



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

SECRETARY OF LABOR,

Complainant,

v.

WAYNE FARMS, LLC,

Respondent.

OSHRC Docket No. 17-1174

ON BRIEFS:

Amy S. Tryon, Senior Attorney, Office of the Solicitor; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Kathleen J. Jennings, Esq.; J. Larry Stine, Esq.; Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA
For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

In September 2016, an employee of Wayne Farms, LLC, sustained serious injuries to his right arm and hand while working on a breeding machine at the company's poultry processing facility in Decatur, Alabama. Following the incident, the Occupational Safety and Health Administration conducted an inspection and issued Wayne Farms a one-item serious citation alleging a violation of 29 C.F.R. § 1910.212(a)(1) for failing to guard the "sprocket and chain system" on the breeding machine. Following a hearing, Judge Sharon D. Calhoun vacated the citation for lack of employee exposure to the alleged violative condition. For the reasons discussed below, we also vacate the citation.

BACKGROUND

Production Line 53 at the Wayne Farms poultry processing facility is equipped with an AccuFeeder breading machine that is used to bread chicken wings. Employees operate the AccuFeeder by pouring bags of flour through a metal grate covering the machine's hopper. The grate is equipped with a hinge on one side and a latch on the other, allowing it to be lifted up if the screw holding the latch down is removed. Inside the hopper—26 inches from its top and 24 inches below the metal grate—are mechanical paddles that activate and run when a sensor detects that more flour is needed. The operator typically fills the AccuFeeder with about four to five 50-pound bags of flour every ten to fifteen-minute cycle over the course of a shift.

The processing facility runs three shifts—two in the day and one overnight. Employees working the daytime shifts process the poultry while employees on the overnight shift thoroughly clean and sanitize the entire facility, including the inside and outside of the AccuFeeder. On the day of the accident, Employee #1 was operating the AccuFeeder, a task he typically performed on the one to several times a month the machine is used. While the machine was running, Employee #1 lifted the hopper's metal grate, which was unlatched at the time, and reached inside to clean flour out of the hopper. The paddles at the bottom of the hopper activated and caught his smock, pulling his arm and hand into the mechanism.

DISCUSSION

The Secretary alleges that Wayne Farms violated 29 C.F.R. § 1910.212(a)(1) because “employees were removing the . . . AccuFeeder grate to knock down breading that was resting along the sides of the machine exposing them to the unguarded sprocket and chain system.” Section 1910.212(a)(1), in relevant part, states:

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.

To establish a violation, the Secretary must prove that the cited standard applies, there was a failure to comply with the standard, employees were exposed to the violative condition, and the employer knew or could have known of the violative condition with the exercise of reasonable diligence. *See Briones Utility Co.*, 26 BNA OSHC 1218, 1219 (No. 10-1372, 2016); *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Here, the judge addressed the elements of noncompliance and exposure together, noting that the two elements “are merged in cases alleging a violation of § 1910.212(a)(1).” The

judge then vacated the citation based on what she found to be a lack of exposure, and on review both parties frame their arguments in terms of exposure.¹

We agree with the judge's decision to vacate the citation but find that the analysis is more accurately considered under the element of noncompliance. Compliance with § 1910.212(a)(1) is framed by the fact that it is a performance standard, which means "it states the result required . . . , rather than specifying that a particular type of guard must be used." *Aerospace Testing Alliance*, No. 16-1167, at 3 (OSHRC 2020) (quoting *Diebold, Inc.*, 3 BNA OSHC 1897, 1900 (No. 6767, 1976) (consolidated), *rev'd on other grounds*, 585 F.2d 1327 (6th Cir. 1978)). Performance standards "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007). The noncompliance question here, therefore, is whether the Secretary established that the grate covering the hopper was required to protect employees from "hazards such as those created by [the Accufeder's] point of operation, ingoing nip points, rotating parts, [or] flying chips and sparks." 29 C.F.R § 1910.212(a)(1).

To make this determination, we consider whether, given "the manner in which the machine functions and how it is operated by the employees," they are exposed to a hazard.² *Rockwell Int'l Corp.*, 9 BNA OSHC 1092, 1097-98 (No. 12470, 1980). In other words, for the Secretary to establish the exposure *to a hazard* required for noncompliance, 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." *Aerospace Testing Alliance*, No. 16-1167, at 4 (OSHRC 2020) (quoting *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1073-74 (No. 93-1853, 1997) (emphasis added)). Therefore, the occurrence of the operator's injury here does not, by

¹ The parties have stipulated to the applicability of the cited standard.

² As we recently observed in *Aerospace Testing Alliance*, the noncompliance element in machine guarding cases overlaps with (as the judge in this case found), but is not identical to, the exposure element of the Secretary's prima facie case. *Aerospace Testing Alliance*, No. 16-1167, at 4 n3 (OSHRC 2020). Thus, as was the case there, the injury sustained by Employee #1 here is only relevant to assessing actual exposure and would likely satisfy that element of the case if we were to reach that issue—it is not a substitute for establishing noncompliance as a separate element. *See Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) ("Exposure to a violative condition may be established either by showing actual exposure or that access to the hazard was reasonably predictable."), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished).

itself, establish that Wayne Farms failed to comply with § 1910.212(a)(1).³ Indeed, noncompliance in this case hinges on whether the operator's actions were reasonably predictable given the machine's normal operation.

As the judge found, “[t]here is no dispute . . . that flour adheres to the interior of the [AccuFeeder's] hopper—that is why the sanitation team cleans it after the second shift every night.” What is in dispute “is whether the hopper needs to be *manually cleaned* in addition to the automated clean out at the end of the second shift.” (emphasis added). The judge concluded manual cleaning was not required and therefore “employees are not,” in the regular course of operation, “required to place their hands below the plane of the metal grate.” On review, the Secretary disputes this finding, pointing primarily to the testimony of Employee #1, the injured operator, that he was instructed to place his hands into the hopper to remove caked flour.

Having reviewed Employee #1's testimony, as well as that of Randall Jordan, the team leader of Line 53, and Joshua Wiley, a batch operator, we agree with the judge that manual cleaning of the hopper was not required during the AccuFeeder's normal operation. Employee #1 was the only witness to testify that manual cleaning was required and, as the judge found, his testimony was internally inconsistent on this point. Indeed, he first testified that he “was taught” by team leader Jordan to open the grate and “stick [his] hand in,” but then testified that he was “never [told to] stick [his] hand in the grate[.]” In addition, in a signed statement to the OSHA compliance officer, he stated that “nobody” “taught” him to place his hand inside the hopper to clean out flour. Based on these inconsistencies, as well the judge's demeanor-based credibility finding that Employee #1 was “nervous and ill-at-ease” while testifying, we decline to credit his testimony regarding the operation of the AccuFeeder.⁴ See *E.R. Zeiler Excavating Inc.*, 24 BNA OSHC

³ For the reasons set forth in our analysis, the judge correctly concluded that a guard was not required here. At the same time, however, she rejected the company's claim that the metal grate on top of the hopper was in fact an appropriate guard, positing that “[i]f guarding were required on the AccuFeeder hopper, the metal grate was [an] inadequate [guard] when the latch bolt was not tightened.” On review, Wayne Farms argues that the judge erred in finding that the grate was an inadequate guard. We need not address this issue, however, because we find that the Secretary has not established a hazard or violative condition based on the way the AccuFeeder functions and how it is operated such that a guard was required.

⁴ The record also supports the judge's determination that Employee #1's claim that he needed to reach into the hopper to clean flour at the end of the second shift in preparation for the sanitation shift was not credible. The accident occurred at approximately 11:00 p.m., and there were

2050, 2057 (No. 10-0610, 2014) (appropriate for Commission to defer to judge’s demeanor-based credibility findings when supported by the record).

Moreover, all of the other Wayne Farms employees testified to the contrary. Team leader Jordan denied training Employee #1 to clean flour from inside the hopper with his hand and testified that to do so was a violation of the company’s safety rules. Jordan also stated that on the one occasion when he observed Employee #1 committing this violation, he “told him not to do it anymore.” And, although the judge found Jordan, like Employee #1, to be “nervous and ill-at-ease,” she credited the majority of his testimony over that of Employee #1 to the extent it was corroborated by other witnesses. Specifically, the judge noted that batch operator Wiley—who she found “credible based on his confident, straightforward demeanor and his logically consistent testimony”—corroborated Jordan’s testimony that he did not train Employee #1 to reach into the hopper and that Jordan had warned Employee #1 not to do so.⁵ Jordan explained that he “saw [Employee #1] that one time and I told him don’t do that, you know, it’s not safe to do that. And that’s the only time I actually saw him myself, but he was witnessed by a couple of other – my other people, Josh [Wiley] and Khai [Reed].” Jordan also testified that if flour was present on the inside of the hopper, it could be knocked off by striking the outside of the machine.

Batch operator Wiley, who the judge credited, testified that he personally told Employee #1 not to reach into the hopper, as did another operator, Khai Reed. Supervisor Keith Powell, who the judge found credible based on his demeanor, also testified that there was never an operational problem with flour caking on the inside of the hopper and the machine’s self-cleaning feature took care of any remaining flour left at the end of the second shift. Numerous other witnesses, including

approximately 2,000 pounds of chicken left to process which, therefore, would have required adding five to six bags of flour.

⁵ The Secretary points to Wiley’s testimony for the proposition that flour frequently caked on the inside of the hopper, which according to the Secretary, necessitated cleaning prior to the sanitation shift. But when asked whether there were “any problems with flour caking,” Wiley said “No.” He then made no mention of cleaning the machine prior to sanitation, but simply referred to his attempts to clean the AccuFeeder of excess flour when switching from orange to white flour. Wiley noted he only attempted to do this when switching from orange flour to white since the orange color would “cover [the white flour] up.” And he made clear that in those instances, he was “not going to stick [his] hand in there” but rather would “find something like a piece of metal or something that’s not going to harm the side of it . . . [and] tap a little bit to try to get what [flour] you can.” Even in tapping the side of the machine, he testified that there was no operational need to raise the grate on the AccuFeeder.

Jordan, EHS specialist Douglas Posey, and former shift manager Renaldo Knox, testified that when Employee #1 was injured, he admitted to them that he knew he should not have placed his hand inside the hopper. Also, testimony from Posey, which was confirmed by a training record submitted into evidence by Wayne Farms, shows that new employees were instructed during orientation not to reach into the moving parts of a machine.

Finally, while Employee #1 claims that he intentionally opened the grate and reached into the hopper every time he operated the AccuFeeder, his personal practice—which was inconsistent with all the other operators who testified—does not establish the machine was normally operated in a way that contemplated or anticipated such entry.⁶ *See Rockwell*, 9 BNA OSHC at 1097-98. On the contrary, the record establishes that Employee #1’s act of reaching into the moving parts of the hopper—which the parties do not dispute are located 24 inches below the grate—was the intentional, idiosyncratic behavior of only one employee. No other employees regularly did this and, as discussed above, Employee #1 was warned by team leader Jordan and his fellow operators not to reach into the hopper when he was observed doing so.⁷ *See Armour Food*, 14 BNA OSHC at 1821 (Secretary failed to establish hazard requiring machine guarding where employees had no reason to put their hand in the machine and it was difficult to do so).

⁶ Nor do we find Employee #1’s estimate that he reached into the hopper “maybe 40 ... [or] 50 times” accurate as the record does not support his claim that the AccuFeeder was run twice a week, and it is undisputed that he was employed by Wayne Farms for approximately four months before he was injured.

⁷ That this conduct was not company practice is supported by team leader Jordan’s testimony that on the one occasion he observed Reed reaching into the hopper, Jordan verbally reprimanded him and did not observe Reed engaging in that misconduct again.

For all these reasons, we conclude that the Secretary has failed to establish that the AccuFeeder's point of operation posed a hazard such that Wayne Farms was required to guard the machine under § 1910.212(a)(1). We therefore vacate the citation based on the Secretary's failure to establish Wayne Farms' noncompliance with the cited standard.⁸

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: September 22, 2020

⁸ Because we have found that the Secretary failed to establish noncompliance, we need not reach the elements of exposure or knowledge, or Wayne Farms' unpreventable employee misconduct defense.



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Secretary of Labor,
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Wayne Farms, LLC,
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OSHRC Docket No.: **17-1174**

Appearances:

Thomas J. Motzny, Esq, Esq.
Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee
For Complainant

J. Larry Stine, Esq.
Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

On January 18, 2017, an employee of Wayne Farms, LLC, sustained serious injuries to his right arm and hand when he reached into a breeding machine at a poultry processing facility in Decatur, Alabama. A compliance safety and health officer (CSHO) of the Occupational Safety and Health Administration investigated the incident and recommended a citation be issued to the employer. On June 7, 2017, the Secretary issued a one-item Citation and Notification of Penalty to Wayne Farms, alleging a serious violation of 29 C.F.R. § 1910.212(a)(1) of the *Machinery and Machine Guarding* standard, for failing to guard the sprocket and chain system of the breeding machine. The Secretary proposes a penalty of \$11,950.00 for the alleged violation.

Wayne Farms timely contested the Citation. The Court held a hearing in this matter on March 27 and 28, 2018, in Decatur, Alabama. The parties have filed briefs. Wayne Farms contends the breeding machine was adequately guarded or, alternatively, any violation of the cited standard resulted from unpreventable employee misconduct

For the reasons discussed below, the Court **VACATES** Item 1 of the Citation.

JURISDICTION AND COVERAGE

Wayne Farms timely contested the Citation on June 30, 2017. The parties stipulate the Commission has jurisdiction over this action and Wayne Farms is a covered employer under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) (*Joint Prehearing Statement*, ¶¶ E.1-3; Tr. 9). 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 Wayne Farms is a covered employer under § 3(5) of the Act.

BACKGROUND

Wayne Farms operates a poultry processing facility in Decatur Alabama. At issue here is Line 53, a production line where chicken wings are precooked (Tr. 18-19, 220). Two of the components of Line 53 are the Nothum machine (the batter) and the AccuFeeder machine (the breader), which form the breading line (Exh. C-1). Employees dump bags of flour through a metal grate on top of a hopper attached to the AccuFeeder. The grate is affixed to the machine with hinges and can be lifted. It is equipped with a latch whose bolt can be tightened with a tool, so the latch cannot be moved, thus ensuring the grate cannot be lifted. Prior to the accident, however, the latch's bolt was not tightened and was loose enough to move by hand. Paddles (sometimes transcribed as "pedals" in the transcript) operated by a chain and sprocket mechanism at the bottom of the hopper move the flour through the AccuFeeder, where other paddles continue to move it along as it breads chicken moving through the line. The paddles at the bottom of the hopper are 26 inches from the top of the hopper and 24 inches from the metal grate (Exh. R-13; Tr. 209, 325-26). The paddles do not run continuously but activate when a sensor detects the batter needs more flour. Employees on Line 53 do not run the AccuFeeder every day (Tr. 20, 51, 124).⁹

Wayne Farms runs three shifts daily. The first shift begins at 7:30 or 8:00 a.m. and ends at 3:30 p.m., when the second shift starts (Tr. 300). Employees on the second shift continue to process the order started by the first shift and continue until it is completed. For example, the order for the day may require the two shifts together to process 200,000 pounds of chicken. When the second shift starts, the first shift may have processed half that amount. The second shift does not end until the day's order is completed. The second shift may end any time from 10:30 p.m. to 1:00 a.m. (Tr. 19, 36).

⁹ The AccuFeeder is shown in photographic Exhibits C-2a, 3a, and 4a, taken as part of OSHA's investigation. At the time the CSHO took the photographs the AccuFeeder had been cleaned, taken offline, and set aside in another part of the facility (Tr. 46).

The AccuFeeder operator dumps flour into the hopper from bags brought in on pallets. The operator dumps four or five bags into the hopper at a time. In a typical day, the operator may use 225 to 300 bags of flour. The AccuFeeder takes approximately 15 minutes to process one bag of flour. At the end of the second shift, the AccuFeeder operator pushes a button on the Nothum machine to activate the automatic clean out of the AccuFeeder. The remaining flour is released from the machine and is collected in buckets or tubs by the operator. The third shift is dedicated to the sanitation department, which thoroughly cleans the facility, including the inside and outside of the AccuFeeder (Tr. 19, 36-37, 70).

Wayne Farms hired Employee #1 to work on Line 53. He worked from September 8, 2016, to January 18, 2017, when he sustained serious injuries after lifting the metal grate on the AccuFeeder hopper and reaching into the hopper (Tr. 17). His duties on Line 53 were to assist with the marinating process and, on days when it was in use, to operate the AccuFeeder (Tr. 20). He had previously worked in the quality control department of another poultry processing facility but had not performed the type of work Wayne Farms assigned to him (Tr. 18).

Keith Powell supervised Line 53 at the time Wayne Farms hired Employee #1. Powell moved to another line about a month later, and shift manager Ronaldo Knox became the supervisor for Line 53. Knox had authority over the other supervisors working the second shift. The other employees working the second shift on Line 53 were the Team Leader, the Batch Operator, Employee #2, and Employee #3. The employees wore smocks, gloves, and slip-resistant boots as personal protective equipment (PPE) (Tr. 21-22, 24).

At approximately 11:00 p.m. on January 18, 2017, Employee #1 lifted the metal grate on the top of the AccuFeeder's hopper and reached into it to remove flour that had stuck to its inner walls. The paddles at the bottom of the hopper activated and caught his smock sleeve, pulling his arm into the mechanism. He was unable to reach the stop button and called for help. Several employees rushed to the area. Supervisor Powell hit the stop button but Employee #1's arm was caught in the mechanism. A maintenance employee used a grinder to cut through the hopper in an effort to free Employee #1, but the process caused the metal to heat up and burn Employee #1. Eventually the employees managed to extricate his arm, and they took him to the facility's first aid station and then to the hospital (Tr. 48-50, 53-54, 306).

Employee #1 has not returned to work since his accident (Tr. 17). He described the extent of his injuries.

I went to the hospital in Decatur and they transported me by ambulance to a Huntsville hospital. The Huntsville hospital advised that I was going to need surgery. So the next morning I had surgery where they put -- they put two metal plates in my arm because I broke both bones in my arm. And they put pins in my fingers, but after a day or two they [saw] where my fingers weren't getting [any] circulation and they . . . [weren't] coloring right, so I had another surgery and that's when they amputated my two fingers. So I went to therapy maybe four or five months. And in therapy my therapist, she realized I wasn't getting too much range of motion with my thumb with me losing those fingers, she requested that I should see a doctor -- I mean think about surgery. So my doctor sent -- my first doctor, he sent me to a hand specialist which let me know that he could get one of the ligaments from one of the fingers that I lost and wire it up to my thumb, which he did.

(Tr. 54-55)

CSHO Benjamin Bailey inspected the facility and investigated the incident from January 26 to May 25, 2017. He took photographs and measurements of the Nothum and AccuFeeder machines and interviewed Wayne Farm employees. Based on his inspection, he recommended the Secretary issue the Citation that gave rise to this proceeding.

SAFETY TRAINING

Although § 1910.212(a)(1) addresses the employer's duty to guard machinery adequately, the parties focused primarily at the hearing and in their briefs on the safety training provided by Wayne Farms.

Wayne Farms provided safety training during orientation for each newly hired employee. According to Douglas Posey, the environmental health and safety (EHS) specialist for Wayne Farms, on the first Monday of a new employee's work schedule, the employee is screened for drugs and meets with a human resources representative. The following Wednesday, a Wayne Farms safety representative presents a three-hour safety class, beginning at 9:00 a.m. (Tr. 253, 255-256).

Posey presented the safety class attended by Employee #1 (Tr. 256). The first page of Exhibit R-15 is a copy of the *New Employee Safety Orientation Checklist* signed and dated by Employee #1.¹⁰ The new employee is instructed to initial the space beside each of the thirty-two

¹⁰ This page and several other signed and dated pages in Exhibit R-15 are dated "9-8-16." The Court takes judicial notice September 8, 2016, fell on a Thursday that year (Monday, September 5, 2016, was Labor Day). Documents given to Employee #1 the first day of orientation (a Monday, according to Posey) were also dated "9-8-16." (Exhs. C-12 & R-4)

topics listed on the checklist as the instructor addresses it. Employee #1 initialed each space, including the one for machine guarding (Exh. R-15, p. 230).¹¹

The safety training includes the following relevant instructions, some of which were presented in a Power Point slideshow (all forms of emphasis in the original):

Do not reach into any type of machinery without first shutting the machinery off.

(Exh. R-15, p. 231)

NEVER PLACE YOUR HAND OR ANY PART OF YOUR BODY IN OR ON MOVING EQUIPMENT.

(Exh. R-15, p. 233)

MACHINE GUARDING

1. **GUARDS MUST BE IN PLACE BEFORE OPERATING ANY MACHINERY.**
2. **ONLY AUTHORIZED PERSONNEL MAY REMOVE GUARDS AFTER EQUIPMENT HAS BEEN LOCKED OUT.**
3. **REPORT ANY MISSING OR DEFECTIVE GUARDS TO YOUR SUPERVISOR AT ONCE.**
4. **NEVER PLACE YOUR HAND OR ANY PART OF YOUR BODY IN MOVING MACHINERY.**

(Exh. R-15, p. 235)

Causes and controls for preventing pinch point injuries

General Info

A Pinch Point is produced when 2 objects come together and there is a possibility that a person could be caught or injured when coming in contact with that area. Pinch points commonly impact fingers/hands, but can impact any area of the body. The injury resulting from a pinch point could be as minor as a blister or as severe as amputation or death. Conveyors, gears, loaders, compactors and other moving equipment are examples of machinery with pinch points.

Common Causes of Injuries from Pinch Points

...

Reaching into moving equipment and machinery.

(Exh. R-15, p. 236)

¹¹ The page numbers cited for Exhibit R-15 refer to the Bates Numbers.

NEVER PLACE YOUR HAND OR ANY PART OF YOUR BODY IN MOVING MACHINERY.

(Exh. R-15, p. 242)

NEVER REMOVE ANY MACHINE *GUARD*, COVER OR SCREEN UNLESS AUTHORIZED TO DO SO AND THE EQUIPMENT HAS BEEN LOCKED OUT.

(Exh. R-15, p. 244)

Never remove any machine guard cover or screen. ... All guards, covers, screen barriers, etc., must be in place before any machine is started.

Never place your hand or any part of your body in moving machinery.

(Exh. R-15, p. 245)

AMPUTATIONS

...

Recognize and avoid amputation hazards through guarding, safe work practices, employer training, administrative controls, and operating in a safe manner.

The best way to prevent amputations caused by stationary or portable machinery is with machine safeguarding:

- Guards provide physical barriers to hazardous areas. They should be secure and strong, and employees should not be able to bypass, remove, or tamper with them. Guards should not obstruct the operator's view or prevent employees from working.
- ...
- LOTO: To reach into equipment with any part of your body, you must be Lockout Tagout Authorized Trained.

Remember:

- You are never required to reach into a place of equipment that you have not been trained to lock out for safety. If you are requested to, stop and report this to your Manager or Safety at once.
- Never reach into any belt, chain, pump, fan, motor, auger, machine drain, hose, evisceration equipment, debone equipment, or other as you can be instantly caught in the equipment and seriously injured.
- Amputations can disfigure and even kill.
- If you see any person working unsafely, report this your supervisor.
- Never remove or bypass a guarding device exposing you to danger.
- Report any missing or damaged guarding at once and do not operate equipment until the guarding is replaced or repaired.

(Exh. R-15, p. 246)

WITNESSES

Eight witnesses testified at the hearing: three employees who worked on Line 53 (Employee #1, the Team Leader, and the Batch Operator), two line supervisors (Keith Powell and Ronaldo Knox), two Wayne Farm safety representatives (Douglas Posey and Robert Fleming), and CSHO Benjamin Bailey. Following are summaries of the employee witnesses' testimony relating to safety training.

Line 53 Operators

Employee #1 (The Injured Employee)

Employee #1 testified he attended the safety training presented during orientation but stated that in three or four hours both the human resources representative and the safety instructor covered all topics required for orientation.

We talked about everything, insurance, 401(k), a little safety. It was just -- orientation is -- I don't know if you guys ever had a regular job, but orientation usually they fly through it. It's supposed to be three, four hours, sometimes it may be an hour and a half. It's just constantly people coming in, telling you different things about the job that we're going to start. And it's pretty much they fly through it. . . . [T]hey run little [safety] films and, like I said, some -- everybody comes in and speaks and talks to us and tells us which department and which different things. And we sign and they give us a paper. We're filling out papers when we should be watching the film. And pretty much that's what we do.

(Tr. 56-57) Nevertheless, Employee #1 acknowledged that by the end of orientation he understood he was not to place his hand past a guard or reach into a machine without turning it off first (Tr. 81, 83).

Initially, Employee #1 stated he had been trained in the operation of the AccuFeeder only by the Team Leader. He then stated supervisor Powell taught him to use the AccuFeeder, telling Employee #1 "all you have to do is pretty much like dump the flour. He was like it's kind of self-explanatory. It was like just don't let it run out. He was like if you let it run out, that's you. That's going to be on you. But other than that, it was -- it was pretty much self-explanatory until like at the end of the shift when they wanted you to clean it out." (Tr. 42)

During OSHA's investigation, Employee #1 gave a signed statement to CSHO Bailey, who asked who had taught him to lift the metal grate of the hopper and reach his hand in to clean flour from the inside. Employee #1 replied, "Nobody." At the hearing he stated he observed the Team

Leader perform that action “once or twice” the first day he saw the AccuFeeder in operation (Tr. 61).

Employee #1 alternated between testifying the Team Leader taught or trained or showed him to lift the metal grate and reach inside the hopper to clean off the flour and testifying he merely observed the Team Leader do so the first day he saw the AccuFeeder in operation (Tr. 35, 37, 60-63, 71). He stated he used this method to clean out the hopper “[e]very single time” of the forty to fifty times he operated the AccuFeeder during the months he worked for Wayne Farms (Tr. 40).¹² He claimed the Team Leader observed him perform this action “[a]lmost every time” and never said anything to him about it (Tr. 41). Employee #1 believed “that was the regular thing to do and that’s what [the Team Leader] showed me.” (Tr. 42) He claimed he could not tap on the outside of the hopper to knock the flour off the inner walls because that would activate sensors that would stop the AccuFeeder’s operation (Tr. 39). He stated neither supervisor Keith Powell nor supervisor Ronaldo Knox saw him lift the metal grate and reach inside the hopper (Tr. 42, 76).

Employee #1’s rationale for reaching inside the hopper changed over the course of his testimony. At first, he explained the Team Leader had trained him to perform the action to prepare the AccuFeeder for the sanitation department to clean it during the third shift.

At the end of a shift they call it clean out because they don't want -- they don't want a lot of flour left in the machine for when sanitation comes in and they start spraying it down and it will probably get all clumped up if there's a lot of flour left in the machine. So we will have to clean, make sure the flour is all out of the machine and is out of the breader. Cleaning out the batter. . . . [The Team Leader] showed me that the flour that's stuck on the sides of the machine, you have to knock it down in there to get it all out in order for the flour to run through the breader into the batter. To get all of it out.

(Tr. 37)

Employee #1 did not apply the same reasoning to the flour covering the outside of the AccuFeeder.

Q.: Was that machine always just so covered up with flour you couldn't clean it up with your hands or brush it off, did you not worry about the outside at all?

Employee #1: No.

¹² Employee #1 testified the Line 53 employees ran the AccuFeeder “maybe twice a week.” (Tr. 20) The Team Leader stated they ran the machine “maybe three times a month.” (Tr. 149) No other employee witness testified on this point.

Q.: It could be as dirty as you want because sanitation was going to clean it up, right?

Employee #1: It was just flour.

Q.: It was just flour. The same thing on the inside as the outside, it was just flour.

Employee #1: Yes.

Q.: And sanitation was going to clean up the outside, right?

Employee #1: Uh-huh, yes.

Q.: And they were going to clean on the inside, too, weren't they?

Employee #1: I assume, yes.

(Tr. 72)

Later in his testimony, Employee #1 switched his reasoning for why he lifted the metal grate and reached inside—it was to reduce waste.

Employee #1: [I]f the flour is on the edge [of the inside of the hopper], there is going to be enough to cover what's left [of the chicken].

Q.: So you would do that and you put your hands in instead of putting another bag of flour in it?

Employee #1: Yes, because they didn't want waste. If I dump a whole other bag of flour and the flour that's on the edge can cover the chicken that's left on the belt and then I done dumped that whole bag of flour in there, so then when I get all the machine -- clean it out, I done cleaned out a whole bag of flour and that's waste.

Q.: So you would open up a guard and stick your hand in to avoid some waste?

Employee #1: Yeah, because that's what I was taught.

Q.: Who taught you to -- who told you, . . . “I want you to stick your hand in the guard, so we don't have any wasted flour.”?

Employee #1: No, they never said stick my hand in the grate or nothing like that.

Q.: Okay.

Employee #1: But they made sure that there's no waste. They don't want [any] waste on anything. Not only flour but anything.

(Tr. 73)

Later still, Employee #1 reverted to his original reasoning, denying he could have left the residual flour in the hopper for the sanitation department to clean. He continued to struggle with explaining how Wayne Farms communicated this duty to him.

Q.: Isn't it a fact. . . that you could have just simply left [the flour] there and sanitation would have cleaned it?

Employee #1: No.

Q.: You don't think sanitation would clean it?

Employee #1: I don't. It was just -- I was told that it was my duty to make sure there wasn't [any] flour left inside of the breeder.

. . .

Q.: Nobody told you [that] you needed to put your hand inside the guard to clean the sides.

Employee #1: Told and showed --

Q.: Did anyone ever tell you . . . in order to clean this side, "I want you to open the guard and put your hands inside the guard and slide down the flour?"

Employee #1: Well, [the Team Leader].

Q.: You said [the Team Leader] didn't teach you that, you said you saw him do it . . . once or twice.

Employee #1: When he was talking to me, when he was showing me he was -- it was pretty much self-explanatory.

Q.: Okay. So now your story is that you didn't learn it from observation, but now this was part of the training process that [the Team Leader] did, right? Is that that you're saying now?

Employee #1: I wouldn't say just like training where I had to sign something and on that nature. It was pretty much like, you know, "[T]he flour is going to be stuck on the side, this is how I usually do it," and he just showed. You know, he showed.

Q.: Did he tell you those things? Did he say, . . . "[I]f the flour's stuck on the side here's how I normally do it," and he knocks it down?

Employee #1: Yes.

. . .

Q So now your story has changed and now you're saying [the Team Leader] sat there and opened it up, put his hands down and said this is the way we do it.

Employee #1: No, I didn't -- I'm not really saying that he specifically said this is what I want you to do. He was like this is what we do, this is how I usually do it when the machine -- when the flour is stuck on the side, that's what -- and I observed. Like you said, I observed. I wouldn't say he taught me. I pretty much saw him, and he was talking[.]

(Tr. 98-100)

The Team Leader

The Team Leader disagrees with Employee #1's statements regarding his training. He testified his training of Employee #1 was "[b]asically 'Just dump bags. . . Dump bags, watch the way the breader comes out at the exit end. It tells you when to add breader.'" (Tr. 122-23) He denied he told Employee #1 to avoid waste and stated he never instructed him or showed him to lift the metal grate and reach inside the hopper to knock flour off the inner walls (Tr. 123, 135). Employees would sometimes tap the outside of the hopper to knock flour down from the inside walls. This tapping did not activate the sensor to stop the machine (Tr. 143). The Team Leader also disputed Employee #1's claim Line 53 ran the AccuFeeder twice a week. He estimated they ran the machine two or three times a month (Tr. 124, 149).

The Team Leader described the method for cleaning out the AccuFeeder at the end of the second shift.

Team Leader: At the end of the shift, like I said, there's a control panel. It has "AccuFeeder clean out" and all the -- it tells you every aspect of that machine. Every belt, every blower, everything that's in it. There's a control panel. At the end of the night you cut your AccuFeeder off. On the exit end here there's two handles that pulls back. And there's a conveyor underneath that runs across the bottom of the feeder here. That you just open it up and it just feeds the breading out. You're just cleaning out the machine. . . . [W]e have a big tub we put under there.

Q.: So you put a big tub on it and the AccuFeeder rolls out from that. When that auto-clean function is done, are you all -- is that what you considered when you said that we want to empty the flour?

Team Leader: Yes, sir.

Q.: Does it matter to you that there would be flour on the side, on the inside of the AccuFeeder at the end of that process?

Team Leader: No.

Q.: Who's going to take care of that flour on the side?

Team Leader: Sanitation.

Q.: Sanitation, all right. So there was no need to put your hands inside the grate and open it up?

Team Leader: No, sir.

Q.: Are there any operational reasons at all to put your -- to lift that grate up and put your hand in?

Team Leader: No, sir.

(Tr. 134-35)

The Team Leader testified he had observed Employee #1 lift the metal grate and reach into the hopper. "I told him don't do that, you know, it's not safe to do that. And that's the only time I actually saw him myself, but he was witnessed by a couple of other—my other people, [the Batch Operator] and [Employee #2]." (Tr. 127) The Team Leader stated he informed supervisor Powell he had seen Employee #1 reach into the hopper (Tr. 127-28). The Team Leader learned that another Line 53 employee, Employee #2, was seen reaching into the hopper a couple of days after he started working. The Team Leader warned him not to do that (Tr. 136).

The Team Leader acknowledged that in his statement to CSHO Bailey made during the inspection, he said he warned Employee #1 not to reach into the hopper "at least two times a week." (Tr. 148) At the hearing he stated he warned Employee #1 more than once and "more than enough times to know that he shouldn't have" reached into the hopper (Tr. 149).

The Team Leader testified the night of the accident, he was at the other end of the line when he heard Employee #1 screaming. It was approximately 11:00 p.m. and approximately 2000 pounds of chicken remained to be processed. The remaining chicken would require the operator to dump five or six (250 to 300 pounds) more bags of flour into the hopper to complete the order—it was not, therefore, the end of the second shift (Tr. 128, 140).¹³ The Team Leader testified that

¹³ In his brief, the Secretary contends the Team Leader contradicted himself, stating on direct examination "that it was the end of the shift when Jackson was hurt. Tr. at 128. On cross-examination, he said that it was not. Tr. at 140." (Secretary's brief, p. 11) The Team Leader's testimony was not inconsistent. On direct examination, this exchange occurred: "Q.: 'About what time was [the accident], do you remember?' Team Leader: '11:00, a little after.' Q.: 'Was that *near the end of the shift*?' Team Leader: 'Yes, sir.'" (Tr. 128) (emphasis added) On cross-examination, he testified

when Employee #1's arm was pulled into the paddles' mechanism, he yelled, "Y'all told me not to do this. Y'all told me not to do this. Y'all told me not to stick my hand in." (Tr. 140)

Batch Operator

The Batch Operator worked second shift on Line 53 with Employee #1 (Tr. 362). He testified Wayne Farms held monthly safety meetings and at every meeting employees were instructed never to remove guards from machinery (Tr. 364-65). "Machine guarding, we got a lot of training. The number one key in machine guarding is we do not remove it. We are not allowed to. It's common sense. When there's a machine guard on there, I'm not maintenance so it's not our responsibility to remove it." (Tr. 364) Employee #1 attended the same meetings (Tr. 365).

The Batch Operator agreed with the Team Leader's statements regarding the issue of flour sticking to the inside walls of the hopper.

Q.: Is there any operational reason to raise the guard on the AccuFeeder?

Batch Operator: No.

Q.: Is there ever any problems with flour caking on the side?

Batch Operator: No. Now when we do -- like when there's a change over or something like that, you know, me personally I'm not going to stick my hand in there. I'm going to find something like a piece of metal or something that's not going to harm the side of it, it's not going to dent or nothing, tap a little bit to try to get what breader you can. . . . There's no way you can get it out. I mean you have to take a hose to actually really clean it out the way it's supposed to be.

(Tr. 366)

He also corroborated the Team Leader's description of cleaning out the AccuFeeder at the end of the second shift. "What we do is, I turn around, I hit the modem for clean out. There's a door on the back of the breader, you pull that door open and there's a chute that comes out. You take your buckets and it puts the breader in there. And whatever breader is left around the sides of it, it stays there for sanitation to clean. Because like I said you can't clean it out unless you use a hose." (Tr. 367)

The Batch Operator was aware Employee #1 had removed the metal grate and reached into the hopper more than once. "I [saw] him one time doing it and I told him not to, that you can wind

it would have taken five or six bags of flour to process the remaining chicken. Q.: '[S]o you weren't yet at the end of the shift.' Team Leader: 'No.'" (Tr. 140)

up hurt. I know [Employee #2] has told him not to. . . . [The Team Leader] told him not to[.]” (Tr. 373) The Batch Operator did not report the actions of Employee #1 to management. “[Employee #1] didn't do it quite often. I can't recall how many times he's done it, but I know I told him at least once or twice I do believe. . . . When I [saw] him and I had the discussion with him, he quit doing it. He stopped. And I was explaining to him, you know, you can get your hand caught. I mean you can get hurt. . . . So there was no need to go to safety because I kind of felt like he, you know, the way I was explaining it to him that he understood.” (Tr. 373-74)

At the time of the accident, the Batch Operator observed there was “half a hopper” left of chicken to be processed, which he estimated was about 5,000 pounds or less. It was not the end of the shift (Tr. 376-77). The Batch Operator heard Employee #1 state, “I shouldn't have done it, I don't know why I done it,” after his arm was caught in the paddles of the hopper (Tr. 370).

Line Supervisors

Keith Powell

Keith Powell was the production supervisor for Line 53 at the time Wayne Farms hired Employee #1 (Tr. 219). His explanation of the clean out process for the AccuFeeder at the end of the second shift accorded with those of the Team Leader and the Batch Operator.

Powell: At the end of the shift it's got a touch screen on the actual Nothum. You go to clean out mode, you hit a button and it self-clean -- like I said, it did everything for you. You had to do nothing that was physically demanding or taking anything apart or loose or anything. I mean you clean it out -- it cleaned out and we left it. Sanitation comes on on third shift and they do all the hard cleaning or the -- you know, chemicals and all that kind of stuff.

Q.: Pressure washer?

Powell: Yes, sir, they cleaned everything. We would never -- production doesn't do any of that kind of stuff.

Q.: Did you ever instruct any of the employees that you had to do more than just run the auto-cycle to get the flour out of the Nothum and the AccuFeeder?

Powell: No, sir.

(Tr. 226-27)

Powell denied the Team Leader ever reported to him that Employee #1 had been observed reaching into the AccuFeeder hopper. If he had received that report, Powell stated he would have disciplined Employee #1. “[Y]ou get caught doing something unsafe you're going to be suspended

for three days pending an investigation.” (Tr. 230) He was unaware Employee #2 had been observed reaching into the hopper and he had not disciplined him for it (Tr. 237).

Ronaldo Knox

Ronaldo Knox was the second shift production manager at the time of Employee #1’s accident. At the time of the hearing, he was working as a shift manager at Perdue Farms (Tr. 294-45). He stated that in his time supervising Line 53 he neither saw anyone remove the metal grate from the AccuFeeder hopper and reach inside, nor did he receive a report of such activity (Tr. 302, 308, 312). The night of the accident, Knox heard Employee #1 state, “I shouldn’t have done that.” (Tr. 307)

Wayne Farms Safety Representatives

Robert Fleming

Robert Fleming is Wayne Farms’s safety manager (Tr. 318). He supervises safety specialist Douglas Posey and two safety techs (Tr. 254, 319). Prior to Employee #1’s accident, he had received no reports employees were lifting the metal grate and reaching into the AccuFeeder hopper (Tr. 321-22).

Fleming was responsible for implementing a stricter safety policy at Wayne Farms four months before Employee #1 began working there.

In May of 2017 we rolled out a new safety disciplinary policy where a violation of a safety policy would result in a three-day suspension for the first offense and a termination for a second offense within 12 months. Of course, all safety violations we will look at the severity of it, the condition of, what’s going on with the facts surrounding it and it may not require that. But general guideline, if it is a safety violation it’s going to be a three-day suspension for first offense. And then we made sure that all supervisors are aware of that. Prior to us getting that policy rolled out, you know, some supervisors they didn’t want to be hard on their employees, I mean as you can see. But some were very strict.

(Tr. 340-41)

The night of the accident, Fleming was awakened by a phone call from Posey informing him of the circumstances. He drove to the facility and began investigating the accident. He noted there was approximately 2,000 pounds of chicken remaining to be processed, which would require five or six more bags of flour to be dumped in the hopper (Tr. 343).

Douglas Posey

Posey is the EHS specialist for Wayne Farms. He presented the orientation safety class to Employee #1. Posey described the structure of the monthly safety meetings held at Wayne Farms. “The safety department -- the monthly safety training is a breakdown of the new orientation. It's broke down throughout twelve months of the year. We schedule classes. We post times when supervisors send their employees. The safety department, myself, Robert Fleming which is the safety manager and our two safety techs handle all the safety classes.” (Tr. 266)

Posey had never seen or received reports of employees lifting the metal grate of the AccuFeeder hopper and reaching into it, but he had “seen employees take their hand, hit the side of [the hopper] or use their foot.” (Tr. 283) The night of the accident, Posey received word Employee #1’s arm was caught in the paddles of the hopper. Posey arrived at the first aid station at the same time Employee #1 was brought there. Posey heard Employee #1 make “several comments about how stupid he was. . . [and] [h]e knew better.” (Tr. 276)

ANALYSIS

Credibility Determinations

Employee #1

Significant discrepancies exist between the testimony of Employee #1 and the testimony of the other employee witnesses. His testimony is also inconsistent with his prior statement to CSHO Bailey and is internally inconsistent.

The most consequential discrepancy is between Employee #1’s statement the Team Leader trained (or taught or showed) him to lift the metal grate of the hopper and reach inside to clean out the flour at the end of the second shift, and the Team Leader’s flat denial that he did so. Each witness had a self-interest in his version of the AccuFeeder training—Employee #1 is accused of engaging in rogue employee misconduct resulting in his serious injuries, while the Team Leader is pushing back against Employee #1’s claim he taught or modeled a dangerous technique to a new employee. Both witnesses appeared nervous and ill-at-ease. As noted, Employee #1 continually modified his previous statements or presented alternative rationales for his actions. He grew defensive when confronted with his inconsistencies. Because the alleged AccuFeeder training occurred only in the presence of Employee #1 and the Team Leader, the Court must look for

guidance to the testimony of the other witnesses regarding the operation and cleaning of the AccuFeeder.

Employee #1 contends the Team Leader somehow conveyed to him the first time he used the AccuFeeder that he was required to lift the metal grate affixed to the hopper and reach inside to knock flour off the inside of the hopper at the end of the second shift. He initially testified this was done in preparation for the third shift sanitation team to come in and clean. He later testified he did this to prevent wasting flour.

Every one of the other six employee witnesses who testified repudiated Employee #1's claim the AccuFeeder operator was required to manually clean out the hopper before the sanitation team began its shift, and the management employees considered doing so a serious safety infraction (Tr. 134-35, 226-27, 283-84, 302, 306, 308-09, 342, 353, 366-67). In his brief, the Secretary quotes the Team Leader and the Batch Operator acknowledging flour sticks to the inner walls of the hopper (Tr. 126, 366). There is no dispute, however, that flour adheres to the interior of the hopper—that is why the sanitation team cleans it after the second shift every night. What is disputed (only by Employee #1), is whether the hopper needs to be manually cleaned in addition to the automated clean out at the end of the second shift.

The Secretary contends the Batch Operator corroborated Employee #1's testimony that unless he manually cleaned out the hopper, the flour inside it would “probably get all clumped up” when the sanitation team started hosing it down (Tr. 37). The Secretary misreads the Batch Operator's testimony. The Secretary quotes the Batch Operator's statement, “And if we do a change over you can't put the hose in there to clean it out because if you do, all the breader is going to do is cake up and it's not going to run. Then it's going to be down for a few hours.” (Tr. 367) It is clear in context, however, that the Batch Operator is not talking about the AccuFeeder clean out at the end of the shift. He is talking about switching mid-shift from breading with spicy (“orange”) flour to regular (“white”) flour (the “change over”), so the residual spicy flour will not affect the next batch of chicken that is supposed to be breaded with regular flour.

[W]hen there's a change over or something like that, you know, me personally I'm not going to stick my hand in [the hopper]. I'm going to find something like a piece of metal or something that's not going to harm the side of it, it's not going to dent or nothing, tap a little bit to try to get what breader you can. Now if it's white breader, okay, you can still leave a little bit in there. It's not going to hurt it if you change over to orange. The orange is going to cover it up. There's no way you can

get it out. I mean you have to take a hose to actually really clean it out the way it's supposed to be.

(Tr. 366)

The Batch Operator means they cannot use a hose to clean out the hopper in mid-shift, when more batches of chicken must be processed before the end of the shift. There is no evidence in the record the residual flour in the hopper creates a problem for the sanitation team on the third shift. The testimony of the Batch Operator, the Team Leader and safety specialist Posey also contradicts Employee #1's claim that he could not tap the outside of the hopper to knock the flour down because it would activate a sensor that would stop the machine (Tr. 143, 366, 283).

Employee #1 stated he learned from the Team Leader to manually clean the hopper at the end of the second shift. He was injured at approximately 11:00 p.m. the night of his accident. The Team Leader, the Batch Operator, and safety manager Fleming testified there remained at least 2,000 pounds of chicken to be processed before the shift could end, requiring the addition of five or six bags of flour. Based on the cycle time of the AccuFeeder, the second shift would have lasted another hour and fifteen minutes to an hour and a half. This is inconsistent with Employee #1's claim he manually cleaned the hopper when the shift was over.

The other rationale for Employee #1 to manually clean out the hopper is that he was trying to conserve flour. All of the other employees denied Wayne Farms considered flour stuck to the interior of the hopper at the end of the second shift to be "waste" or "floor loss," such that it needed to be manually cleaned (Tr. 123, 134, 249, 262, 268-69, 299-300, 353, 368).

Even if Employee #1 somehow received the mistaken impression Wayne Farms required him to lift the metal grate and reach into the hopper to clean it out, whether in preparation for the sanitation team or to prevent waste, he was corrected on this several times by the Team Leader, the Batch Operator, and Employee #2. The Team Leader testified he had observed Employee #1 reach into the hopper and had told him not to do it "more than enough times to know that he shouldn't have." (Tr. 149) The Batch Operator "told him at least once or twice" not to reach into the hopper and was aware Employee #2 had done so also (Tr. 373-74). After the Team Leader learned that shortly after being hired, Employee #2 was observed reaching into the hopper, he warned him not to do it. Employee #2 did not repeat the action and cautioned Employee #1 against doing so (Tr. 136, 373).

The Secretary attempted to shift the focus from the actions of Employee #1 to his state of mind. He asked employee witnesses a series of questions regarding Employee #1's motivation for persisting in manually cleaning out the hopper.

[O]bviously you wouldn't say that [Employee #1] was getting any kind of personal joy out of opening the guard, right? . . . And he wasn't -- it wasn't like an employee talking on a cell phone and was doing it for his own reasons or . . . an employee who's smoking, right? . . . So there wasn't any personal reason he would have been trying to open the guard and stick his hand in there, right? . . . So he must have thought for some reason that he had to do that in order to get . . . Well, I mean what possible motive could he have for doing that if it wasn't to complete a task? . . . And he didn't achieve any personal benefit as far as you could tell by doing this, right?

(Tr. 247-248)

I think you heard me ask this question yesterday, but he didn't derive any personal gain from knocking the breading off the side of the machine, is that right? . . . [D]id he get any personal gain from doing it? . . . I mean can you think of a personal gain that he would have gotten from knocking the breading off the side of the machine?

(Tr. 357)

It is not the burden of Wayne Farms to plumb the depths of Employee# 1's psyche. The Court agrees that Employee #1's continued manual cleaning of the hopper, despite repeated warnings, is baffling.¹⁴ The record establishes, however, that he received general training not to remove guards or reach into machinery, and he had been specifically told several times by three employees not to manually clean the AccuFeeder hopper. Based on this analysis, the Court determines Employee #1's testimony is not credible. His testimony was refuted on several points by the other six employee witnesses, and his own testimony was contradictory. The Court finds his testimony that the Team Leader communicated to him that he was required to manually clean the AccuFeeder hopper at the end of the second shift is unreliable and is not credited.

Team Leader

The Court credits the Team Leader's testimony that he did not train or show Employee #1 how to lift the metal grate of the AccuFeeder hopper and reach into to knock the flour off the inside. The Court also credits his testimony that he warned Employee #1 several times not to do

¹⁴ Employee #1's awareness that manually cleaning the AccuFeeder hopper was a safety violation is indicated by the various statements he made immediately after his arm was caught in the paddle mechanism: "Y'all told me not to stick my hand in," (Tr. 140); "I shouldn't have done that," (Tr. 307); and he was "stupid" and "knew better." (Tr. 276) Employee #1 denied making these statements (Tr. 95-96). The Court does not credit his denial.

so. This testimony is corroborated by the Batch Operator, whom the Court found credible based on his confident, straightforward demeanor and his logically consistent testimony.

The Court does not credit the Team Leader's testimony that he informed supervisor Keith Powell of Employee #1's infraction (Tr. 127, 137). Powell flatly denied the Team Leader informed him of any safety violations.

Q.: Do you ever recall [the Team Leader] telling you that [Employee #1] was putting his arms in the AccuFeeder?

Powell: No, sir. [the Team Leader] never brought that to my attention. Never.

Q.: So you have been asked that question repeatedly, haven't you?

Powell: Yeah. He's never told me anything about [Employee #1] or anybody doing anything unsafe.

Q.: Okay. Had you seen anyone doing something like that, what has been your practice when you observe an employee engaging in an unsafe act?

Powell: Even something like that, you get caught doing something unsafe you're going to be suspended for three days pending an investigation. So, you know, if a guy did something unsafe they wouldn't -- I guess they would do it behind your back or something. They wouldn't do it in front of me so that they could be caught or something, but I've never seen anybody do anything unsafe.

(Tr. 229-230)

[The Team Leader] never told me anything like that. . . . Because something like this could happen, you know, so that's not going to be tolerated and we don't tolerate that. And [the Team Leader] has the ability -- we have an open door policy. If he came to me with an allegation like that and me as a supervisor didn't do anything he should let my boss know or safety know.

(Tr. 239)

The Team Leader testified that after he learned Employee #2 had been observed reaching into the hopper, he verbally reprimanded him, and Employee #2 was warned by "the shift manager that the next time he was caught he was going to have a three-day suspension and/or termination." (Tr. 136). Supervisor Powell and former shift manager Knox denied any awareness Employee #2 had been reprimanded by the Team Leader (Tr. 237, 311-12). Neither safety manager Fleming nor EHS specialist Posey was aware Employee #2 had been reprimanded for reaching into the hopper (Tr. 312, 352). The Court finds the testimony of the management officials credible in this respect, based on their demeanor and consistent testimony.

Wayne Farms's safety rules require employees to "[r]eport unsafe acts and conditions to a member of leadership immediately." (Exh. R-1, p. 231) Safety manager Fleming testified that in May 2017 he had implemented a new safety disciplinary policy requiring a three-day suspension for an employee's first safety violation (Tr. 340-41). When asked why he did not report Employee #1's repeated manual cleanings of the hopper to management, the Batch Operator testified, "When I [saw] [Employee #1] and I had the discussion with him, he quit doing it. He stopped. And I was explaining to him, you know, you can get your hand caught. I mean you can get hurt. . . So there was no need to go to safety because I kind of felt like he, you know, the way I was explaining it to him that he understood." (Tr. 373-74)

Based on the record, the Court determines the Team Leader did not report the safety infractions of Employee #1 or Employee #2 to his supervisors. The Court finds it likely the Line 53 employees attempted to handle safety violations among themselves and chose not to involve management, perhaps to avoid one of their co-workers receiving a three-day suspension.

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

The Citation alleges:

On or about 1/18/17—Line 53, Further Processing Plant, Superflex Breeding System, employees were removing the Nothum AccuFeeder grate to knock down breeding that was resting along the sides of the machine exposing them to the unguarded sprocket and chain system.

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.

The Secretary 's Burden of Proof

To establish a violation, "the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 169 (1st Cir. 1982).

Wayne Farms concedes § 1910.212(a)(1) applies to the cited condition (*Joint Prehearing Statement*, ¶ D.5).

Failure to Comply with the Cited Standard/Access to the Violative Condition

Although noncompliance with a standard and employee access to a violative condition are two separate elements of the Secretary's burden of proof, they are merged in cases alleging a violation of § 1910.212(a)(1). "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). Thus, it is not necessary to guard a machine unless employees are exposed to hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

Wayne Farms argues the AccuFeeder hopper was adequately guarded because the metal grate was affixed to the hopper. Assuming a guard was required on the hopper, the Court disagrees. It is undisputed the bolt on the latch was not tightened and was easily moved so the metal grate could be lifted.¹⁵ A guard is not effective if it is easily bypassed by an employee. The Commission, in discussing an employer's implementation of a two-hand tripping device as a "secondary safeguarding measure," stated:

Respondent asserts that an employee would only jog a machine with each of his hands on a separate button. Respondent thus appears to contend that its machines were equipped with an acceptable form of guarding: a two-hand tripping device. ... However, such a guarding method is only acceptable if installed in such a way that it cannot be easily circumvented by employees. ... The record does not support the assertion in Respondent's brief that employees in fact used both hands to operate the controls, nor can we conclude that the controls were arranged so as to require two-hand operation. Thus, the existence of the dual buttons does not alter our conclusion that Respondent violated the standard.

Pass & Seymour, Inc., 7 BNA OSHC 1961, n. 5 (No. 76-4520, 1979) (citations omitted).

¹⁵ CSHO Bailey speculated the sanitation team deliberately left the latch untightened "possibly because USDA may have wanted to inspect this particular machine after the sanitation crew is done." (Tr. 174)

Here, Employee #1 easily circumvented the metal grate so he could reach into the hopper. If guarding were required on the AccuFeeder hopper, the metal grate was inadequate when the latch bolt was not tightened.

The issue is whether the Line 53 employees were exposed to a hazard because of the way the AccuFeeder functions and is operated. In determining whether the Secretary has proven access to the hazard, the “inquiry is not simply into whether exposure is theoretically possible,” but whether 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.” *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997).

The problem for the Secretary is his case rests almost entirely on information gathered from Employee #1 during CSHO Bailey’s investigation. The Court has determined Employee #1 is an unreliable witness and does not credit his testimony or statements made to the CSHO. All employee witnesses except Employee #1 stated there was no operational necessity to reach into the hopper. The Court credits their testimony. Neither has the Secretary shown Employee #1 was in the zone of danger of the hopper due to inadvertence. He intentionally bypassed the metal grate even after being warned not to.

The chain and sprocket mechanism that drives the paddles is 24 inches below the metal grate of the hopper, and employees are not required to place their hands below the plane of the metal grate. The Commission has held employees working at half that distance to unguarded machinery were not in the zone of danger.

As the Commission held in *Syntron, Inc.*, 11 BNA OSHC 1868, 1983–84 CCH OSHD ¶ 26,841 (No. 81–1491–S, 1984), where the operator of a cut-off saw stood about 1 foot from the unguarded blade while the saw was operating in an automatic mode, a violation of § 1910.212(a)(1) cannot be found in the absence of evidence that the operator would have any reason to put his hands close enough to the unguarded parts of the machinery to be exposed to a hazard. *See Rockwell International*, 9 BNA OSHC at 1097–98, 1980 CCH OSHD at p. 30,846 (employees not exposed to the hazard of unguarded power presses where operators did not hold the metal pieces during processing and had no cause to place their hands within the bed of the press ram).

Jefferson Smurfit Corp., 15 BNA OSHC at 1422.

The Secretary argues it was reasonably predictable Employee #1 would be in the zone of danger of the paddle mechanism “based on the frequency with which [he] used his hand to clean out the breeder.” (Secretary’s brief, p. 12) Employee #1 testified he reached into the hopper

“[e]very single time” of the forty or fifty times he operated the AccuFeeder (Tr. 40). As noted, the Court does not credit his testimony. The Team Leader testified his line ran the AccuFeeder about three times a month. Employee #2, whom the Court finds credible, testified Employee #1 had stopped manually cleaning the hopper after he had been warned (Tr. 374). The record establishes there was no operational necessity for employees to reach into the hopper and such an action could not be done inadvertently. The Commission has rejected the Secretary’s argument that exposure is based on physical possibility.

The Secretary contends that exposure means “physically possible for an employee to put his hand in the hazardous area, even if by inadvertence or improper performance of his job,” . . . except where such contact is “freakish or suicidal.” . . . The Secretary’s interpretation of these standards to mean that, in effect, guarding is required unless employee contact would occur only under freakish circumstances does not so much carry the Secretary’s burden to prove exposure as eliminate it.

Fabricated Metal Prod., Inc., 18 BNA OSHC at 1074, n.8.

The Court concludes the Secretary failed to establish employees at Wayne Farms had access to the paddle mechanism at the bottom of the AccuFeeder hopper, either through operational necessity or inadvertence. For these reasons, the Court **VACATES** Item 1 of the Citation.¹⁶

¹⁶ Had the Secretary established the first three elements of his burden of proof, the Court would have found he established actual knowledge of the violation. The Team Leader had observed Employee #1 reach inside the hopper. His knowledge is imputed to Wayne Farms. “[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).

The Wayne Farms employees, including the Team Leader, testified the Team Leader was not a supervisory employee (Tr. 113, 239-40, 308). The Team Leader classified himself as a “supervisor without responsibility” but acknowledged he instructed employees on Line 53 and was responsible for ensuring they followed safety rules (Tr. 113-14). When asked for examples of how he instructs employees, the Team Leader responded, “My marination operator, I tell him we need to make marination and we need to go ahead and get marination made. Get all your ingredients out for your marinade. My batcher, make sure you’re using the right meat codes, make sure you’re using the right meat, you know.” (Tr. 114) Powell testified the Team Leader “oversees” the line and is “in charge of” it (Tr. 239-40).

The Commission has long recognized that “an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor” for the purpose of establishing knowledge. *Access Equip. Sys.*, 18 BNA OSHC at 1726, 1999 CCH OSHD at p. 46,782. . . . (knowledge imputed from “a leadman . . . ‘in charge of’ . . . two [other] employees,” whom the employer’s general manager “considered . . . to be ‘like the lead person for’ [those two employees]”); *Iowa S. Utils. Co.*, 5 BNA OSHC 1138, 1139, 1977-78 CCH OSHD ¶ 21,162, p. 25,945 (No. 9295, 1977) (knowledge imputed from a “temporary working foreman . . . vested with some degree of authority over the other crew members assigned to carry out the specific job involved”); *Mercer Well Serv., Inc.*, 5 BNA OSHC 1893, 1894, 1977-78 CCH OSHD ¶ 22,210, p. 26,722 (No. 76-2337, 1977) (imputing knowledge of employee “considered to be in charge of the crew when [his supervisor] was not present”).

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** that Item 1 of Citation No. 1, alleging a serious violation of § 1910.212(a)(1), is **VACATED** and no penalty is assessed.

SO ORDERED.

Date: February 4, 2019

/s/ _____
Administrative Law Judge
Atlanta, Georgia

American Engineering & Development Corp., 23 BNA OSHC 2093, 2096 (No. 10-0359, 2012). The Court determines the Team Leader was a supervisory employee.