (emphasis added)

The Court determines PSSI had actual knowledge, imputed through managers Wilson and Sharp, of the violative condition cited in Instance (a) of Item 1. PSSI also had actual knowledge

of the condition based on the continuing existence of the hazard and the company's policy of having supervisors mark the unsafe drains with orange cones.

The Secretary has established PSSI violated § 1910.22(d)(1) with regard to Instance (a).

Characterization of the Violation

The Secretary characterized the violation of § 1910.22(d)(1) as 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).

CSHO Bennett testified the most likely injuries resulting from the tripping hazard created by the unsafe drains were ankle sprains and broken ankles (Tr. 62). The violation is serious.

Item 2: Alleged Serious Violation of § 1910.212(a)(1)

Alleged Violation Description

Item 2 of Citation No. 1 alleges:

> On 4/17/17, at the work station located at 920 Queen City Parkway, Gainesville, Georgia, employees were exposed to amputation hazards as they were directed to clean the Line 2 Quill Puller that was not guarded.

Section 1910.212(a)(1)

Section 1910.212(a)(1) provides:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are-barrier guards, two-hand tripping devices, electronic safety devices, etc.

(1) The Applicability of the Cited Standard

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding* of the general industry standards. Section 1910.212 is captioned "General requirements for all machines." The quill puller is a machine and the cited standard applies to it.

PSSI argued at the hearing and in its brief that a more specific standard, the LOTO standard, applied to the quill puller during PSSI's shift, so 1910.212(a) does not apply. "Section 1910.22(a)(1) is a general standard that applies when a more specific standard does not. . . . PSSI's policy and procedure was to lock out the machine prior to cleaning it. Bennett admitted that if the machine is locked out, there is no hazard. There is no evidence that a locked out machine presents a hazard." (PSSI's brief, p. 26-27)

The Secretary strongly objected to the presentation of evidence by PSSI regarding a rule requiring employees to lock out the quill puller before they began the first knockdown on the machine. The Secretary argues in his brief that such evidence should be excluded. The Court allowed PSSI to present the evidence at hearing over the Secretary's standing objection (Tr. 195, 205). Upon review of the pleadings, discovery documents, and the hearing record, the Court has reconsidered that ruling and determines no weight should be given to evidence of PSSI's LOTO program. The Court will not consider evidence PSSI required employees to lock out the quill puller prior to cleaning it, for the reasons that follow.

No Weight Given to Evidence of LOTO Rule

The Secretary argues safety director Rob Lowe's testimony that PSSI required its employees to lock out the quill puller prior to cleaning "came as a complete surprise to the Secretary, who had been led to believe that the first knockdown of the quill puller was performed while the machine was running, and that employees performing the first knockdown were subject to Respondent's 'two foot rule,' which prohibits employees from getting closer than two feet from the rotating parts." (Secretary's brief, p. 5)

PSSI contends the LOTO standard is more applicable to the cited condition. This is an affirmative defense.

> Under Commission precedent, preemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer. 29 C.F.R. § 1910.5(c)(1); see Commission Rules 34(b)(3) and(4), 29 C.F.R. § 2200.34(b)(3) and (4); *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); *Vicon Corp*., 10 BNA OSHC 1153, 1157, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923,1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense). . . . Spirit neither raised this issue as a defense in its answer nor sought to amend its answer to add it. Therefore, we find that the argument was waived.

Spirit Aerosystems, Inc., 25 BNA OSHC 1093, 1097, n. 7 (No. 10-1697, 2014).

PSSI asserted nine affirmative defenses in its answer. Preemption of § 1910.212(a)(1) by the LOTO standard is not one of them (Answer, pp. 3-4). PSSI did not amend its answer to assert this defense.

PSSI also failed to raise the issue of the LOTO rule in the *Joint Prehearing Statement* filed by the parties on March 5, 2018, one week before the hearing in this proceeding:

F. Statement of Contested Facts

The Parties agree that the following facts are relevant and remain contested:

. . .

Citation 1 Item 2

11. Whether the machine identified in the citation was guarded.

12. Whether the machine identified in the citation was guarded by location.

13. Whether the injured employee engaged in unforeseeable and unpreventable misconduct.

14. Whether Respondent violated the standard at issue.

15. Whether Respondent had knowledge of the cited conditions.

16. The Respondent also believes the issues of whether the location near the machine at issue was a workstation, whether there was a hazard to employees, and whether the Respondent had knowledge of that hazard are in dispute.

(*Joint Prehearing Statement*, pp. 10-11)

Despite PSSI's failure to include the LOTO rule in the contested facts in the *Joint Prehearing Statement,* Lowe testified at the hearing it is PSSI's policy to lock out the quill puller before cleaning it (Tr. 186-87). The Secretary's counsel objected.

> [W]e have been proceeding with the understanding that it does not have to be locked and tagged out for the first knockdown. . .. So my interrogatory requests all rules, and the rules that I was given are just the lock-out/tag-out machine guarding that apply generally, and also do allow for working within two feet. I've never been provided any rule specifically to this machine or specifically requiring it to be locked and tagged out, even during the first knockdown. And, again, maybe that's an unwritten rule, but I asked it in an interrogatory, not a document. And so this is a complete surprise to the Secretary, completely unfair at this point.

(Tr. 188)

The Secretary's objection is supported by PSSI's answer to the Secretary's interrogatories and its own safety manual. Interrogatory 15 propounded by the Secretary to PSSI asks,

> Do you contend that your employees were, as of April 17, 2017, prohibited from cleaning that quill puller that is the subject of Citation 1, Item 2, while the machine was operating or operable? Identify all facts and evidence you contend support your response.

PSSI did not respond positively that it had a mandatory rule requiring employees to lock out the quill puller before cleaning. Instead, PSSI responded,

> Respondent's employees do not generally clean equipment while it is running. If equipment must be cleaned while it is running, employees must maintain a sufficient distance from the equipment while cleaning, as set forth in the Respondent's machine guard policy.

(Exh. C-15, p.10)

PSSI's safety manual, *Injury Illness Prevention Program,* (dated January 15) provides:

> In this industry it may be occasionally necessary to clean equipment or machinery while the equipment is running . . . In these cases PSSI employees shall remain a **Safe Distance** (Minimum 2') from the point of operation.

(Exh. R-1, p. 57) (emphasis in original)

As shown by PSSI's answer to the interrogatory and its safety manual, PSSI did not have a specific rule in place prohibiting employees from cleaning the quill puller while it is running or requiring them to lock out the machine first. PSSI's five managers present at CSHO Bennett's opening conference did not mention it was the company's policy to lock out the quill puller before cleaning it. PSSI did not assert as an affirmative defense that it required its employees cleaning the quill puller to comply with the LOTO standard, a more specific standard. PSSI did not identify compliance with the LOTO standard as an issue with respect to Item 2 of Citation No. 1 in the *Joint Prehearing Statement,* filed a week before the hearing. The only factual issue PSSI identified regarding compliance with the cited standard was "Whether the machine identified in the citation was guarded by location." No mention is made of whether the machine should have been locked out.[4]

[4] On December 15, 2017, PSSI filed the expert report of David Brani, whom PSSI planned to call as an expert witness. The Secretary moved to exclude the report and Brani's testimony, and the Court granted the motion on March 1, 2018, finding Brani's opinions in the report were impermissible legal conclusions. On March 5, 2018, the parties filed their *Joint Prehearing Statement*, in which they stated, "Respondent will call (or proffer) David Brani, Ph.D., P.E., Senior Engineer, Applied Technical Services, Inc., as an expert witness at trial in this matter. A copy of his expert report is attached as EXHIBIT A. . . . The Secretary objects to the attachment of the report because it has been excluded from evidence in response to his motion in limine." (*Id.*, p. 7) In the expert report, Brani states PSSI "determined that to effectively clean the machine's discharge that it needed to be operational." (*Id.,* Exh. A, p. 16 of 19). Brani also states that during his visit to the Pilgrim's Pride facility, PSSI "demonstrated their cleaning procedure for the Quill Puller discharge [and] . . . confirmed that their practice was to maintain at least a 2 foot buffer between any body part and the point of discharge." (*Id.,* Exh. A, p. 17 of 19) The Court refers to this report only to point out the Secretary's review of the document would not alert him PSSI was changing its ground for defense in Item 2 to argue implementation of LOTO. Rather, the document reaffirms PSSI's initial defense of implementation of the two-foot rule while cleaning the operating machine.

The Court determines that whether PSSI had a rule requiring its employees to lock out the quill puller before cleaning it is not an issue in this proceeding. Therefore, any exhibits or testimony referring to PSSI's LOTO program in general, or a purported specific rule to lock out the quill puller, will not be considered.[5] The Court will consider only PSSI's defense that it safely implemented the two-foot rule.

(2) The Employer's Noncompliance with the Standard's Terms

> In order to establish a violation of section 1910.212(a)(1), the Secretary must first prove the existence of a hazard." *Armour Food Co.*, 14 BNA OSHC 1817, 1821 (No. 86-247, 1990). "To prove an employer failed to comply with § 1910.212(a)(1), the Secretary 'must show that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated." *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No. 89-553, 1991). The mere fact that it is not impossible for an employee to come into contact with the moving parts of a particular machine does not, by itself, prove that the employee is exposed to a hazard.

Buffets, Inc., 21 BNA OSHC 1065, 1066 (No. 03-2097, 2005).

CSHO Bennett testified the quill puller was not guarded (Exhs. C-4a, C-5, C-14; Tr. 66). Safety director Rob Lowe testified it was, identifying silver parts and a bar in a photograph of the machine (Exh. R-24; Tr. 220, 261). Lowe personally had not viewed the quill puller and did not know the measurements from the point of operation to the parts he considered guards (Tr. 261-63). Cross-examination by the Secretary's counsel established the elements he considered guards would not prevent the PSSI employee assigned to clean the machine from accessing the point of operation.

> Q.: But you don't mean to say, when you refer to the bar across the top, that there's anything that physically makes it impossible for an employee to get into that pinch point, are you?
>
> Lowe: Not impossible. No.

[5] In his brief, the Secretary argues Lowe's testimony regarding its LOTO program should be excluded pursuant to Fed. R. Civ. P. 37[(c)](1), which provides: "If a party fails to provide information . . .the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." The Secretary argues PSSI failed to supplement or correct its response to interrogatories to alert the Secretary it was now relying on its LOTO policy as a defense in Item 2. The Court construes the Secretary's argument that Lowe's testimony should be excluded pursuant to Fed. R. Civ. P. 37(c)(1) as a motion to exclude his testimony. Under Commission Rule § 2200.40(a), "A motion shall not be included in another document, such as a brief or a petition for discretionary review but shall be made in a separate document." The Court denies the motion.

Q.: Okay. And am I right in understanding that in cleaning this area out in the quill puller, that an employee also has to clean inside where these augers are?

Lowe: They do.

Q.: And what about up underneath what you call a guard? Do they have to clean in there?

Lowe: They do hose that out. Yes.

Q.: Okay. And same with the bottom one? Do they have to hose that down, too, hose that out?

Lowe: That's correct.
. . .

Q.: In order to clean this out properly, how close does an employee have to get to this auger, whether it's running or not?

Lowe: Probably within a couple feet.

(Tr. 264-65)

Unlike Lowe, CSHO Bennett personally viewed the quill puller. She testified that to hose down all the required areas on the machine, the employee would need to move around it. There were no lines on the floor to demarcate a two-foot perimeter, and there was no physical barrier to the point of operation.

Q.: When employees clean off machines like the quill puller, are they stationary?

Bennett: No.

Q.: What are they doing?

Bennett: They are contorting to what -- however they need to get to the machine, whether it's standing on their tiptoes to get up over the machine, whether it's ducking down below it, around it, to the side of it. It's like washing a car. You're not going to stay in one spot to get the whole car clean. You're going to have to do the same thing to the machine that's -- they're working on.

Q.: Okay. Is it a wet environment?

Bennett: Yes.

Q.: Now, in this particular machine, the quill puller, were there any lines on the floor, denoting that two-foot limit?

Bennett: No.

Q.: Were there any barriers preventing them from going closer than two feet?

Bennett: No.

(Tr. 67-68)

The Court credits Bennett's testimony the point of operation of the quill puller was not guarded. She examined the machine, observed it in operation, and took measurements of it. Lowe had not seen the machine in person and was basing his testimony on his view of a photograph shown to him. He acknowledged he did not know the distances from the point of operation and the purported guards.[6]

The Court finds the Secretary has established PSSI failed to comply with the terms of § 1910.212(a)(1). Reasonably predictable exposure is established by proving that "either by operational necessity or otherwise (including inadvertence) ... employees have been, are, or will be in the zone of danger." *Nuprecon LP*, 23 BNA OSHC 1817, 1819 (No. 08-1307, 2012) (citations omitted). It was operationally necessary for the employee hosing down the quill puller to move around and focus on the machine while performing that task. Training employees to mentally observe a two-foot rule is insufficient to comply with the cited standard. It is reasonably predictable an employee moving around a machine while intent on hosing off feathers and chicken parts would inadvertently come too close to the point of operation. The Commission has long-recognized OSHA's machine guarding standard was designed to protect employees from common human errors such as "neglect, distraction, inattention or inadvertence. . . The standard was designed to provide against such human weaknesses." *Slyter Chair, Inc.*, 4 BNA OSHC 1110, 1112 (No. 1263, 1976). Section 212(a)(1) "implicitly recognizes that human characteristics such as skill, intelligence, carelessness, and fatigue, along with many other qualities play a part in an individual's job performance, and it avoids dependence on human conduct for safety." *B.C.*

[6] PSSI contends the quill puller was "guarded by location" within the meaning of § 5.9.1.1 of ASME B20.1-2012, *Safety Standards for Conveyors and Related Equipment.* Section 4 of that document defines "guarded by location" as "moving parts so protected by their remoteness from the floor, platform, walkway, or other working level or by their location with reference to frame, foundation, or structure as to reduce risk of accidental contact by persons or objects. . . . Unprotected danger points and areas that are inaccessible to the operating personnel in the normal performing of the duties shall be considered guarding by location." (Exh. R-16) The moving parts of the quill puller were not remote from the floor and their location with the frame, the foundation, and the structure of the machine did not reduce the risk of accidental contact by employees. Employee #1 was injured during his normal performance of his duties.

Crocker, 4 BNA OSHC 1775, 1777 (No. 4387, 1976). "The plain purposes of the standard are to avoid dependence upon human behavior and to provide a safe environment for employees in the machine area from the hazards created by the machine's operation." *Akron Brick & Block Co*., 23 BNA OSHC 1876, 1878 (No. 4859, 1976).

Training employees to observe the two-foot rule was inadequate to protect employees. The cited standard required a physical guard to prevent the employee performing the first knockdown from having access to the point of operation. The violation is established.

(3) Employee Access or Exposure to the Violative Conditions

> Employees may come within the zone of danger "while in the course of assigned working duties, personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976); *Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, 812 (3d Cir. 1985) ("'access,' not exposure to danger is the proper test"). The Secretary need not show it was certain that employees would be in the zone of danger, but he must show that exposure was more than theoretically possible. *Fabricated Metal Prods., Inc*. 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Phoenix Roofing*, 17 BNA OSHC at 1079; *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2195 (No. 90-2775, 2000) (finding that it was "'reasonably predictable' that an employee would come into contact with the unguarded belt and pulley either while attempting to reposition the fan, or inadvertently while passing nearby"), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001).

Calpine Corp., 27 BNA OSHC 1014, 1016-1017 (No. 11-1734, 2018).

It is undisputed Employee #1 was actually exposed to the point of operation of the quill puller—he suffered the amputation of one of his fingertips. This occurred while he was performing his assigned duty. Exposure to the violative condition is established.

(4) The Employer's Actual or Constructive Knowledge of the Violation.

The quill puller was not guarded. This was an obvious condition observable every night when PSSI supervisors walked through the picking room with the production supervisor. Lowe testified, "We inspect the floor before every shift. Our supervisors do the inspection with our clients. We also -- anytime a corporate-level employee is on site -- that could be an area manager, division manager, vice president, senior vice president; it could be the safety department[.]" (Tr. 252) "The Commission has held that 'the conspicuous location, the readily observable nature of the violative condition, and the presence of [the employer's] crews in the area warrant a finding of constructive knowledge.' *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1871, 1993-95 CCH

OSHD ¶ 31,207, p. 43,723 (No. 92-2596, 1996)." *KS Energy Services, Inc.*, 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008).

The Court finds PSSI had constructive knowledge of the violative condition of the quiller pull.

Characterization of the Violation

The Secretary characterized the violation of § 1910.212(a)(1) as serious. Employee #1 sustained an amputation of one of his fingertips. The violation is serious.

Unpreventable Employee Misconduct Defense

PSSI contends the injury to the hand of Employee #1 was the result of his unpreventable misconduct. To establish that a violation was the result of unpreventable employee misconduct an employer is required to show that it: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co*., 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007).

The unpreventable employee misconduct defense applies in situations where the behavior of the employee, not the existence of a violative condition, is at issue. Here, the violative conduct is the failure to guard the quill puller, not the inadvertent action of the employee. PSSI's reliance on the unpreventable employee misconduct defense regarding Employee #1 is misplaced. Neither PSSI nor Pilgrim's Pride installed a guard on the cited machine. PSSI's unpreventable employee misconduct defense fails.

CITATION NO. 2

Amended Item 1: Alleged Other-Than-Serious Violation of § 1904.40(a)

Alleged Violation Description

Item 1 of Citation No. 2, as amended by the Secretary, alleges:

> On 4/25/2017, the employer failed to provide current copies of the records it keeps under Part 1904 within four business hours after the Secretary's representative requested them.

Section 1904.40(a)

Section 1904.40(a) provides:

> When an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours.

(1) The Applicability of the Cited Standard

Section 1904.40(a) is found in *Subpart E--Reporting Fatality, Injury and Illness Information to the Government.* Section 1904.0 provides: "The purpose of this rule (part 1904) is to require employers to record and report work-related fatalities, injuries, and illnesses." Employee #1 sustained a work-related injury.

Section 1904.40(a) applies to the cited condition.

(2) The Employer's Noncompliance with the Standard's Terms

An authorized government representative includes the compliance officer who conducted the inspection. *See* § 1904.40(b)(1)(i). Pursuant to § 1904.29, an employer is required to maintain OSHA 300 and 300-A forms or equivalent forms. CSHO Bennett requested a copy of PSSI's OSHA 300 log of injuries. The copy she received did not have an entry for the April 17 amputation injury (Exh. C-2: Tr. 27-29). At the hearing, the parties entered this stipulation into the record, read by counsel for PSSI:

> Your Honor, the parties have agreed to stipulate that Emily Esser, an employee of Respondent Packers Sanitation Services, Inc., updated the OSHA 300 log for the Gainesville facility at issue, to include the injury amputation to [Employee #1] that formed the basis of the inspection in this case on Friday, April 21, 2017, at 8:32 a.m., as reflected in Exhibit R-14.

(Tr. 284)

Thus, PSSI updated the 300 log within seven days of receiving information that an employee injury occurred, in accordance with § 1904.29(b), but did not provide the updated log to the CSHO. PSSI contends it met the obligations of § 1904.40(a), claiming,

> [T]he Secretary argues that PSSI did not provide OSHA with its updated or current copy of the 300 log. OSHA, however, never specified to PSSI that it was requesting the "current" copy of its 300 log. Rather, the OSHA inspector, Bennett, only requested the 300 log and did not specify that she wanted a current or updated copy. Moreover, the standard does not require that the employer provide "current" copies of the logs; the standard only says "copies." "Current" is language that the Secretary has attempted to add to its citation that is not in the regulation. PSSI provided its onsite logs within four hours.

(PSSI's brief, p. 33)

"Current" records are accurate records, which the Secretary has emphasized bear a significant relationship to employee safety and health.

> OSHA injury and illness records are designed to be used by employers, employees, the public health community, and the government to learn about the injuries and illnesses that are occurring in American workplaces. See "Improve Tracking of Injuries and Illnesses," 81 FR 29623 (May 12, 2016). Accurate OSHA injury and illness records enable employers to identify, and correct, hazardous conditions, allow employees to learn about the hazards they face, and permit the government to determine where and why injuries are occurring so that appropriate regulatory or enforcement measures can be taken. . . . Thus, Congress viewed accurate records as necessary for the enforcement of the Act. 29 U.S.C. 657(c). Inaccurate or incomplete injury and illness records will leave all of the relevant parties underinformed, and thereby create an ongoing hazardous condition detrimental to full enforcement of the Act. The Commission has recognized as much. See, e.g., *Gen. Dynamics*, 15 BNA OSHC [2122,] 2131 n. 17 [(No. 87-1195, 1993)] (recordkeeping regulations "clearly are safety- and health-related"); *Johnson Controls,* 15 BNA OSHC at 2135-36 ("[A] failure to record an occupational injury or illness . . . does not differ in substance from any other condition that must be abated pursuant to . . . occupational safety and health standards . . .").

Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness, 81 FR 91792-01 (December 19, 2016).

The Court finds PSSI failed to provide accurate copies of its OSHA 300 log to CSHO Bennett within four business hours. Providing inaccurate copies is a violation of § 1904.40(a). A violation is established.

(3) Employee Access or Exposure to the Violative Conditions

Employee access to a hazard is not an element of the Secretary's burden of proof for a recordkeeping violation. "[T]he Secretary need not prove harm to any particular employee resulting from a violative record, to establish a violation." *Gen. Dynamics Corp*., 15 BNA OSHC 2122, 2132 n. 17 (No. 87-1195, 1993).

(4) Employer's Actual or Constructive Knowledge of the Violation.

PSSI's employee updated the OSHA 300 log for the Gainesville workplace on April 21, 2017. PSSI had an accurate copy of the log in its possession, yet it provided CSHO Bennett with an inaccurate copy. The employer was aware of its own actions. Actual knowledge is established.

CHARACTERIZATION OF THE VIOLATION

The Secretary characterized the violation of § 1904.40(a) as other-than-serious. "[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). As noted in the *Clarification,* recordkeeping violations are clearly safety- and health-related.

The violation is other-than-serious.

PENALTY DETERMINATION

"In assessing penalties, 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 Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity 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.,* 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted). "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." *Natkin & Co. Mech. Contractors,* 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973).

PSSI employees approximately 14,000 employees company-wide. OSHA had cited PSSI for safety violations within the five years prior to the Citation at issue (Tr. 64-65). The Court does not credit PSSI with good faith due to the knowledge of PSSI's supervisory knowledge of the longstanding unsafe conditions created by the inadequately covered drains and the unguarded quill puller. *Gen. Motors Corp., Cpcg Oklahoma City Plant*, 22 BNA OSHC 1019, 1048 (Nos. 91-2834E & 91-2950, 2007) ("Where GM's supervisory and managerial personnel knew of widespread noncompliance with the requirements of the LOTO standard by servicing and maintenance employees, and tolerated as well as encouraged such hazardous work practices, we see no basis on which to accord GM any good faith penalty credit.").

The number of PSSI employees exposed to the drains in the picking room is not clear in the record. Employees #1 and #2 worked in the picking room, and PSSI supervisors inspected the room and placed orange cones at the beginning of each shift. Exposure occurred on a nightly basis. The likelihood of injury caused by the inadequately covered drains and the unguarded quill puller is high. PSSI took no precautions against injury on the unguarded quill puller. The Court does not consider the placement of orange cones on either side of the unsafe drains to be an effective precaution against injury. The Court determines the gravity of Items 1 and 2 of Citation No. 1 is high.

Instance (b) of Item 1 was vacated. The Court determines the appropriate penalty for Instance (a) of Item 1 is $4,527.00. The Court assesses a penalty of $12,675.00 for Item 2.

With regard to Item 1 of Citation No. 2, the recordkeeping violation, the Secretary has highlighted the significance of maintaining accurate, updated records. "Inaccurate or incomplete injury and illness records will leave all of the relevant parties underinformed, and thereby create an ongoing hazardous condition detrimental to full enforcement of the Act." *Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness*, 81 FR 91792-01 (December 19, 2016). The Court determines a penalty of $1,811.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby **ORDERED**:

1. Item 1, of Citation No. 1, alleging a serious violation of § 1910.22(d)(1) is **AFFIRMED** as to instance (a), and a penalty of $4,527.00 is assessed; instance (b) is **VACATED** and no penalty is assessed.
2. Item 2 of Citation No. 1, alleging a serious violation of § 1910.212(a)(1), is **AFFIRMED**, and a penalty of $12,675.00 is assessed; and
3. Item 1 of Citation No. 2, alleging an other-than-serious violation of § 1904.40(a), is **AFFIRMED**, and a penalty of $1,811.00 is assessed.

SO ORDERED.

/s/

Date: February 11, 2019

Administrative Law Judge
Atlanta, Georgia