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

Secretary of Labor, Complainant v. Norman W. Fries, Inc. d/b/a Claxton Poultry Farms, Respondent.	OSHRC Docket No.: **17-0304**

Attorneys and Law Firms:

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JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

In September 2016, the Savannah Area Office of the Occupational Safety and Health Administration (OSHA) received notice of an accident at a Norman W. Fries, Inc., d/b/a Claxton Poultry Farms (Claxton Poultry) facility in Claxton, Georgia. An employee had suffered a compound fracture to his left forearm when his arm was pulled into a conveyor. Compliance Safety and Health Officer (CSHO) Frances Stevens-Matos conducted an investigation into the accident and recommended the Secretary issue Claxton Poultry a citation alleging a serious violation of 29 C.F.R. § 1910.212(a)(1) for failure to guard the ingoing nip-point on the conveyor. The Secretary issued the citation for which he proposes a penalty of $12,675.00. Claxton Poultry timely contested the citation, bringing the matter before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act).

I held a hearing in the matter on April 16, 2018, in Savannah, Georgia. The parties filed simultaneous post-hearing briefs on June 6, 2018.

For the reasons that follow, Item 1, Citation 1, alleging a violation of § 1910.212(a)(1) is **VACATED**.

JURISDICTION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 9). The parties also stipulated at all times relevant to this action, Claxton Poultry was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 9). Based on the parties' stipulations and the facts presented, I find Claxton Poultry is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Claxton Poultry operates a chicken processing and packaging facility in Claxton, Georgia. Companywide, it has approximately 250 employees (Tr. 107). The area of the facility at issue is the seasoning department. That department has 29 employees (Tr. 100). Employees in the seasoning department season, weigh, and package chicken parts for sale to fast food restaurants (Tr. 212).

The seasoning department consists of four processing lines. Monica Locke, who managed the department in 2016, described the process in that department. Employees dump chicken parts into a hopper (Tr. 209). The employees then weigh, season, and place the chicken in a tumbler or mixing tank (Tr. 209). Once mixed with the seasoning, the meat is placed on a conveyor to be placed into bags. "Scoopers" scoop the chicken from the conveyor into bags that they then weigh (Tr. 210). Each line has two scoopers who stand on opposite sides of the conveyor (Tr. 210). The scooper places the bag on the conveyor. The bag passes through a metal detector on its way to the "packer" who again weighs the bag, labels it, and places it in a box (Tr. 210-12; see also Exhs. J-1 p. 35; C-9).

During this process, chicken parts will occasionally fall from the bags onto the conveyor or onto the floor (Tr. 20, 214; Exh. J-2 p. 61). The employee tasked with cleaning the floor during the production process is called the "floor man." (Tr. 216) The floor man picks the fallen pieces of chicken off the floor with various tools or by hand (Tr. 29, 36, 199, 217). Using a hose, the floor man may spray pieces of chicken that have fallen under the equipment to move them to a more easily accessible location (Tr. 36, 189, 216). Acting as floor man was not a regularly

assigned job, but something an employee might be asked to do as chicken accumulated on the floor and when the employee was not doing another task (Exh. J-1 p. 39).

Claxton Poultry hired the injured employee two or three months prior to the accident. (Exh. J-1 p. 34). He had worked that time in the seasoning department primarily performing stacking jobs. On August 31, 2016, he had been "dumping" meat into the tumbler, a stage in the process that preceded the scooping process (Exh. J-1 p. 38). It was nearing the end of the shift and the injured employee had cleaned his area. Seeing this, the injured employee's supervisor, Pablo Cruz, directed him to clean the floors around line 2 (Exh. J-1 p. 39). The injured employee proceeded to do so. As he picked up a piece of fallen chicken, the injured employee's hand became caught by the underside of the conveyor belt. It was pulled into the ingoing nip-point of the conveyor, causing a compound fracture to his forearm (Tr. 73).

Claxton Poultry reported the injury to the Savannah Area OSHA office. CSHO Stevens-Matos was assigned to conduct an investigation of the accident. She began her investigation on September 8, 2016, by going to the Claxton facility (Tr. 75). She took pictures of the seasoning lines and a video of a demonstration of the process (Exhs. C-1, C-3, C-4, C-5, and C-9). She interviewed employees and management officials (Tr. 74). She measured the width of the conveyor, but took no other measurements (Tr. 129, 133).

Based on her investigation, CSHO Stevens-Matos concluded employees were exposed to a caught-in hazard caused by the ingoing nip-point on the underside of the conveyor belt (Tr. 103-04).[1] CSHO Stevens-Matos recommended Claxton Poultry be issued a citation alleging a serious violation of the standard at 29 C.F.R. § 1910.212(a)(1) for failure to guard the ingoing nip-point on the conveyor. The Secretary issued the recommended citation for which he proposes a penalty of $12,675.00.

DISCUSSION

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited

[1] This area is depicted in Exhibit C-4. A close-up of the nip-point is depicted in Exhibit C-5.

employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The cited standard at 29 C.F.R. § 1910.212(a)(1) reads,

> 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.

The Secretary alleges Claxton Poultry failed to guard the "nip-points on the return-rollers on the underside of the conveyor" on lines 2, 3, and 4 in the seasoning department, exposing employees to amputation hazards. CSHO Stevens-Matos testified employees designated as the floor person were exposed to the cited hazard as they picked up fallen chicken pieces from the floor in the event the employee falls or loses his balance (Tr. 84-85).

Applicability of the Standard

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding.* Section 1910.212 is captioned "General requirements for all machines." This standard applies to all machines not covered by a more specific standard. Claxton Poultry does not dispute the applicability of the standard to the conveyor. To the extent employees are exposed to injury from the ingoing nip-point of the conveyor, it must be guarded under § 1910.212(a)(1). The cited standard applied to the cited conditions.

Employee Exposure

The key issue in dispute is whether the Secretary has met his burden to establish employees were exposed to a hazard as alleged in the citation. Because § 1910.212(a) is a performance standard, the Secretary must establish the hazard addressed by the standard existed. *Con Agra Flour Milling Co.,* 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993). In this case, the Secretary must establish employee exposure to the ingoing nip-point on the underside of the conveyor belt.

In *Fabricated Metal Products, Inc*., 18 BNA OSHC 1072 (No. 93-1853, 1997), the Commission considered the question of employee exposure to the hazards posed by inadvertent contact with rotating machine parts. The Commission considered its prior holding in *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976), and *Rockwell Inter'l Corp.,* 9 BNA OSHC 1092 (No. 12470, 1980). In *Gilles & Cotting* the Commission addressed the general question of

employee exposure to hazards. The Commission set forth a test for employee exposure based on the principle of "reasonable predictability." 3 BNA OSHC at 2003. The Commission held that the Secretary bore the burden of proving "that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Id*. In *Rockwell Inter'l Corp.,* 9 BNA OSHC 1092 (No. 12470, 1980), the Commission specifically addressed employee exposure to hazards associated with machine operation. The Commission held,

> The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury. Whether the point of operation exposes an employee to injury must be determined based on the manner in which the machine functions and how it is operated by the employees.

Id. at 1097-98. Based on these two prior holdings, the Commission concluded,

> in order for the Secretary to establish employee exposure to a hazard [he] must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. We emphasize that, as we stated in *Rockwell*, the inquiry is simply not whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable.

Fabricated Metal Products, 18 BNA OSHC at 1074 (citations omitted). The Commission agreed with the judge the likelihood of contact was too remote to establish employee exposure. The Commission based this finding on evidence employees were never less than 18 inches from the rotating part during the course of their work, the CSHO never observed employees closer than 2 feet from the part even when walking past the machine, and that the parts were sufficiently blocked to prevent contact even in the event of a slip or fall.

The Secretary contends "there is no question that employees were exposed to the ingoing nip-point on the Seasoning Line conveyors." (Secretary's Post-Hearing Brief, p. 9) I disagree. Although there is no question the injured employee was exposed, the Secretary failed to establish this exposure was reasonably predictable as a result of the manner in which the conveyor functions and the way it is operated.

The Secretary's case is based largely on the speculation of CSHO Stevens-Matos regarding the potential for exposure. CSHO Stevens-Matos opined there were several ways in which an employee could be caught in the conveyer. She testified:

> For example, you may have an employee that is cleaning the floor in the area near the conveyor belt and when the employees goes down to pick up the chicken meat and then the employee goes up, they can lose their balance and move inward towards the conveyor belt as it is in motion.
>
> Another scenario is that the employee can get down to get the chicken piece off from the floor and as they get up they may reach in to support themselves. Like normally when we get down..or at least I do it, I may lose my balance. I may not have the strength to get up so I may support myself. Or an employee may support themselves as they get up.
>
> Or another scenario is that when an employee is working near this area they can have a piece of clothing or their personal protective equipment being caught in by the conveyor belt and then pulled into the rollers.

(Tr. 85). The underside of the conveyor is not smooth. CSHO Stevens-Mattos noted the employees wore protective gloves, sleeves, and smocks, all of which could be caught by the underside of the belt because it is not smooth (Tr. 104). Although it is theoretically possible for an employee to be exposed in the manner suggested by CSHO Stevens-Matos, the evidence presented by the Secretary fails to establish expsoure is reasonably predictable.

The Secretary argues this potential for employee exposure as described by CSHO Stevens-Matos was manifest in the accident. The fact of the accident, without more, is not sufficient to establish exposure based on CSHO Stevens-Matos's theory. *Cf. Calpine Corp*., 27 BNA OSHC 1014, 1016 n. 6 (No. 11-1734, 2018). The record fails to establish by a preponderance of the credible evidence how the injured employee came to be pulled into the ingoing nip-point of the conveyor. There were no witnesses to the accident. The injured employee did not testify at the hearing. Portions of this deposition testimony were admitted into the record as Exhibits J-1 and J-2. In his deposition, the injured employee testified he had reached down to pick up a piece of chicken that had fallen underneath the conveyor (Exh. J-2 p. 15). He testified "I raised up and I turned the wrong way and it caught my glove. By the time I realized it caught my glove, it pulled me all the way in." (Exh. J-2 p. 15) This testimony is not consistent with his statement to Claxton Poultry soon after the accident. The injured employee signed an incident report on September 2, 2016, that states "there was a piece of meat on the belt. He was trying to catch the piece of meat before it went around the belt. He states his green glove

got caught up in the belt or sprocket." (Exh. R-2) The injured employee testified the company nurse taking the statement was mistaken and that he signed the statement without reading it (Exh. J-2 pp. 20-21). I find this unconvincing.[2] The Secretary relies on this evidence as support for his position the scenarios posed by CSHO Stevens-Matos are more than speculation. This reliance is misplaced.

The Secretary presented no other evidence picking up fallen chicken placed employees in the zone of danger. There is no credible evidence employees reach under the conveyor to pick up chicken by hand. There is no evidence any employee has ever been exposed to the underside of the conveyor belt as a result of losing his or her balance and inadvertently reaching into it. According to the seasoning department employee who testified at the hearing, it was "not normal" for chicken to fall under the conveyor (Tr. 44). When chicken was under the conveyor, it was not the normal process to pick it up by hand (Tr. 29-30, 39). Nor does any part of the floor man job require coming in proximity to the conveyor belt (Tr. 40-41). CSHO Stevens-Mattos never observed the operation of the seasoning line or the job of floor man (Tr. 115). Where the Secretary puts forth no evidence that the employee exposure was part of normal operations and that no one had ever been exposed in this manner before, I am constrained to find any actual exposure was idiosyncratic and not reasonably predictable.

As seen in the photographic evidence, the conveyor is surrounded by a metal frame. Claxton Poultry posits the frame would prevent the employee from reaching the underside of the conveyor under the circumstances described by CSHO Stevens-Matos. The Secretary presented no objective evidence in support of his theory of access to the ingoing nip-point of the conveyor. The record contains no measurements of the cited equipment.[3] The Secretary has the burden to

[2] Because the injured employee did not testify in person, I am unable to assess his demeanor. There is evidence in the record of bias and/or self-interest which may have caused him to change his version of events. Claxton Poultry first opposed the injured employee's claim for worker's compensation and later terminated him. The injured employee's testimony was varying and uncorroborated by any other evidence. I find it unreliable. The company nurse testified in person at the hearing. Although she may have had some interest in supporting Claxton Poultry's position, I found her an otherwise credible witness.

[3] CSHO Stevens-Matos testified she could not take measurements of the conveyor, its surrounding frame, or the area around the conveyor because doing so would expose her to a hazard (Tr. 130). She was able to take a photograph of the underside of the conveyor (Exh. C-4) and to measure the width of the conveyor belt, suggesting she considered some proximity to the conveyor safe. When asked why she did not ask Claxton Poultry to lock out the equipment so she could take more complete measurements, she responded that because the inspection was not comprehensive, she had not assessed the efficacy of the company's lockout program (Tr. 130). There is no evidence CSHO Stevens-Matos requested and was denied the opportunity to review Claxton Poultry's lockout program for this limited purpose. Although I do not suggest CSHOs place themselves in harm's way during an inspection, where evidence is necessary to meet the Secretary's burden, the Secretary must endeavor to obtain it. If the Secretary obtained the

establish the frame did not prevent access to the hazard. The Secretary has not met this burden. On this record, Claxton Poultry's theory that exposure to the nip-point in the manner described by CSHO Stevens-Matos is not possible is as plausible as the Secretary's theory that it is.

The Secretary has failed to meet his burden to establish employee exposure to the ingoing nip-point on the conveyors on the seasoning line was reasonably predictable under the circumstances. The citation is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, Citation 1, alleging a serious violation of 29 C.F.R. § 1910.212(a)(1) is **VACATED**.

SO ORDERED.

/s/

Heather A. Joys

Administrative Law Judge
Atlanta, Georgia

Date: August 22, 2018

information in discovery, he failed to present it at the hearing. Failure to present this evidence seriously undermined the Secretary's ability to meet his burden of proof.