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

Secretary of Labor, Complainant, v. Peacock Timber Company, Inc., Respondent.	OSHRC Docket Nos. **14-0497 & 14-0498**

Appearances:

Jonathan Hoffmeister, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Grover T. Peacock, President and Brenda Peacock, Vice President, *pro se*, Peacock Timber Co., Inc., Troy, Alabama
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is 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 (2014) (the Act). Peacock Timber Company, Inc., (hereinafter Peacock) is a timber mill located in Troy, Alabama. On February 25, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Heather Sanders conducted inspection No. 960627 (Docket No. 14-0498) of Peacock at its mill at 68 County Road 7757 in Troy, Alabama. On March 10 – 19, 2014, CSHO Amick conducted a second inspection, No. 963197 (Docket No. 14-0497), of that same worksite.

Based upon CSHO Sander's inspection, the Secretary of Labor, on March 24, 2014, issued two Citations and Notification of Penalty to Peacock. Citation 1 alleged two serious violations. Item 1, Citation 1 alleged violations of § 5(a)(1) of the Act or the general duty clause, for failure to provide seat belts on powered industrial trucks. Item 2, Citation 1 alleges a

violation of the standard at 29 C.F.R. § 1910.147(c)(1) for failure to develop procedures for the control of hazardous energy. The Secretary later amended Item 2, Citation 1 to allege a violation of 29 C.F.R. § 1910.147(c)(4)(I), in the alternative. The Secretary proposes a total penalty of $4,000.00 for Citation 1. Other than serious Citation 2 alleges violations of the standards at 29 C.F.R. § 1910.134(c)(2)(i) for failure to provide information from Appendix D of the respiratory protection standard to employees using dust masks and 29 C.F.R. § 1910.151(b) for failure to have an employee trained in first aide onsite. The Secretary does not propose a penalty for Citation 2.

Based upon CSHO Amick's inspection, the Secretary of Labor, on March 24, 2014, issued a Citation and Notification of Penalty with one item to Peacock alleging a serious violation of 29 C.F.R. § 1910.95(c)(1) for failure to have hearing conservation program for its employees exposed to noise in excess of the action level. The Secretary proposes a penalty of $2,800.00 for the Citation.

Peacock timely contested all of the citations. Prior to the hearing, the Secretary withdrew Item 1, Citation 1 for inspection No. 960627 alleging a violation of § 5(a)(1) of the Act. Therefore, Item 2, Citation 1 and Items 1 and 2, Citation 2 in Docket No. 14-0498 and Item 1, Citation 1 in Docket No. 14-0497 are at issue.

I held a hearing in this matter on January 14, 2015 in Troy, Alabama. The parties were given the opportunity to file post-hearing briefs by February 27, 2015. Only the Secretary filed a post-hearing brief.[1]

For the reasons discussed below, Item 2, Citation 1, Docket No. 14-0498, is affirmed as a serious violation and a penalty of $1,000.00 is assessed; Item 1, Citation 2, Docket No. 14-0498 is affirmed as an other than serious violation with no penalty; Item 2, Citation 2, Docket No. 14-0498 is vacated; and Item 1, Citation 1, Docket No. 14-0497 is affirmed and a penalty of $2,000.00 is assessed.

[1] Peacock informed this office via email it did not intend to file a brief. It did reiterate its defenses in that email. The Court will consider all arguments made by Peacock in pretrial filings and at the hearing.

Jurisdiction

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act. The parties also stipulated at the hearing that at all times relevant to this action, Peacock was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, (Tr. 11).

Background

Peacock's facility is a timber mill established by Grover Thomas ("Tommy") Peacock[2] approximately six years ago. Tommy Peacock and his wife, Brenda Peacock, are co-owners of the timber mill. Also employed as the shop manager for the company is Clinton Grover ("Clint") Peacock - Tommy and Brenda Peacock's son. The company has approximately seven full-time employees (Tr. 211). The company also employs Jesse "Lane" Peacock, Tommy Peacock's brother, on a part-time basis as the safety manager. Tommy, Clint, and Lane Peacock, along with five of the company's employees, testified at the hearing; Brenda Peacock represented the company at the hearing.

On February 25, 2014, CSHO Sanders initiated an inspection of Peacock's facility at the Troy, Alabama mill (Tr. 37). CSHO Sanders testified her supervisor assigned her the inspection after the OSHA Mobile Area Office received a complaint about alleged unsafe conditions related to forklifts and unguarded saws at the mill (Tr. 37). CSHO Sanders testified the agency has a National Emphasis Program on amputations and the Mobile Area Office has a Local Emphasis Program on industrial trucks, both of which mandate an onsite inspection upon receipt of a complaint involving related conditions (Tr. 38).

Upon her arrival at the Peacock timber mill, CSHO Sanders met with Tommy Peacock, who identified himself to her as the boss (Tr. 40). She explained she needed to check on the complaint items, but also she would be addressing anything that "jumped out at her" or what she described in her testimony as "plain view hazards." (Tr. 83). During her inspection, CSHO Sanders observed several large pieces of mill equipment including a debarker, head rig, and edger (Tr. 45; Exhs. C-1 and C-2). She asked Tommy Peacock about the use of the machines,

[2] Several witnesses were members of the Peacock family. First names will be used throughout to designate which individual provided which testimony.

including the maintenance procedures. At that time, Tommy Peacock told CSHO Sanders employees, including himself, perform maintenance on the machines, but the company had no written program to address locking out or tagging out the equipment during those operations (Tr. 43). Tommy Peacock informed CSHO Sanders the company utilized lock out procedures when performing maintenance operations, that employees were trained on those procedures, but that he did not regularly observe employees while performing those procedures (Tr. 43-44).

During her inspection, CSHO Sanders also observed employees using dust masks (Tr. 71). Tommy Peacock admitted to CSHO Sanders the company did not provide employees with training on the use of dust masks, but did make them available for employee use (Tr. 70-72). CSHO Sanders spoke with two employees she observed wearing the masks. Both informed her they had not received any training on the use of dust masks (Tr. 70-72). The dust masks were available in the restroom in a box containing instructions printed on the outside (Tr. 229, 282). CSHO Sanders observed the environment around the saws and other mill equipment was dusty (Tr. 72). The record does not contain any evidence of air contaminant exposure levels.

In her discussions with Tommy Peacock during her walk around inspection, CSHO Sanders asked about the availability of medical treatment in the event of an injury (Tr. 74). Tommy Peacock informed CSHO Sanders the nearest hospital was 6 to 8 miles away from the mill in Troy (Tr. 74). He also told CSHO Sanders he had been previously trained in first aid and CPR four years earlier (Tr. 75). While traveling to and from the inspection site, CSHO Sanders noted it took 15 to 20 minutes to travel from the general vicinity of the hospital in Troy to the mill (Tr. 76). The record does not contain any other evidence of the distance or time from the nearest hospital to the mill.

CSHO Sanders testified the worksite was loud, as she would have expected at a timber mill (Tr. 80). She testified she screened for noise levels using a noise monitor (Tr. 80). According to her testimony, she found noise levels to be over 90 decibels, requiring her to make a referral for noise monitoring, which she did (Tr. 80-81). Tommy Peacock testified he observed the noise monitor used by CSHO Sanders never registered over 90 decibels. He also testified CSHO Sanders told him her monitor was "no good" and that she was going to have better equipment sent to the worksite for monitoring.

Upon her return to her office, CSHO Sanders made a referral to her supervisor for noise monitoring at Peacock's worksite. That inspection was assigned to CSHO Amick on March 11, 2014 (Tr. 115). CSHO Amick has a bachelor's degree in environmental health, was trained in noise monitoring procedures, and, at the time he conducted his inspection of Peacock's worksite, had performed noise monitoring on approximately 25% of the 150 inspections he performed (Tr. 109-12). CSHO Amick took with him to Peacock five Quest Noise Pro dosimeters (Tr. 116-17). Prior to going to Peacock's worksite, CSHO Amick testified he prepared the dosimeters by ensuring each had fresh batteries and pre-calibrating them (Tr. 116-17). This pre-calibration is performed using a calibration can (Tr. 118). CSHO Amick testified the microphone of the dosimeter is placed in the can, which produces a known decibel level of noise (Tr. 118). If the dosimeter reads at the same level as the known decibel level produced by the can, it is considered in calibration (Tr. 118). CSHO Amick found all the dosimeters to be operating properly (Tr. 119-20).

CSHO Amick first went to Peacock's shop several miles from the mill. There he met with Clint Peacock. Clint Peacock testified CSHO Amick gave a lengthy explanation of inspection and noise monitoring procedures and then made comments suggesting he enjoyed destroying businesses (Tr. 277). Clint Peacock also testified he asked CSHO Amick for some of the information CSHO Amick was providing about the requirements for a lock out/tag out program and a hearing conservation program in writing, but that CSHO Amick never provided him with such information (Tr. 272-73).

After this meeting, CSHO Amick proceeded to the mill to conduct noise monitoring. He placed a dosimeter on two of the employees at the worksite (Tr. 123). He placed one on himself (Tr. 126). The large part of the dosimeter was placed on the employee's hip and the microphone was placed on the employee's shoulder (Tr. 105). CSHO Amick testified he observed the employees during the entire sampling period which consisted of the employees' 8-hour shift (Tr. 127-28, 132). One employee was working near the edger and the head saw throughout the shift (Tr. 140; Exhs. C-3 and C-4). CSHO Amick testified the employees told him the work they were doing was typical of their daily activities (Tr. 129). Once the shift was over, CSHO Amick removed the dosimeters. He then attempted to hold a closing conference but was informed

Tommy Peacock was unable to attend.

Upon his return to his office, CSHO Amick post-calibrated the dosimeters using the same methodology as for his pre-calibration (Tr. 135-36, 163). After post-calibrating the dosimeters, CSHO Amick downloaded the information recorded by the dosimeters onto his computer (Tr. 137). According to CSHO Amick, once the information is downloaded, the computer generates a report containing various information, including the monitoring results (Tr. 137). The reports for the two employees monitored by CSHO Amick are contained in Exhibits C-5 and C-6 (Tr. 142-44). These reports show exposure of one employee to a time-weighted-average (TWA) of 96.4 decibels (Exh. C-5) and the other employee to a TWA of 92.1 decibels (Exh. C-6).

Based on her observations at the mill, CSHO Sanders recommended four citations be issued – three of which are at issue. She recommended a violation of 29 C.F.R. § 1910.147(c)(1) be issued based on Peacock's lack of written procedures for locking and tagging out equipment during maintenance. She also recommended other than serious violations of 29 C.F.R. §§ 1910.134(c)(2)(i) and 1910.151(b) be issued based on Peacock's failure to provide information to employees voluntarily using dust masks and for failure to have an individual trained in first aide at the worksite, respectively. With regard to the alleged violation of 29 C.F.R. § 1910.147(c)(1), Peacock contends it was not required to have procedures in writing, as long as procedures were being followed. Peacock further contends it provided employees with all the information necessary for the proper use of dust masks. Finally, Peacock contends the hospital is closer than CSHO Sanders represented and that Tommy Peacock is trained in first aid and is at the worksite daily.

Based upon his monitoring results, CSHO Amick recommended a serious citation alleging a violation of 29 C.F.R. § 1910.95(c)(1) be issued. In his prior discussions with Clint Peacock, CSHO Amick had determined Peacock had no hearing conservation program in place (Tr. 164-69). Clint Peacock had admitted to CSHO Amick the company had not performed any audiograms on its employees (Tr. 168-69). Peacock does not deny it had no program in place and had not performed audiograms, but denied knowing employees were overexposed to noise (Tr. 263-64).

LEGAL ANALYSIS

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 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).

Docket No. 14-0498

Item 2, Citation 1: Alleged Violation of 29 C.F.R. § 1910.147(c)(4)(i)

Item 2 of Citation 1 alleges a violation of 29 C.F.R. § 1910.147(c)(1) or, in the alternative, § 1910.147(c)(4)(i).[3] The standard at 29 C.F.R. § 1910.147(c)(1) requires an employer to "establish a program consisting of energy control procedures, employee training and periodic inspection" for employees performing work covered by the standard. The standard at 29 C.F.R. § 1910.147(c)(4)(i) requires such procedures be "developed, documented and utilized."

Item 2 alleges:

> [T]he employer exposed employees to potential hazardous energies (including 480 VAC 3-phase electrical and 100 PSI pneumatic) in that employees were allowed to perform servicing and maintenance on the debarker and head rig without having a written lock-out tag-out program or having machine specific lock-out tag-out procedures for equipment with more than one energy source.

The Secretary contends employees were engaged in service and maintenance operations on the debarker and the head rig, including greasing, lubricating, and changing out blades, for which there were no written procedures. The Secretary further contends the program Peacock did have in place did not satisfy the training or inspection requirements of § 1910.147(c)(1). Peacock does not deny it had no written procedures for locking and tagging out its equipment but contends written procedures were not required or necessary to ensure employee safety and that it

[3] The Secretary's motion to amend Item 2 of Citation 1 was granted on August 11, 2014. The Secretary sought to amend only the standard cited. The description of the alleged violation remains as in the original.

had a system in place that provided adequate employee protection.

Applicability of the Standard

The standards at 29 C.F.R. § 1910.147 apply to "[s]ervicing and maintenance of machines and equipment in which the *unexpected* energization or startup of the machines or equipment, or release of stored energy could cause injury to employees…" 29 C.F.R. § 1910.147(a)(i).[4]

Section 1910.147(b) defines *servicing and/or maintenance* as

> Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

Tommy Peacock testified employees grease the debarker two times per week, change blades on the head rig every few months, lubricate the head rig once per week, and oil it daily (Tr. 219, 243, 245-46). These activities fall within the definition of servicing and maintenance as defined in the standard.

The Court also finds employees engaged in these activities could be injured by the unexpected energization or start up of the equipment. While employees are greasing the debarker, unexpected energization could result in an employee being pulled into moving chains or shafts (Tr. 52-53). As Tommy Peacock's testimony indicates, the employee servicing the

[4] The regulation contains an exception when all of the following are met:

> (1) The machine or equipment has no potential for stored or residual energy or reaccumulation of stored energy after shut down which could endanger employees; (2) the machine or equipment has a single energy source which can be readily identified and isolated; (3) the isolation and locking out of that energy source will completely deenergize and deactivate the machine or equipment; (4) the machine or equipment is isolated from that energy source and locked out during servicing or maintenance; (5) a single lockout device will achieve a locked-out condition; (6) the lockout device is under the exclusive control of the authorized employee performing the servicing or maintenance; (7) the servicing or maintenance does not create hazards for other employees; and (8) the employer, in utilizing this exception, has had no accidents involving the unexpected activation or reenergization of the machine or equipment during servicing or maintenance.

Peacock stipulated in the joint prehearing and at the hearing after some discussion the debarker and head rig have two energy sources (Tr. 15). Tommy Peacock's testimony also establishes two sources of energy for both pieces of equipment (Tr. 241-49). The exception is not applicable.

carriage on the head rig could be injured should the valve for the pneumatic power be bumped or turned on (Tr. 214-15, 251-452, 254-55). Similarly, his testimony establishes the portion of the debarker that removes the bark could fall on an employee during servicing (Tr. 218, 255). The Secretary has established the standard applies to the cited conditions.

Failure to Comply with the Terms of the Standard

The Secretary contends Peacock did not meet the training or inspection requirements of the standard and did not have documentation of any lock out procedures for servicing of the head rig and debarker (Tr. 50, 54, 216). Peacock admits it did not train certain employees, did not perform regular inspections, and had no written procedures for lock out of equipment (Tr. 220, 244, 253, 261).

The requirements for training under § 1910.147 are found at § 1910.147(c)(7). Employees performing lock out are designated in the standard as "authorized employees." 29 C.F.R. § 1910.147(b). The standard requires those employees receive training on "recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control." 29 C.F.R. § 1910.147(c)(7)(i)(B). The standard requires "affected employees" be "instructed in the purpose and use of the energy control procedure." 29 C.F.R. § 1910.147(c)(7)(i)(B). An affected employee is one whose job requires him to operate equipment on which servicing or maintenance is performed or in such an area. 29 C.F.R. § 1910.147(b). It also requires

> [a]ll other employees, whose work operations are or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are lock out or tagged out.

29 C.F.R. § 1910.147(c)(7)(i)(C).

Peacock admits only employees who actually performed lock out, or the authorized employees, were instructed on its lock out procedures. That training did not include an explanation of the energy sources (Tr. 244). It included a short, one-time demonstration. Employees were then watched periodically. Tommy Peacock testified:

> A: I just show him. Lock it out. Take the – and put it in there, lock it and put the key in your pocket and keep it there until you get through with it.

Q: And is that it? Then you're done training them?

A: Uh-huh.

Q: Okay. And you didn't do like periodic retraining, did you?

A: No. Once I train him, I figure he ought to know then.

(Tr. 257).

Other employees who work with the debarker and head rig, but do not perform maintenance, received no lock out training until after the inspection (Tr. 261-62). Employees working in the lumber yard received no lock out training (Tr. 260). Although these lumber yard employees do not enter the area in which equipment is being serviced as part of their normal duties, there is no work rule prohibiting them from doing so (Tr. 261). The Court finds Peacock's lock out program was deficient for failure to meet the training requirements of § 1910.147.

The standard at 29 C.F.R. § 1910.147(c)(6) requires annual inspections of energy control procedures which are to include, among other things, a review between the inspector and the authorized employee. Peacock admits no such procedures were in place at the mill (Tr. 257-60). Rather, Tommy Peacock testified he spends his days at the mill watching employees to ensure they are operating safely (Tr. 258). He admitted he does so while performing other duties and that he cannot watch every employee all the time (Tr. 258-60). Employees are permitted to perform maintenance and servicing such as blade changes, without him being present (Tr. 243, 44). These informal procedures do not meet the requirements of the cited standard. The Court finds Peacock's lock out program deficient for failure to meet the inspection requirements of § 1910.147.

Peacock concedes it did not have in place written lock out procedures (Tr. 50, 216). The Secretary also has established Peacock was in violation of the standard at 29 C.F.R. § 1910.147(c)(4)(i), pleaded in the alternative.

Peacock contends no written procedures were required, citing, without specificity, to statements made by former OSHA Assistant Secretary Joseph Dear in a Congressional hearing (Tr. 216, 283).[5] Peacock does not contend it relied on these statements in failing to comply with

[5] The Court takes judicial notice Joseph A. Dear served as Assistant Secretary of Labor for Occupational Safety and

the terms of the standard. Because the actual statements were not made part of the record, it is not possible for the Court to determine the nature or context of the statements. Moreover, the plain language of the standard is clear in its requirements.

Tommy Peacock also contends he did not reduce the procedures to writing because he is dyslexic and because it is "just wasted time and paper. Nobody's going to ever look at that stuff." (Tr. 220-21). Peacock also suggests it should not be cited because the standard's requirements are "petty." These are not valid defenses to the explicit mandate of the standard. *See Secretary of Labor v. OSHRC (CF & I Steel Corp.),* 941 F.2d 1051, 1059 n. 10 (10th Cir. 1991) ("[a]n employer may not simply substitute its judgment for that of OSHA…despite its subjective belief that an agency interpretation is invalid.").

The Secretary has established Peacock violated the terms of the cited standard.

Employee Exposure to the Hazard

It is undisputed employees performed maintenance activities that exposed them to the hazards associated with unexpected energization or start up of the debarker and head rig. According to Tommy Peacock, the debarker operator greased the equipment two times per week (Tr. 219). The employee was exposed to at least the unexpected release of the pneumatics (Tr. 255). The head rig operator also services that machine (Tr. 52). According to Tommy Peacock the blade is changed every few months (Tr. 243). The head rig is also lubricated once per week and oiled daily (Tr. 245-46). During these operations, the employee is potentially exposed to unexpected start up of the carriage which could result in him being pulled into the machine (Tr. (Tr. 214-15, 254-55). Both Lane and Tommy Peacock perform other maintenance on the equipment regularly (Tr. 52). CSHO Sanders testified the lack of written procedures requires employees to rely on memory and, given the lack of formalized inspections, could result in an employee inadvertently omitting or forgetting a step in the process. Peacock admits not all employees are trained on the procedures. Those employees, as well as new employees, who were permitted in the area of the debarker and head rig could violate lock out procedures (Tr. 253, 261). For example, the procedures in place at the time of the inspection required employees

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Health from 1993 through 1997. Mr. Dear died February 26, 2014. *Joseph Dear Dies*, Los Angeles Times, Feb. 27, 2014.

working on the carriage to "mash a button two or three times" to vent the air (Tr. 252). There was no lock in place on the valve. Peacock's procedure did not protect the servicing employee from inadvertent start up of the carriage if he did not see and prevent another employee from inadvertently turning on or bumping the switch (Tr. 252). Such a procedure exposes the employee servicing the machinery to the hazard specifically addressed in the standard. The Secretary has established employee exposure to a hazard.

Employer Knowledge

The Secretary has the burden to establish Respondent was aware of the violative conduct. To establish employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*., 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). As discussed herein, Tommy Peacock was knowledgeable about the operation of and energy sources for the debarker and head rig. He was also well aware of the servicing and maintenance activities at the mill. He knew the potential risk to employees of not locking out the equipment (Tr. 215-16, 255). Finally, although he had procedures he felt adequate for locking out the equipment, he was aware those procedures were not in writing, that not all employees were trained, and that he did not perform annual inspections (Tr. 216, 244, 257). Tommy Peacock's knowledge of the violative conditions is imputed to Peacock. *Todd Shipyards Corp*., 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984); *see also Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986). The Secretary has established actual knowledge of the violative conditions.

Classification

The Secretary alleges the violation of 29 C.F.R. § 1910.147(c)(4)(I) was serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

It is well-settled that, pursuant to § 666(k), when the violation of a regulation

> makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2087-2088 (No. 88-0523, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214.

The Secretary contends that should either the debarker or the head rig unexpectedly start up, an employee could be pulled into the machine (Tr. 53, 63-64). An employee pulled into either machine could suffer cuts, amputation, or even death as a result (Tr. 63-64). Although the record indicates no Peacock employee has been injured during maintenance operations, this does not negate the potential for injury in the event improperly followed lock out procedures. The Secretary has established the violation was serious.

Item 1, Citation 2: Alleged violation of 29 C.F.R. § 1910.134(c)(2)(i)

Item 1, Citation 2 alleges a violation of 29 C.F.R. § 1910.134(c)(2)(i). The cited standard applies where respirators are not required, but an employer allows voluntary use of respirators that do not create a hazard to employees. Under such circumstances, the standard requires the employer "provide the respirator users with the information contained in Appendix D to this section."

Item 1 alleges Peacock "[f]ailed to provide the information contained in Appendix D of the Respiratory Protection Standard to employees that voluntarily wear dust masks while working in the sawmill." Peacock admits it did not do so, but contends the box for the dust masks contained enough information for the employees to safely use them.

Applicability of the Standard

The standard at § 1910.134 applies to all general industry worksites. The specific standard cited applies to those worksites where respirator use is not required but the employer has determined voluntary respirator use is permissible. 29 C.F.R. § 1910.134(c)(2)(i). Dust masks or "filtering facepieces" are defined under the standard as "a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium." 29 C.F.R. § 1910.134(b). Occupational use of dust masks is, therefore, regulated by § 1910.134.

It is undisputed Peacock provided dust masks for voluntary use. CSHO Sanders observed employees using those masks (Tr. 72). The Secretary has established applicability of the standard to Peacock's worksite.

Failure to Comply with the Terms of the Standard, Employee Exposure to the Hazard, and Employer Knowledge

It is undisputed Peacock supplied employees with dust masks, but provided them with no training. CSHO Sanders testified she observed employees using dust masks (Tr. 71). When she inquired, Tommy Peacock admitted the masks had been made available for employees (Tr. 72). She also observed a box containing the masks in the restroom (Tr. 72, 229). She then asked employees wearing the masks whether they had been provided Appendix D (Tr. 71). She asked further whether they had been instructed to read the manufacturer's instructions on use, care and limitations of the dust masks, not to use another employee's dust mask, and to use only in suitable environments (Tr. 70-71). The employees indicated they had not received that information (Tr. 71). Employees stated they used the dust masks because it was dusty (Tr. 72). The dust masks were supplied by Peacock and their use was in plain view of Tommy Peacock (Tr. 72). Failure to provide employees with the information in Appendix D could result in improper use of dust masks, exposing employees to health hazards (Tr. 73).

Peacock contends the box the dust masks came in is available to employees and contains the necessary information (Tr. 282). The information contained on the box was never made part of the record. Even if the entire contents of Appendix D were contained on the box, a fact

Peacock failed to prove, simply placing the box in the company restroom does not relieve Peacock of its duty to provide employees with the information. Tommy Peacock testified he simply chose not to provide any information about the dust masks to employees because "you pick your battles…we try to target our instructions to what really will kill you or hurt you." (Tr. 229). This defense is without merit. An employer is not free to decide with which regulations it will comply. *Phoenix Roofing, Inc. v. Secretary of Labor*, 874 F.2d 1027, 1031 (5th Cir. 1989) ("[i]t would also be improvident for us to …send employers the message that they [can] ignore the obvious mandates of the safety regulation and independently determine what, if any, measures should be undertaken in a given situation.").

The Secretary has established Peacock failed to comply with the requirements of the standard, that employees were exposed to the hazard associated with potential improper use of the dust masks, and Peacock had knowledge of the violation.

Classification

The Secretary contends the violation is other than serious. The Commission has defined a non-serious violation as "one in which there is a direct and immediate relationship between the violative condition and occupational safety and health but not of such relationship that a resultant injury or illness is death or serious physical harm." *Crescent Warf & Warehouse Co.*, 1 BNA OSHC 1219 (No. 1, 1973). CSHO Sanders testified the purpose of informing employees of the information contained in Appendix D is to ensure they use dust masks in the correct environment and that they do not use dirty masks (Tr. 73). Use of a contaminated or dirty mask could cause illness (Tr. 73). The Secretary has established an other than serious violation.

Item 2, Citation 2: Alleged Violation of 29 C.F.R. § 1910.151(b)

> Item 2, Citation 2 alleges Peacock violated 29 C.F.R. § 1910151(b) which requires,
>
> In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid.

Item 2 alleges Peacock "did not ensure persons were trained to render first aid when the nearest hospital/clinic was not in close proximity to the site." The Secretary alleges the nearest

hospital or clinic was at least 6 miles or approximately 20 minutes away and that no one at the mill had been trained in first aid for at least three years.

Applicability of the Standard

The standard at 29 C.F.R. § 1910.151 applies to all general industry worksites. The requirements of the specific cited standard at § 1910.151(b) are triggered when there is no "infirmary, clinic, or hospital in near proximity to the workplace…" 29 C.F.R. § 1910.151(b). The standard does not define "near proximity." In *Love Box Co.*, 4 BNA OSHC 1138 (No. 6286, 1975), the Commission adopted the finding of the Tenth Circuit in *Brennan v. OSHRC and Santa Fe Trail Transport Co.,* 505 F.2d 869, 872 (10th Cir. 1974), that for first aid to be effective it must be administered within three minutes. In light of that holding, the Court finds a reasonable interpretation of the term "near proximity" to be where the nearest medical facility is not more than a three minute drive away.

The nearest medical facility to Peacock's mill is at least 6 miles away (Tr. 12). CSHO Sanders drove from the mill to her hotel next to the hospital and testified it took her 20 minutes to do so (Tr. 76). Although Peacock questioned CSHO Sanders whether there might be faster routes, it presented no evidence of such. The Court finds the Secretary has established the standard applies to the conditions at the worksite. Peacock was required to have an individual trained in first aid present at the worksite.

Failure to Comply with the Terms of the Standard

The plain language of the standard requires the employer to ensure at least one individual at the worksite is adequately trained to render first aid. The standard does not define "adequately trained." In interpreting that phrase, the Commission has held "[t]he standard contemplates a conscious effort on the part of the employer to make certain that one or more employees at each workplace had adequate first aid training. It is not enough if, by chance, some employees had a smattering of such training many years past." *Cylcone Drilling & Workover, Inc.*, 9 BNA OSHC 1439 (Nos. 80-1636 and 1721, 1981). The Commission also has held the Secretary's burden is not met by a mere showing no employee has a valid first aid training certificate. *Wissie Smith, Inc.,* 15 BNA OSHC 1327 (No. 90-2182, 1991). Thus, the Secretary must show more than the

passage of time or lapse in certification to establish the inadequacy of training.

The parties stipulated the only individual onsite with first aid training was Tommy Peacock (Tr. 12).[6] It also was stipulated Tommy Peacock's training took place more than four years prior to the inspection and his certification had expired (Tr. 12). The Secretary presented no other evidence regarding the adequacy of Tommy Peacock's training or evidence of what a reasonable person familiar with the saw mills would consider adequate first aid training. Rather, the Secretary relies exclusively on a Letter of Interpretation stating to be adequate, first aid training must be conducted every three years (Tr. 78). This letter of interpretation was not made part of the record and CSHO Sander's testimony does not specify the date or author of such letter. This is insufficient to meet the Secretary's burden to establish Tommy Peacock's training was inadequate.

The Commission has rejected the Secretary's interpretation of the standard to require an employer to have an individual with a current first aid certification present at the worksite. *Savina Home Industries, Inc*., 4 BNA OSHC 1956, 1957 (No. 12298, 1977); *Snyder Well Servicing, Inc.,* 10 BNA OSHC 1371, 1376 (No. 77-1334, 1982); *Wissie Smith, Inc*., 15 BNA OSHC at 1358. In *Snyder Well Servicing*, the Commission further held insufficient the CSHO's testimony he had received no information indicating anyone had been trained. *Snyder Well Servicing, Inc.*, 10 BNA OSHC at 1377. In so holding, the Commission agreed with the judge's holding that to find no one at the employer's worksite had been adequately trained based only on the CSHO's testimony that no one told him otherwise would be "conjecture." *Id*.

In the instant case, the Secretary presented no evidence to establish the training received by Tommy Peacock approximately four years prior was inadequate. The Secretary presented no evidence CSHO Sander's inquired into the adequacy of Tommy Peacock's training or his memory of first aid procedures. Nor did the Secretary inquire into his knowledge during cross examination of Tommy Peacock. To find Tommy Peacock's training was inadequate based solely on his lack of certification and the passage of four years, would require speculation. The Secretary has failed to meet his burden to establish Peacock violated 29 C.F.R. § 1910.151(b)(1)

[6] Clint Peacock also testified he had first aid training (Tr. 282). He did not, however, testify to whether this occurred before or after the inspection. The Court finds Tommy Peacock was the only individual trained in first aid at the time of the inspection.

and Item 2, Citation 2 is vacated.

Docket No. 14-0497

Item 1, Citation 1: Alleged Violation of 29 C.F.R. § 1910.95(c)(1)

Item 1, Citation 1 alleges a violation of 29 C.F.R. § 1910.95(c)(1) which requires an employer to

> administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (o) of this section, whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent.

Based on CSHO Amick's noise monitoring results, the Secretary alleged Peacock's employees were exposed to noise in excess of the action level of 85 decibels and Peacock had not implemented a hearing conservation program that included, among other things, audiometric testing.

Applicability of the Standard

In order to establish applicability of the standard, triggering the employer's obligations under the cited standard, the Secretary must establish employee exposure above the 85 decibel threshold. The Secretary contends CSHO Amick's monitoring results show typical exposure of Peacock's employees to noise in excess of the 85 decibel threshold necessary to establish applicability of the standard. Peacock disputes the accuracy of CSHO Amick's monitoring results. Peacock questions the competency of CSHO Amick on the day of the inspection and points to what it perceives as discrepancies in the documentation related to the dosimeters.

The record establishes CSHO Amick's educational background and work experience rendered him competent to perform the monitoring. Nothing in his explanation of how he performed the monitoring was contrary to the directives in the manual for the dosimeters he used (see Exh. R-1). CSHO Amick testified the monitoring results are transferred directly from the dosimeter to the computer (Tr. 202-03). He is not able to alter the results in this process (Tr. 203). Tommy Peacock conceded a sawmill is a noisy environment. It was not disputed the employees monitored by CSHO Amick were performing their typical duties. Therefore, the

preponderance of the evidence establishes CSHO Amick's noise monitoring results accurately represent employee exposure to noise at Peacock's facility and the standard's requirements apply.

The Court does not find any of the discrepancies noted by Peacock sufficient to discredit CSHO Amick's results. Peacock argues the Secretary did not submit into the record the monitoring results generated by the dosimeter worn by CSHO Amick.[7] It appears the monitoring results for the device used by CSHO Amick do show his exposure was less than the threshold of 85 decibels (Exh. R-1, pp. 23-26). However, these results did not form the basis for any citation and there is no evidence CSHO Amick was in the same proximity to the noise generating machinery as the employees. Based upon the photographs taken by CSHO Amick, the Court concludes he was some distance from the where the employees were working (Exhs. C-3 and C-4). As a result, a lower exposure level would be expected. The results of monitoring on CSHO Amick do show exposure near the action level of 85 decibels. These results are consistent with what would be expected given CSHO Amick's location and are not so divergent from the exposure levels obtained for the employees to warrant discrediting the results obtained by the employee monitoring.

Peacock also notes records supplied to it by the Secretary show discrepancies in the purchase date of the dosimeter used to monitor the employee referenced in instance (a) of the citation item. Specifically, dosimeter No. NLJ010087 had been used on occasions that preceded the date shown on Exhibit C-5 as the "purchase date" for that dosimeter (compare Exh. R-1, pp. 1, 4 and Exh. C-5).[8] CSHO Amick explained this date represents when the dosimeter was first connected to a particular computer during the download process (Tr. 161-62). It does not truly represent the purchase date because the purchase date is not stored in the dosimeter or the computer. He testified the purchase date information is not information that would change or

[7] As the Court explained at the hearing, the Secretary is under no obligation to present every document related to the investigation in this matter. The Court finds no significance to the fact the Secretary submitted only those monitoring results that formed the basis of the citation.

[8] Clint Peacock also took issue with the fact the reports were presented to Peacock out of order. On December 18, 2014, the Court ordered the Secretary to produce documents to Peacock that related to the dosimeters used during the inspection. The Secretary complied with this order. The Court finds no substantive significance to the order of the Secretary's document production.

alter the monitoring results (Tr. 162). There is no evidence to the contrary. This discrepancy does not necessitate discounting CSHO Amick's monitoring results. Finally, the Court notes even if this were a valid basis for discounting the results of monitoring using dosimeter No. NLJ010087, the records for dosimeter NLJ010090 contain no such discrepancy (Exh. C-6) and the results of monitoring with that dosimeter establish employee exposure above the 85 decibel threshold.

Finally, Peacock contends the noise monitoring does not accurately represent actual employee exposure levels because employees wear hearing protection. The standard at § 1910.95(c) states: "For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with appendix A and Table G-16a, and *without regard to any attenuation provided by the use of personal protective equipment*." (emphasis added). The standard explicitly directs its requirements are triggered at exposure levels regardless of the use of hearing protection. The cited standard applies to the conditions at Peacock's worksite.

Failure to Comply with the Terms of the Standard

Having established employee exposure to noise above the action level, the Secretary must also establish noncompliance with the terms of the standard by showing Peacock had no hearing conservation program in place. A hearing conservation program that would comply with the cited standard would include, among other things, monitoring of noise levels (§ 1910.95(d)); employee notification and training (§§ 1910.95(e) and (k)); audiometric testing (§§ 1910.95(g) and (h)); hearing protection (§ 1910.95(i)); and record keeping requirements (§ 1910.95(m)). CSHO Amick testified when he inquired about a hearing conservation program, Clint Peacock told him the company had none (Tr. 168-69). Tommy Peacock admitted the same in his testimony (Tr. 263). Although Peacock did provide its employees with some form of hearing protection, Tommy Peacock admitted the company had no written program, did no monitoring, provided no training, and did not perform audiometric testing on its employees (Tr. 263-64). The Secretary has established Peacock was in violation of the requirements of the standard.

Employee Exposure to the Hazard

As discussed in detail herein, CSHO Amick's noise monitoring results establish employee exposure to the hazard of noise over the action level. The standard presumes a hazard at that level without regard to any attenuation provided by personal protective equipment. CSHO Amick testified without contradiction exposure at such a level could lead to hearing loss (Tr. 11, 178-80). This is particularly true where, as here, the employer has made no effort to determine whether the personal protective equipment provided is effective (Tr. 179). The Secretary has met his burden to establish employees were exposed to a noise hazard.

Employer Knowledge

The Secretary contends Peacock had constructive knowledge of employee overexposure to noise levels, triggering the requirements of the cited standard. CSHO Amick testified Tommy Peacock stated to him while he was setting up the dosimeters that "anyone working in this environment should know that they are [at] risk of losing their hearing." (Tr. 177). Tommy Peacock did not deny making this statement. He also admitted in his testimony, based on a lifetime of experience around sawmills, that "they are relatively loud." (Tr. 264). He admitted he may have lost some hearing due to his own exposure to noise over the years (Tr. 265). The Commission has held,

> [W]hen employees are exposed to a condition that is regulated by the Secretary's health standards, such as noise, reasonable diligence requires the employer to use those test procedures or measurements that are available to determine whether the exposure exceeds the limits set forth in the standard.

Continental Electric Co., 13 BNA OSHC 2153 (No. 83-921, 1989), *citing, Seaboard Foundry, Inc.*, 11 BNA OSHC 1398, 1402 (No. 77–3964, 1983); *General Electric Co.,* 9 BNA OSHC 1722, 1728 (No. 13732, 1981). Given Tommy Peacock's awareness of the high level of noise experienced by employees working in a saw mill, reasonable diligence would have required Peacock determine actual exposure levels. The Secretary has established constructive knowledge.

Classification

The Secretary alleged the violation was serious. Repeated or long term overexposure to noise can lead to permanent hearing loss (Tr. 111; 178-80). The levels found at Peacock's facility were at a level that could cause such hearing loss (Tr. 179). A hearing conservation program is designed to minimize that risk by ensuring proper hearing protection is used and employee's hearing is monitored (Tr. 178-80). The violation is properly classified as serious.

Affirmative Defenses

Peacock's general defense to all of the citation items is the government agents in this case engaged in misconduct and the government's actions in this matter constitute impermissible overreaching. It is not clear on this record what misconduct on the part of the government agents Peacock is alleging. Although repeatedly referring to "misconduct," Peacock never articulated what that misconduct was or why the actions of the government agents should negate the undisputed facts presented in support of the violations affirmed herein.

Was the Inspection Proper?

The requirements for conduct of the Secretary's representative during an inspection are governed by § 8 of the Act. 29 U.S.C. § 657. Under §§ 8(a)(1) and (2), the Secretary may enter for purposes of inspection and investigation, any workplace "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." 29 U.S.C. § 657(a)(2). Section 8(e) provides walk around rights to the employer and "a representative authorized by his employees" during the inspection. 29 U.S.C.§ 657(e). Finally, § 8(f)(1) requires the Secretary to make an inspection, if upon receipt of a complaint and a determination that "reasonable grounds to believe" a violation or danger exists, as soon as practicable to determine whether the violation or danger exists. 29 U.S.C. § 657(f)(1).

An employer raising a defense under this provision of the Act must show the Secretary's inspection was unreasonable and resulted in actual prejudice to it in the preparation or presentation of its defense on the merits. *Gem Indus. Inc.,* 17 BNA OSHC 1184, 1187 (No. 93-1122, 1995), *aff'd without published opinion*, 149 F.3d 1183 (6th Cir. 1998). Peacock failed to articulate any requirement or mandate of § 8 that the Secretary violated. The Secretary's

inspection was made pursuant to a complaint that specified conditions likely to be encountered at a saw mill (Tr. 38). Both CSHO's conducted opening conferences. CSHO Amick inquired whether there was a union so that it could be made aware of the inspection and choose whether to exercise its right under § 8(e) to participate (Tr. 205-06).[9] Both CSHO's conducted their walk around inspections during regular working hours. Neither was there more than two days. There is no allegation either asked employees to stop work or otherwise impeded the work being performed. No employee who declined was required to wear a dosimeter (Tr. 125). Peacock called five employees to testify. None testified to any interference with their work by the CSHOs. Peacock has failed to establish the inspections were conducted in violation of § 8 of the Act. Nor has Peacock shown how any conduct of the CSHO's prejudiced it in its defense.

Peacock contends the inspections were improperly initiated. Peacock contends OSHA should not have initiated an inspection based on an employee complaint containing falsified information. Peacock also questions the veracity of CSHO Sanders's claim her sampling necessitated a referral for noise monitoring. The Court interprets these arguments as Fourth Amendment challenges to the constitutionality of the Secretary's inspection.

The Commission has recognized valid consent operates as a waiver of the Fourth Amendment right against unreasonable search and seizure. *Cody-Zeigler, Inc*., 19 BNA OSHC 1410 (Nos. 99-0912, et. al. 2001). Consent may be given by any management official and need not be express. *U.S. v. Thriftimart, Inc*. 429 F.2d 1006 (9th Cir. 1970). Whether an employer voluntarily gave consent to a search is a question of fact to be determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. at 249-50; *U.S. v. Chemaly*, 741 F.2d 1346, 1352 (11th Cir.1984). The Government bears the burden of proving both the existence of consent and that the consent was not a function of acquiescence to a claim of lawful authority but rather was given freely and voluntarily. *U.S. v. Massell*, 823 F.2d 1503,1507 (11th Cir. 1987).

The Secretary established Peacock provided voluntary consent. It is undisputed CSHO Sanders informed Tommy Peacock of the basis for the inspection and further informed him she would also be looking at plain view hazards. Tommy Peacock accompanied CSHO Sanders on

[9] Peacock suggests this inquiry was inappropriate and part of a targeting scheme for non-union employers. It presented no evidence to support such an allegation.

the inspection. Similarly, CSHO Amick informed Clint Peacock of the purpose and nature of his inspection, following which Clint Peacock raised no objection to CSHO Amick proceeding to conduct noise monitoring (Tr. 270-71). Tommy Peacock accompanied CSHO Amick when he arrived at the mill and showed him around the facility (Tr. 200). None of the five employees who testified described being intimidated or harassed by the CSHOs. There is no evidence of record of any intimidation, coercion, or misrepresentation on the part of either CSHO.

Peacock suggests CSHO Sanders's referral for noise monitoring was based on false information. Tommy Peacock testified he observed the noise monitor used by CSHO Sanders did not provide the readings to which she testified and upon which she based her referral. Based upon her straightforward demeanor, the Court found CSHO Sanders to be a credible witness on this matter. Moreover, Peacock did not establish Tommy Peacock has any familiarity with the use of noise monitoring equipment. To the contrary, he testified, "I was looking over her shoulder at it and I had no clue what it was supposed to be doing." (Tr. 214). The record does not support a finding of wrongdoing by CSHO Sanders regarding to her decision to make a referral for noise monitoring and OSHA's subsequent decision to conduct an inspection. Even if Tommy Peacock believed at the time CSHO Sanders's readings were not what she claimed, he nevertheless consented to the inspection. He cannot now claim that consent was not knowing or voluntary.

Regarding CSHO Amick, Peacock takes the most issue with comments Clint Peacock alleges CSHO Amick made during his initial contact with him. Clint Peacock testified CSHO Amick told him "it was illegal to lie to OSHA, that if I did lie to OSHA…I could face jail time and fines." (Tr. 271). He later testified CSHO Amick

> went into this long-winded stories about, you know how wonderful his career was and everything…And he told me about going into these big companies and, you know, there would be a boardroom full of the operators and the owner. And he said he'll start telling what the violations are, and he said everybody would start getting angry at one another…And he just closed his eyes and reared back his head and smiled when he was telling about it and would giggle. (Tr. 277).

CSHO Amick did not deny making these statements; he only testified he did not recall making them (Tr. 195). If made, these comments were imprudent and demonstrated a lack of discretion on the part of CSHO Amick, but they do not contain threats or intimidating statements. CSHO

Amick did not threaten Clint Peacock with jail if he refused to allow the inspection, he only stated that providing false statements could result in prosecution. In any case, Clint Peacock did not testify he felt intimidated or threatened such that he was compelled to provide consent. Rather he testified he was made extremely angry by these comments. Nevertheless, he said nothing to suggest he was withdrawing consent and allowed CSHO Amick to proceed to the mill to perform his monitoring. The Court finds this an insufficient basis for a finding of lack of consent.

Did the Government Overreach?

Peacock contends CSHO Sanders recommendation to issue a general duty clause violation and the subsequent determination by the Secretary not to pursue that citation, establish overreaching on the part of the Secretary. The decision regarding which citations to pursue in litigation is within the broad discretion of the Secretary and the Court will not second guess that decision. More importantly, Peacock presented no evidence CSHO Sanders fabricated any of the facts upon which she based the original citation item. Rather, Peacock seems to take issue with the lack of a regulation specifically addressing the violative condition sited. In so doing, Peacock demonstrates a lack of familiarity with the elements of a general duty clause violation - one of which being there is no specific regulation that addresses the cited condition.

The Court also understands Peacock takes issue with the noise exposure level set by the Secretary as a trigger for requiring a hearing conservation program. Tommy Peacock testified despite knowing individuals who worked around sawmills his entire life, he was unaware of any one of those individuals suffering a hearing loss (Tr. 264-65). He went on to testify regarding the level of exposure set by the Secretary in the regulation:

> And so I think this was a crock. You know, it's made up for OSHA to get money. There's nothing that – they've got this – me and Clint stepped outside the door, and it was 8[sic] decibels just right outside the door out here. Right – eighty. That this hearing –the noise limits are ridiculously low.

(Tr. 265). He raised a similar defense in his closing argument, stating, "even some of the regulations that we're technically in violation, I don't think that we should be, that anybody should be prosecuted over violations that are so petty and difficult to achieve." (Tr. 314). A defense based on a challenge to the wisdom of a standard's requirements is not one the

Commission is empowered to entertain. *Manganas Painting Co., Inc*., 21 BNA OSHC 1964, 1971 (No. 94-0588, 2007) *citing Loomis Cabinet Co*., 15 BNA OSHC 1635, 1640 (No. 88-2012, 1992). Similarly, "alterations to OSHA"s safety standards cannot…be obtained in adjudicatory proceedings before the Commission, which only concerns itself with the employer's alleged violation of an existing standard." *Carabetta Enterprises Inc.*, 15 BNA OSHC 1429, 1432 (No. 89-2007, 1991).

Infeasibility or Impossibility of Compliance

To the extent Peacock raises an affirmative defense of infeasibility of compliance (Tr. 315), it has failed to meet its burden to establish the elements of that defense. Peacock has presented no evidence to establish it was functionally impossible to draft written lock out procedures, provide employees with information about dust masks, or implement the elements of a hearing conservation program. *See M.J. Lee Construction Co*., 7 BNA OSHC 1140 (No. 15094, 1979).

Penalty Determination

The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* § 17(j) of the Act. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

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The Secretary proposed a penalty of $2,000.00 for Item 2, Citation 1, alleging a serious violation of 29 C.F.R. § 1910.147(c)(1). The Secretary contends the penalty is based on an assessment the severity of an injury resulting from failure to properly lock out a machine is high and the probability of an accident is low (Tr. 65). The Secretary also reduced the gravity based penalty by 60% due to the small size of the employer. The Secretary gave neither a reduction nor an increase for good faith or history. The undersigned agrees the potential injury in the event of an accident should an employee improperly lock out the equipment at the mill is high. The equipment contains large, sharp blades and the material being worked on is large heavy logs and other lumber. Should an accident occur, amputation is a likely injury. The evidence establishes Peacock took measures to reduce the likelihood of an accident. Very few employees are permitted to work on the equipment to perform servicing activities. Tommy Peacock did make efforts to ensure those individuals were trained on lock out procedures. The undersigned finds a gravity based penalty of $5,000.00 is warranted based on these facts. Peacock is a small employer, having only seven full time employees. The undersigned finds, based upon the testimony of employees, Peacock is entitled to a reduction for good faith. Although the company has minimal documentation of safety policies, each employee testified company officials emphasize safety at the worksite. Peacock officials were cooperative during the inspection. The company has no history of prior citations or serious injuries. Based upon the foregoing considerations, a penalty of $1,000.00 is assessed.

The Secretary has proposed no penalty for Item 1, Citation 2. The undersigned agrees no penalty for this violation is warranted given the lack of evidence of a serious injury resulting from the violative condition.

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The Secretary proposed a penalty of $2,800.00 for Item 1, Citation 1. The Secretary contends the penalty is based on the likelihood of permanent hearing loss due to daily exposure to high levels of noise (Tr. 180-81). The Secretary reduced the gravity based penalty based on Peacock's small size but gave no reductions for good faith or history. The undersigned agrees the exposure levels found during the inspection put all of Peacock's employees at a significant

risk for permanent hearing loss. Peacock provided hearing protection, but had not performed any type of evaluation of the effectiveness of that protection. A gravity-based penalty of $7,000.00 is warranted. For reasons discussed herein, the undersigned has taken into consideration Peacock's small size, good faith, and history in reducing the gravity-based penalty. A penalty of $2,000.00 is assessed.

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

OSHRC Docket No. 14-0497

Based upon the foregoing decision, it is ORDERED that

1. Item 1, Citation 1, alleging a violation of 29 C.F.R. § 1910.95(c)(1) is affirmed as a serious violation and a penalty of $2,000.00 is assessed.

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Based upon the foregoing decision, it is ORDERED that

1. Item 1, Citation 1, alleging a violation of § 5(a)(1) of the Act is withdrawn;
2. Item 2, Citation 1, alleging a violation of 29 C.F.R. § 1910.147(c)(1) or, in the alternative, § 1910.147(c)(4)(i), is affirmed as a serious violation and a penalty of $1,000.00 is assessed;
3. Item 1, Citation 2, alleging a violation of 29 C.F.R. § 1910.134(c)(2)(i) is affirmed as an other than serious violation and no penalty is assessed; and
4. Item 2, Citation 2, alleging a violation of 29 C.F.R. § 1910.151(b) is vacated.

SO ORDERED.

/s/

Date: May 1, 2015

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia