United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, COMPLAINTANT, v. GAVILON GRAIN, LLC, AND ITS SUCCESSORS, RESPONDENT.	Docket No. 18-0702

DECISION AND ORDER

Attorneys and Law firms

Danielle L. Jaberg, Esq., Attorney, Office of the Solicitor, U.S. Department of Labor, San Francisco, CA, for Complainant.

Patrick J. Barrett. Esq., Attorney, Fraser Stryker LLC, Omaha, NE, for Respondent.

JUDGE: Patrick B. Augustine, United States Administrative Law Judge.

I. INTRODUCTION

Pursuant to a local emphasis program ("LEP") targeting grain handling facilities, Complainant initiated a programmed inspection of Respondent's corn mill in Burley, Idaho. During her inspection, Compliance Safety and Health Officer ("CSHO") Joan Behrend observed an unguarded shaft bushing on a gear box and accumulations of grain dust around the exterior of the facility. (Ex. C-2, C-5, C-11 to C-19). Based on her observations, CSHO Behrend recommended, and Complainant issued under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678, a two-item Citation and Notification of Penalty ("Citation"), which alleged a serious violation of 29 C.F.R. § 1910.212(a)(1) and an other-than-serious violation of 29 C.F.R. § 1910.272(j)(1). Complainant proposed a penalty of $4712.00 for the guarding violation alleged in Citation 1, Item 1. Complainant did not propose a penalty for Citation 2, Item 1.

Respondent submitted a timely notice of contest, bringing the matter before the Occupational Safety and Health Review Commission ("Commission").

This case was designated to proceeding under the Simplified Proceeding Rules of the Commission. The Commission has adopted Rules for Simplified Proceedings, which apply in this case. *See* Subpart M of 29 C.F.R. Part 2200 (29 C.F.R. §§ 2200.200 - 2200.211). In Simplified Proceedings hearsay is admissible, "[p]rovided it is relevant and material," and under certain circumstances, "can constitute substantial evidence." *Bobo v. United States Dept. of Agriculture*, 52 F.3d 1406, 1414 (6th Cir.1995) (citation omitted) and the "Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious or unreliable. Testimony will be given under oath or affirmation." 29 29 C.F.R. § 2200.209(c).

A trial was held in Boise, Idaho. Only two witnesses testified at trial: (1) CSHO Joan Behrend; and (2) Respondent's Superintendent, Tarent Tevis. Though the rules for Simplified Proceedings allow for closing on the record, the parties filed post-trial briefs.[1]

Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. The Court finds Complainant failed to prove a violation of the guarding standard alleged in Citation 1, Item 1. The Court does find, however, Complainant established a violation of the housekeeping standard alleged in Citation 2, Item 1.

II. JURISDICTION

The parties stipulated to the Court's jurisdiction over this matter, and Respondent conceded it is an employer engaged in interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 12). *See Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir.

[1] Issues not briefed by the parties are deemed abandoned. *Georgia-Pacific Corp*., 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

2005). In addition to those jurisdictional matters, Respondent also agreed to withdraw affirmative defenses two and three from its Answer and conceded if the conditions existed as alleged in the Citation, it had actual knowledge of both citations. (Tr. 12, 15).

III. THE ACT, REGUL:ATIONS AND JUDICIAL PRECEDENT

The Act is meant "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). The Act imposes a general duty on employers to furnish employees a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." *Id.* § 654(a)(1). It also authorizes the Secretary of Labor to promulgate occupational safety and health standards. *Id.* § 655(a). The Act assigns enforcement and rulemaking authority to the Secretary, while assigning adjudicative authority to the Commission, an independent agency. *Martin v. O.S.H.R.C.*, 499 U.S. 144, 151 (1991). [2]

The Act did not create a strict liability regime. Under the Act, the employer is not made into "an insurer" of its employees. *Horne Plumbing & Heating Co. v. O.S.H.R.C.*, 528 F.2d 564, 570 (5th Cir. 1976). Rather, "the Act seeks to require employers to protect against preventable and foreseeable dangers to employees in the workplace." *W.G. Yates & Sons Constr. Co. v. O.S.H.R.C.*, 459 F.3d 604, 607 (5th Cir. 2006).

To implement its statutory purpose, "Congress imposed dual obligations on employers. Employers must first comply with the 'general duty' to free the workplace of all recognized hazards. 29 U.S.C. § 654(a)(1). They also have a 'special duty' to comply with all mandatory health and safety standards. *Id*. at § 654(a)(2)." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722

[2] The Commission serves as a "neutral arbiter" between the Secretary and cited employers. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a *court* in the agency-review context." *Martin*, 499 U.S. at 151, 154 (emphasis in original).

F.3d 1304, 1307 (11th Cir. 2013). The Secretary must establish his *prima facie* case by preponderance of the evidence. *See Hartford Roofing Co*., 17 BNA OSHC 1361 (No. 92-3855, 1995).

> "Preponderance of the evidence" has been defined as:
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> > The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014).

If the Secretary establishes all the elements of his *prima facie* case, the employer may then come forward and assert affirmative defenses. Respondent bears the burden of proving any affirmative defense by preponderance of the evidence. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993) *aff'd,* 28 F.3d 1213 (6th Cir. 1994).

A violation may be characterized as "willful," "repeat," "serious," or "other than serious," which shapes the penalty possibilities. *See* 29 U.S.C. § 666.[3]

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[3] A violation is considered "other than serious" when "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 and Warehouse Co*., 1 BNA OSHC 1219, 1222 (No. 1, 1973). A "serious" violation exists "if there is a substantial probability death or serious physical harm could result" from a condition or practice, "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). The Secretary need not show there is a substantial probability that an accident will occur; he need only show that if an accident occurred, serious physical harm would result. If the possible injury addressed by the regulation is death or serious physical harm, a violation of the regulation is serious. *Phelps Dodge Corp.* v. OSHRC, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993). Section 17(a) of the Act provides that a repeat violation may be predicated upon violations of "…the requirements of section 5 of the Act, any standard or rule promulgated under section 6 of the Act, or regulations prescribed pursuant to the Act. A section 5(a)(2) violation may therefore be repeated on the basis of either a section 5(a)(1) or section 5(a)(2) violation. *Potlatch Corp*., 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Commission has stated there are two ways in which Complainant can establish willfulness. First, the employer "knows of the legal duty to act," and, knowingly an employee is exposed to a hazard, nonetheless "fails to correct or eliminate the hazardous exposure." Second, the employer's state of mind was "such that, if informed of the duty to act, it would not have cared." *Branham Sign Co.,* 18 BNA OSHC 2132, 2134 (No. 98-0752, 2000). A willful violation is one committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *A.C. Dellovade, Inc.* 13 BNA OSHC 1017, 1019 (No. 83-1189, 1987). A willful violation is differentiated from a non-willful violation by a heightened awareness that can be considered as conscious disregard

IV. THE OSHA INSPECTION

Respondent's grain handling facility in Burley, Idaho is a small component of a fairly large company. According to CSHO Behrend, although the Burley facility only has 12 full-time employees, Respondent employs 1700 people nationwide (Tr. 39). Those 12 full-time employees are responsible for processing approximately 36,000 bushels of corn each day at a facility that has a one-million-bushel capacity. (Tr. 39). The corn is delivered to the facility by truck or by rail and is stored in seven large bins. (Tr. 184; Ex. R-18). The whole grain corn is transferred from these bins to the grinding building, where the corn is processed or "milled" into cattle feed. (Tr. 183; Ex. R-18). From there, the milled corn is transferred to overhead tanks, where local dairy farmers and cattlemen fill their trucks, drive across a scale, and pay based upon the weight of the milled corn. (Tr. 183; Ex. R-18).

A. The Unguarded Gear Box Bushing

During her inspection of the facility, CSHO Behrend came to a platform near the grinding building where she observed a gear box with a shaft bushing that was not guarded. (Tr. 60; Ex. C-5, C-9). The bushing, as illustrated in the photos and video was an exposed disc with protruding bolt heads that rotated at approximately 49 revolutions per minute. (Tr. 60, 61, 213; Ex. C-2, C-5, R-10). The rotating bushing is located roughly 8 inches above the ground and is partially blocked by an enclosed piece of machinery, which, in the photographs, is the large gray oval to the left of the bushing. (Tr. 84, 199; Ex. C-2, C-5, R-6, R-10). According to Tevis, the bushing was part of the gear box that drives a drag chain. The drag chain delivers whole grain corn to the leg that,

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of or plain indifference to the standard. *General Motors Corp. Electro-Motive Div.,* 14 BNA OSHC 2064, 2068 (No. 82-630, 1991). This test describes misconduct that is more than negligent but less than malicious or committed with specific intent to violate the Act or a standard. *Georgia Electric Co.,* 595 F.2d at 318-19; *Ensign-Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422-23 (D.C.Cir. 1983). The Commission has identified the employer's state of mind as the "focal point" for finding a violation willful.

ultimately, takes the whole grains to the grinder. (Tr. 194). This drag chain is operated remotely from the MCC room, which is located on the opposite side of grain holding bins 2 and 3. (Tr. 192–93; Ex. R-18).

According to CSHO Behrend's interviews, as well as Tevis' testimony, the only time an employee accesses the platform upon which the bushing is located is to perform maintenance on the drag and leg inside the boot pit, which occurs once every three months, or to pump out rainwater, which happens infrequently. (Tr. 194–98). Otherwise, employees walk in the areas surrounding the platform that houses the gear box to enter the grinder room and break room, but there was no indication any employee walks over, or even near, the platform as part of their line of travel. (Tr. 198). In order to perform the required maintenance, an employee lifts up the yellow hatch shown in Exhibit R-8, which is located roughly five feet away from the bushing, and climbs down the ladder to enter into the boot pit to grease various pieces of the machinery located below. (Tr. 194–99; Ex. R-7, R-6). According to Tevis, this procedure requires locking out both the drag and the leg, which is done from the MCC room and the grinder building, respectively. (Tr. 196–97). Gustavo Guzman, whom CSHO Behrend interviewed during her walkaround inspection, told her he locks out the equipment when he performs maintenance in the boot pit.[4]

B. Grain Dust Accumulations

On the other side of the whole grain holding bins are the ground corn tanks and the previously mentioned MCC room. Located between tanks A and B is what Tevis referred to as the North Green Leg, which presumably feeds the tanks with ground corn.[5] During her walkaround

[4]. Another employee, Jose Guzman, told CSHO Behrend he did not perform lock out; however, as will be discussed later in this opinion, it is unclear whether he understood what CSHO Behrend was asking both because he did not speak/understand English well and because CSHO Behrend did not specify which equipment she believed should have been locked out. (Tr. 139–40, 164–65, 167, 173–74).

[5]. This was not clearly specified at trial; however, given its location and the product the leg was carrying, the Court infers this was part of the process. "[T]he Commission may draw reasonable inferences from the evidence*[.]" Fluor*

of the facility's exterior, CSHO Behrend observed a build-up of material on and around the surfaces of appliances and boxes near the North Green Leg, which she identified as grain dust. (Tr. 90–91). These accumulations measured ¼ inch to 4 inches in depth and ranged in texture from hard caked to fine ground dust. (Tr. 88–91). She first observed these accumulations on the first day of her inspection, January 31, 2018, and again when she returned to the worksite the following day. (Tr. 92–94). When CSHO Behrend returned to the site, she gathered samples from four separate locations and sent them to the lab at OSHA's Technical Center in Salt Lake City, Utah. (Tr. 93–96). The lab's analysis showed 72% of the sample passed through a 40-mesh sieve after the sample was dried. (Ex. C-21). Respondent did not perform an independent analysis of the sample, nor did it have any basis to dispute the conclusions found in the report. (Tr. 206, 209).

According to Tevis, the accumulations observed by CSHO Behrend were not accumulated grain dust, but were the result of a spill coming from the North Green Leg, which he testified occurred the morning CSHO Behrend arrived. (Tr. 186-188). As Tevis described it, the drag line that feeds the North Green Leg became plugged because too much ground corn was in the system, which prevented the North Green Leg from taking the ground corn away fast enough. (Tr. 187). This caused the line to back up and the and expel the excess ground corn through a hatch at the end of the drag line and onto the ground. (Tr. 187). Tevis testified when the system backs up and expels excess grain through the hatch, a sensor trips and the drag line automatically shuts down. (Tr. 187).

Tevis testified the North Green Leg had backed up a few times before. (Tr. 189). When spills occur, Tevis testified the company housekeeping policy requires them to be cleaned within

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)). That said, the particulars of where the North Green Leg delivers ground corn is of little consequence to the outcome of this case.

48 to 72 hours. (Tr. 189; Ex. R-4). After a spill occurs, Tevis testified the company will assess whether to discard the spilled material or reintroduce it into the system. (Tr. 189). In this case, Tevis testified they were able to reintroduce most of the material identified by CSHO Behrend as fugitive grain dust. (Tr. 189). According to Tevis, the subject accumulations must have been the result of a spill because the area in question was cleaned the night before the inspection, which means all of the material, including the hard cake and dust, accumulated prior to CSHO Behrend's arrival at 11:30 a.m. on January 31, 2018 (Tr. 216).[6] As to the consistency of the material, Tevis testified it had rained in the area that morning, though local report submitted into evidence indicates otherwise. (Tr. 188; Ex. R-5).

V. LEGAL AND FACTUAL ANALYSIS

A. Citation 1

To establish a *prima facie* violation of a specific standard promulgated under section 5(a)(2) of the Act[7], the Secretary must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more

[6] Such explanation may clarify the accumulation of dust at the North Green Leg, however, it does not explain the accumulation of dust on appliances and other areas tested nor that some of the dust appeared caked.

[7] The Act contemplates performance standards, specification standards, and standards which combine both approaches. *Am. Iron & Steel Inst. v. OSHA,* 577 F.2d 825, 837 (3d Cir. 1978). Unlike a specification standard, which details precise requirements an employer must meet, a performance standard indicates the degree of safety and health protection required, but leaves the method of achieving the protection to the employer. Compliance with a performance standard is determined by whether the employer acted as a reasonably prudent employer would: [T]he employer is required to assess only those hazards that a "reasonably prudent employer" would recognize. *See W.G. Fairfield Co.,* 19 BNA OSHC 1233, 1235 (No. 09-0344, 2000), *aff'd*, 285 F.3d 499 (6th Cir. 2002); *see also*, *Thomas Indus. Coatings, Inc.,* 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) ("[P]erformance standards ... are interpreted in light of what is reasonable."). A reasonably prudent employer is a reasonable person familiar with the situation, including any facts unique to the particular industry. *W.G. Fairfield Co.*, 19 BNA OSHC at 1235; *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794 (No. 90- 998, 1992); *see also Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9th Cir. 1976). Under Commission precedent, industry practice is relevant to this analysis, but it is not dispositive. *W.G. Fairfield*, 19 BNA OSHC at 1235-36; *Farrens Tree Surgeons*, 15 BNA OSHC at 1794; *see* also *Smoke-Craft,* 530 F.2d at 845 (noting that in absence of any industry custom the need to protect against an alleged hazard "may often be made by reference to" what a reasonably prudent employer "familiar with the industry would find necessary to protect against this hazard"). *Associated Underwater Servs*., 24 BNA OSHC 1248, 1250 (No. 07-1851, 2012).

of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134 (No. 85-0531, 1991).

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1910.212(a)(1): One or more methods of machine guarding was not provided to protect the operator and other employees in the machine area from hazards such as those created by rotating parts:
>
> a) West of grinder shed: On January 31, 2018 and at times prior thereto employees working in the area of the small gray leg were exposed to a rotating shaft bushing on an electric motor gearbox. The rotating shaft bushing was not fully guarded.

See Citation and Notification of Penalty at 6.

The cited standard provides:

> On 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.

29 C.F.R. § 1910.212(a)(1).

1. Cited Standard Applies

Under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014)(concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *KS Energy Servs., Inc.,* 22 BNA OSHC 1261, 1267 (No. 06-1416, 2008)(finding "the cited ... provision was applicable to the conditions in KS Energy's traffic control zone"), *aff'd*, 701 F.3d 367 (7th Cir. 2012); *Active Oil Serv., Inc.,* 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005)(finding

"that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.,* 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004)("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions."

At trial, Respondent argued the gear box and associated shaft bushing were not "machines" under the terms of the standard. (Tr. 192). Tevis testified the gear box and shaft bushing were not a "machine" under the standard because they did not require an operator at the point of operation. (Tr. 215). Though Respondent appears to have abandoned that argument in its post-trial brief, the Court will briefly address the issue to remove any doubt as to the applicability of the standard.

Subpart O, which governs machinery and machine guarding, does not specifically define the term "machine". *See generally* 29 C.F.R. § 1910.211 (providing definitions for Subpart O). The title of § 1910.212, however, indicates the broad application of its terms: "General requirements for *all machines*." *Id.* § 1910.212 (emphasis added). Neither the plain language of the title nor any reference coming before or after it indicate an intent to limit the scope of the general guarding standard to a particular type of machine. Instead, the standard targets the hazards associated with working on or near machines, including "nip points, rotating parts, flying chips and sparks." *Id.* § 1910.212(a). The Commission has rejected similar attempts by employers that denied the standard applies to machines. *See Ladish Co.*, 10 BNA OSHC 1235 (No. 78-1384, 1981) ("The language of the cited standard, as well as the heading of section 1910.212, 'General requirements for all machines,' clearly indicates that the cited standard is generally applicable according to its terms to the hazards presented by the moving parts of all types of industrial machinery unless a more specific machine guarding standard applies."); *Ormet Corp.*, 9 BNA OSHC 1055 (No. 76-530, 1980) (finding standard applied to conveyor belts as "an integral part of the manufacturing process").

The gear box and associated shaft bushing are clearly integral parts of the machine and manufacturing process under the standard and Commission precedent. Further, the shaft bushing is a "rotating part" and, when viewed in isolation, presents the type of hazard contemplated by the standard. Accordingly, the Court finds the standard applies.

2. Employee Exposure to Hazard

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission's longstanding "reasonably predictable" test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing id.*). *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).[8]

The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr*. Co., LLC, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013)(*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction*, Co., 17 BNA OSHC at 1234; *Gilles & Cotting, Inc*., 3 BNA OSHC at 2003.

[8] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access", which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 3 BNA OSHC at 2002 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

Merely because the shaft bushing rotates and is not fully enclosed, however, does not mean Complainant established a violation of the standard. In order to do that, Complainant "must do more than show it may be physically possible for an employee to come into contact with the unguarded machinery in question. Rather, Complainant must establish employees are exposed to a hazard as a result of the manner in which the machine functions and the way it is operated." *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419 (No. 89-553, 1991) (citing *Armour Food Co.*, 14 BNA OSHC 1817, 1821 (No. 86-247, 1990); *Rockwell Int'l Corp.*, 9 BNA OSHC 1092, 1097–98 (No. 12470, 1980)).

The shaft bushing at issue is not a point of operation; indeed, as discussed earlier, the machine is remotely operated from the MCC room on the opposite side of the storage bins. Thus, Complainant's case is predicated on inadvertent contact with the rotating wheel. Complainant contends there are two scenarios under which such contact could occur, both based on the possibility of a slip and fall. First, Complainant argues the employees who perform preventative maintenance on the drag and leg are exposed to the hazard posed by the recessed bushing each time they enter the hatch adjacent to the gear box because the handles on the hatch present a tripping hazard. (Tr. 66, 74). Second, Complainant contends employees were exposed to a hazard by virtue of traveling through the area adjacent to the unguarded shaft bushing in order to get to the break room and other areas around the plant. (Tr. 68, 73, 77). In response, Respondent contends both scenarios only present a remote *possibility* of exposure but do not rise to the level of a hazard requiring the installation of a guard. Based on the location of the bushing and the infrequency of work performed in its vicinity, the Court agrees.

Of the two scenarios posited by Complainant, the one that presents the most likely case for exposure involves the employees who perform preventative maintenance below the platform. In

order to get below the platform, the employees must lift the yellow hatch illustrated in Exhibit R-7. (Ex. R-7). This hatch, according to Tevis, is approximately 5 feet away from the rotating bushing, which is roughly 8 inches above the ground. (Tr. 199). Looking at the bushing from the vantage point of the hatch itself, it is tucked behind and mostly covered by a gray pill-shaped box. (Ex. C-2, C-5, R-6).[9] According to CSHO Behrend, the handles on the yellow hatch presented a tripping hazard that could cause the maintenance employees to stumble into the rotating bushing, which, in turn could grab a sleeve or pant leg and cause injury.

This assessment was not based on an observation of Respondent's work practices but was based on CSHO Behrend's interviews with Respondent's employees. (Tr. 68). According to one of those employees, Gustavo Guzman,[10] the machinery in that area is locked out when he performed preventative maintenance in the boot pit below the hatch. (Tr. 164–66). Though Tevis testified Gustavo did not have full command of the English language, CSHO Behrend stated she was satisfied she and Guzman were able to communicate clearly about locking out the machinery, as they spoke about it at length. (Tr. 164–67). For some reason, however, CSHO Behrend placed little stock in her purportedly extensive conversation with Gustavo. Instead CSHO Behrend concluded the equipment was not locked out during maintenance because Jose Guzman, with whom she had a much shorter conversation, told her he did not lock out equipment.[11] (Tr. 169–70). Under cross-examination, however, CSHO Behrend admitted she did not specify which equipment she was referring to when she asked either Jose or Gustavo about locking out

[9]. For the purposes of clearly identifying the parts at issue, the Court will occasionally refer to the photographs submitted by Respondent. Though most of Respondent's photographs show the bushing after Respondent installed a guard, the pictures submitted by Respondent are still shots from a video, which resulted in blurry, hard-to-identify photos.

[10]. CSHO Behrend interviewed two employees with the last name Guzman—Gustavo and Jose. For ease of reference, the Court shall refer to them by their first names.

[11]. CSHO Behrend testified she also interviewed a Milton Hernandez; however, she could not remember whether he told her that he worked in the area around the platform. (Tr. 78). She concluded he was exposed to the hazard based primarily on her understanding of his job duties, which she found to be similar to those of the Guzmans. (Tr. 78–79).

equipment. (Tr. 175–76). Thus, the Court finds her conclusion on the issue of whether the bushing is locked out during maintenance carries little weight.

On the other hand, Tevis testified, consistent with Gustavo's statement to CSHO Behrend, both the drag line and leg are locked out during preventative maintenance. (Tr. 196). According to Tevis, the drag line, which is connected to the bushing at issue, must be shut down during preventative maintenance on the leg, because the leg would become backfilled with product if the drag continued to run. (Tr. 196–97). This is because the drag's job is to transport whole corn to the leg; thus, when the leg is shut down, so must the drag and its shaft bushing. (Tr. 197). Thus, in addition to safety-related reasons for locking out, there are practical ones as well. Based on his intimate knowledge of the process, along with its consistency with Gustavo Guzman's statements to CSHO Behrends, the Court credits Tevis' testimony over CSHO Behrends that the bushing is locked out during maintenance. The locking out of the drag line and leg during maintenance eliminates the hazard and employees coming into contact with or being exposed to it. In that regard, CSHO Behrend's finding of exposure incidental to maintenance is even more tenuous.

Equally tenuous is CSHO Behrend's conclusion that employees passing through the area surrounding the platform would be exposed to the rotating shaft bushing. According to the testimony, employees walk in the area surrounding the platform in order to access various buildings, including the break room and the grinding room. (Tr. 68, 77, 198). According to her testimony, however, the break room is roughly a one- to two-minute walk from the platform, and she did not indicate why or how employees would travel through this area to get to there. (Tr. 62). For that matter, it is unclear if the area in question is used as a regular path of travel through the plant or simply a place where employees might walk through on occasion; in fact, Tevis testified he could not think of a reason why anyone would be in the area immediately surrounding the

platform. (Tr. 198). CSHO Behrend testified she did not observe any employees in the area during the inspection; her only evidence of potential exposure came from her interviews with the Guzmans and Hernandez. CSHO Behrend testified Tevis told her people would "walk by" the area, but it does not appear any clarification was given as to how close employees would, or even could, get to the platform while walking by it, nor was there any evidence to suggest that it was a well-traveled area.

The Court finds CSHO Behrend's conclusions regarding the employees' exposure to a hazard were largely speculative. *See Ormet Corp.*, 9 BNA OSHC 1055 ("The only evidence of a hazard to employees [was] the compliance officer's opinion that the 'nip points' presented a danger."). The employees who performed preventative maintenance used a hatch that was roughly five feet from the partially obscured and low-to-the-ground rotating bushing. *See Jefferson-Smurfit*, 15 BNA OSHC 1419 (No. 89-553) (equipment operators not exposed to hazard when work duties placed them no closer than 16 inches to 2 feet away from nip points); *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072 (No. 93-1853, 1997) (finding no exposure where work area in front of machine presses were "large enough to allow employees to travel between assigned machines and maintain a distance of at least two feet from any point of operation"). Given the distance of the hatch from the bushing and its location, the Court finds, as the Commission did in the cited cases, it is highly unlikely Respondent's maintenance employees would slip and fall into the zone of danger. *See Jefferson-Smurfit*, 15 BNA OSHC 1419 ("[E]xposure to a hazard is not established where employees have sufficient space to walk past unguarded machinery such that contact with the hazardous nip points, while possible, is unlikely."). Such a scenario is even less likely considering the equipment is locked out during the once-per-quarter preventative maintenance and occasional water removal.

Likewise, the Court finds Complainant failed to show mere passers-by would be exposed to the purported hazard. There is simply no evidence to suggest this is a well-traveled area, nor was there any evidence or suggestion employees walked anywhere near the platform on their way through the area. *See, e.g., Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072 (finding no exposure where employees walking by machine presses were at least two feet away from partially exposed camshafts, which were "two feet above the floor and somewhat recessed from the outer edge"). Given the layout of the platform, employees walking by it would be at least the same distance, if not more, as the employees performing maintenance under the hatch. Instead, the Court agrees with Tevis that any potential exposure would most likely be the result of an intentional act. *See Armour Food Co.*, 14 BNA OSHC 1817 ("While it was physically possible for Armour's employees to reach into the mixer and touch the blades, the mere fact that it was not impossible for an employee to get his hands into the mixer blades does not demonstrate that the employee was exposed to a hazard.").

Because there is no evidence Respondent's employees were exposed to a hazard posed by the rotating bushing, the Court finds Complainant failed to establish a violation of 29 C.F.R. § 1910.212(a)(1). Accordingly, Citation 1, Item 1 shall be VACATED.

B. Citation 2

Complainant alleged an other-than-serious violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1910.272(j)(1): The employer did not develop and implement a written housekeeping program that established the frequency and method(s) determined best to reduce accumulations of fugitive grain dust on ledges, floors, equipment, and other expose [sic] surfaces:

a) North Green Leg: On January 31, 2018 and at times prior thereto the frequency and housekeeping methods established by the employer were not robust enough to keep up to 4 inches of fugitive, combustible dust from accumulating on and around the north green leg area.

See Citation and Notification of Penalty at 7.

The cited standard provides:

> The employer shall develop and implement a written housekeeping program that establishes the frequency and method(s) determined best to reduce accumulations of fugitive grain dust on ledges, floors, equipment, and other exposed surfaces.

29 C.F.R. § 1910.272(j)(1).

1. Cited Standard Applies

According to 29 C.F.R. § 1910.272(b)(1), the cited standard applies to "grain elevators, feed mills, flour mills, rice mills, dust pelletizing plants, dry corn mills, soybean flaking operations, and the dry grinding operations of soycake." Respondent's facility grinds corn into feed for livestock. (Tr. 183). Thus, the standard applies.

2. Cited Standard Was Violated

Respondent has a written housekeeping program. The issue in this case is whether the frequency and methods of housekeeping laid out in Respondent's program were sufficient for the purposes of addressing the accumulations observed by CSHO Behrend in the North Green Leg area of the plant. Complainant contends the amount of accumulations observed—up to 4 inches in one location—show the program was insufficient or, at the least, insufficiently implemented to comply with the terms of the standard. Respondent contends the accumulations observed by CSHO Behrend were not fugitive grain dust but the result of an overflow of spilled grain from a hatch on the leg, which was in need of repair. Additionally, Respondent argues its program adequately accounts for both spilled grain and fugitive grain dust. The Court disagrees.

Under Subpart R, fugitive grain dust "means combustible dust particles, emitted from the stock handling system, of such size as will pass through a U.S. Standard 40 mesh sieve (425 microns or less)." 29 C.F.R. § 1910.272(c). The standard for cleaning up fugitive grain dust depends on the location where it is found. If fugitive dust accumulations are found in a "priority" area, then such accumulations must be cleaned up once they exceed 1/8 of an inch. *Id.* § 1910.272(j)(2)(ii). The North Green Leg of Respondent's facility is located outdoors, which means it is not a priority area under the standard. *See Id.* § 1910.272(j)(2)(i). Spilled grain, on the other hand, is exempt from the definition of fugitive dust accumulation under § 1910.272(j)(4); however, Respondent's housekeeping program must still address procedures for cleaning up grain spills. *Id.* § 1910.272(j)(4).

CSHO Behrend took measurements of the accumulations around the North Green Leg, which were extensive, and found they ranged in depth from as little as one-quarter-of-an-inch to as much as four inches deep. (Tr. 102; Ex. C-2). She first observed these accumulations on the first day of her inspection and saw them again when she returned the following day when she returned to take samples. (Tr. 92–93). The accumulations ranged in consistency from powdery dust to hard caked material, which led CSHO Behrend to believe the accumulated material had been present for a while. (Tr. 91). She gathered samples from four separate locations, which she sent to the lab at OSHA's Salt Lake Technical Center. As noted above, 72% of the sample passed through a 40-mesh sieve and was determined to be combustible. (Ex. C-21). This qualifies the accumulations as fugitive grain dust under the definition supplied by the standard. Further, the dust was present on nearly every surface in the surrounding area, including elevated ledges, outlets, and equipment, just like the language in the cited standard. (Ex. C-2, C-11 to C-20). This was not

just a pile of spilled material, as Respondent has characterized it, as such a spill would mostly effect the floor area. As such, the Court finds the accumulations were fugitive grain dust.

While Respondent has a program that accounts for grain spills and fugitive grain dust in priority areas, it does not account for fugitive grain dust in places like the outside area of the North Green Leg. (Ex. R-4). Thus, while Respondent has a housekeeping program, it is incomplete. The grain dust was not found in a priority area, which requires it to be cleaned up once it meets the required 1/8-inch threshold. *See* 29 C.F.R. § 1910.272(j)(2)(ii). Nevertheless, the Court agrees with Complainant a combustible substance, especially one found adjacent to electric installations, should represent a higher priority than mere spills. Accordingly, the Court finds the standard was violated.

3. Employee Exposure to Hazard

Through her interviews, CSHO Behrend presented evidence Respondent's employees worked in the area around the North Green Leg. (Tr. 111–112). Respondent did not present any evidence to the contrary. Accordingly, the Court finds Respondent's employees were exposed to the hazard posed by the fugitive grain dust.

4. Employer Knowledge

At trial, Respondent stipulated that, if the conditions were shown to be a violation of the hazard, it had actual knowledge of those conditions. (Tr. 15). Indeed, Tevis testified the North Green Leg had a history of such accumulations. (Tr. 189). Accordingly, the Court finds Respondent had actual knowledge of the condition.

5. Classification

A violation is considered "other than serious" when "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 and Warehouse Co*., 1 BNA OSHC 1219, 1222 (No. 1, 1973). The Court agrees with the classification of Complainant as no evidence was put forth that the violative condition would result in serious injury or illness or death.

IV. PENALTY DETERMINATION

When a citation is issued, it may include a penalty amount. *See* 29 U.S.C. § 659(a). The penalty amounts proposed in a citation become advisory when an employer timely contests the matter. *Brennan v. OSHRC*, 487 F.2d 438, 441-42 (8th Cir. 1973); *Revoli Constr. Co.*, 19 BNA OSHC 1682, 1686 n. 5 (No. 00-0315, 2001). The Secretary's proposed penalties are not accorded the same deference the Commission gives his reasonable interpretations of an ambiguous standard. *See Hern Iron Works*, 16 BNA OSHC 1619, 1621 (No. 88-1962, 1994)(rejecting Secretary's contention that his penalty proposals are entitled to "substantial weight"); *Nacirema Operating Co*., 1 BNA OSHC 1001, 1003 (No. 4, 1972) (declining to agree with the with the result or methodology the Secretary used to calculate the penalties).

Complainant did not propose a penalty for Citation 2, Item 1, because it was characterized as other-than-serious. The possibility of a hazard coming to fruition under the circumstances described above was remote. In fact, CSHO Behrend testified the accumulations would probably not start a fire or explode on its own but only contribute to the continuation of a fire if one were to occur. (Tr. 108). As such, the Court sees no reason to depart from Complainant's recommendation. Accordingly, Citation 2, Item 1 shall be affirmed as am other-than-serious citation with no penalty to be assessed.

V. ORDER

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. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. Citation 1, Item 1 is VACATED.
2. Citation 2, Item 1 is AFFIRMED as other-than-serious, and no penalty is assessed.

SO ORDERED

/s/
Patrick B. Augustine
Judge, OSHRC

Date: October 21, 2019
Denver, Colorado