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

Secretary of Labor, Complainant v. Southern Hens, Inc., Respondent.	OSHRC Docket No.: **17-0029**

Appearances:

Jeremy K. Fisher, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Stephen J. Carmody, Esq., Brunini, Grantham, Grower & Hewes, PLLC
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

AMENDED DECISION AND ORDER

On August 4, 2016, an employee of Southern Hens, Inc. (Southern Hens) sustained a severe laceration to her thumb when it became caught in the drive mechanism of the machine she was cleaning. She lost a portion of her thumb as a result. Following the incident, the Jackson, Mississippi, Occupational Safety and Health Administration (OSHA) Area Office conducted an inspection of the facility. As a result of the inspection, the Secretary issued a three-item serious citation. Items 1a and 1b, Citation 1, allege violations of the lockout standard at 29 C.F.R. § 1910.147 for failure to have clear written procedures, and failure to follow those procedures during machine cleaning operations. Item 2, Citation 1, alleges a violation of the machine guarding standard at 29 C.F.R. § 1910.212 for failure to guard an in-going nip point on a conveyor. The Secretary proposed a total penalty of $19,134.00 for the violations.

Southern Hens contested the citations bringing the matter before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act

of 1970, 29 U.S.C. § 651-678 (the Act). All three alleged violations and the proposed penalty are at issue.

I held a hearing in this matter on October 10, 2017, in Jackson, Mississippi. The parties filed post-hearing briefs on January 12, 2018.[1]

For the reasons discussed below Items 1a is vacated; Items 1b and 2 are affirmed as issued. A penalty of $ 12,000.00 is assessed.

JURISDITION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 13-14). The parties also stipulated at the hearing that at all times relevant to this action, Southern Hens was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, (Tr. 13). Based on the stipulations and the facts presented, I find Southern Hens is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Southern Hens is a poultry processor with a facility in Moselle, Mississippi. At that facility, Southern Hens operates three plants with approximately 700 employees (Tr. 144). During the day, employees process poultry for retail and commercial sale (Tr. 21). During the night shift (from 8:30 p.m. to 6:30 a.m.) employees perform sanitation work, including cleaning the machines used in the poultry processing operations.

The citation in this matter involves operations at Plant No. 3 only. Plant No. 3 contains several large pieces of equipment used in the poultry processing operations. At issue in this proceeding are the Short Weight Tumbler, Freezer No. 2, and Chiller No. 2.

The Accident

The accident occurred while an employee was cleaning the Short Weight Tumbler (the Tumbler). The Tumbler is a large machine used to remove water from processed chicken parts in order to get an accurate weight (Tr. 244-45). It does so by spinning the chicken parts in a

[1] To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned. Throughout the pre-trial proceedings, Southern Hens raised the affirmative defense of unpreventable employee misconduct with regard to Item 2, Citation 1. It did not address that defense in its post-hearing brief. With regard to Item 2, Citation 1, I consider that defense abandoned.

drum large enough for a person to climb into.[2] The Tumbler is in a room with no other equipment (Tr. 48).

The injured employee's regular assignment was to clean the Tumbler. At the time of her accident, she had been doing that job daily for approximately one month (Tr. 18, 51). The injured employee was assigned to clean the Tumbler by Greg Webb, the Sanitation Manager (Tr. 20-21; 245). She was trained by another sanitation employee named Jessie who had previously done the job (Tr. 25). According to the injured employee, this training involved an explanation and some demonstration. Although he told the injured employee to lock out the machine before climbing into the drum and showed her where the locks were located, Jessie did not demonstrate the lockout process (Tr. 49; 75-76). The injured employee was never given written lockout procedures for the Tumbler (Tr. 49).[3]

The process of cleaning the Tumbler involved hosing it down, followed by applying cleaning chemicals or foaming, and hand scrubbing, inside and out (Tr. 25-27, 33-34). The entire process took approximately 4 hours (Tr. 33). The process began with opening doors that served as guards for the drive mechanism (Tr. 36-37, 41; 78).[4] The Tumbler was off, but not locked out at this time (Tr. 78-79). After the doors were opened, exposing the drive mechanism, the injured employee would turn on the Tumbler and begin hosing it down (Tr. 78). According to the injured employee, she was instructed by Jessie and Manager Webb to keep the drum of the Tumbler spinning while hosing and foaming (Tr. 27-28; 78). She testified Jessie instructed her to deenergize and lock out the Tumbler when the process required her to climb inside the drum to scrub it (Tr. 25-26; 76). She testified this was the process she followed (Tr. 84). She would then reenergize the Tumbler after she had scrubbed the inside of the drum in order to continue hosing it down (Tr. 85-86).

Cleaning the Tumbler included scrubbing near the drive mechanism. The injured employee testified the scrubbing process brought her hand within 7 inches of the drive

[2] The Tumbler is depicted in Exhibit C-1; the drum of the Tumbler is depicted in Exhibit C-2.

[3] I found the injured employee's testimony credible. She did not appear practiced or rehearsed. Although she was occasionally confused by the wording of some questions, her demeanor when testifying evinced an earnest attempt to provide an honest answer. Her testimony on cross examination was consistent with that on direct. Little of her testimony was rebutted. Neither Jessie nor Manager Webb were called to testify.

[4] The closed door is depicted in Exhibit C-2 (Tr. 36). The open door and exposed drive mechanism is depicted in Exhibit C-3.

mechanism (Tr. 46). Hand scrubbing took approximately an hour and, except for scrubbing the interior of the drum, was performed while the Tumbler was activated (Tr. 47).

Because the Tumbler was the only equipment in the room, once the injured employee was trained, she worked alone (Tr. 49). However, various employees, including Manager Webb, passed through the area throughout the shift (Tr. 51-52; 77).

On August 4, 2016, the injured employee reported to work and attended the usual daily staff meeting (Tr. 54). She then proceeded to begin the process of cleaning the Tumbler (Tr. 55). After foaming the Tumbler, the injured employee prepared to scrub it. She climbed a ladder to reach the upper part of the Tumbler and began scrubbing (Tr. 55). She had previously opened the doors exposing the drive mechanism. As she scrubbed her glove became caught in the drive mechanism pulling in her hand (Tr. 55). Once the drive mechanism released her hand, the injured employee removed her glove to see her thumb partially amputated (Tr. 56-57). She testified she panicked and began running to find Manager Webb. Manager Webb wrapped the hand and told the injured employee to wait for Matt Lee, the Safety Coordinator (Tr. 56-57). When Safety Coordinator Lee arrived[5], 30 minutes later, he took the injured employee to the hospital for treatment (Tr. 211).

As a result of the accident, the injured employee required two surgeries on her hand (Tr. 57). She permanently lost a portion of her thumb. She returned to work in November, 2016, but could not perform the assigned work because of her medical restrictions and was off work again until January, 2017 (Tr. 58). In January, 2017, upon her return, Southern Hens issued a disciplinary notice to the injured employee indicating she had failed to lock out the Tumbler "prior to cleaning." (Exh. C-4; Tr. 59). The injured employee refused to sign the disciplinary notice because she felt it was "not [her] fault." (Tr. 61)

The Inspection

Southern Hens notified the Jackson, Mississippi, OSHA Area Office of the accident prompting that office to open an inspection on August 10, 2016 (Tr. 107). Compliance Safety and Health Officer (CSHO) David Young was assigned to and conducted the inspection. CSHO Young's inspection was limited to Plant No. 3 (Tr. 108). His inspection consisted of a review of company's written policies and procedures, interviews with management and production

[5] Safety Coordinator Lee does not work the night shift. He was called at his home (Tr. 210).

employees, including the injured employee, and a walk around Plant No. 3. CSHO Young's inspection encompassed both poultry processing and sanitation operations (Tr. 125, 133-35).

During his walk around inspection, CSHO Young observed two parallel production lines (Tr. 125). These two production lines contained equipment for freezing processed chicken parts. Employees were stationed on either side of the lines (Tr. 125). CSHO Young saw an employee working from a catwalk elevated 15 -18 inches above the floor attempting to free product that had become backed up after falling off the conveyor on Chiller No. 2 (Tr. 126-27). The employee had been using a metal rake-like tool to clear the area but had resorted to using his hands (Tr. 126). CSHO Young observed the employee's hand came within inches of a pinch point located under the conveyor (Tr. 127).[6] A similar conveyor was located next to the cited conveyor. CSHO Young noted a plastic guard covered the pinch point on the other conveyor (Tr. 128). CSHO Young spoke with the employee he had observed using his hands to clear the product (Tr. 129). The employee told CSHO Young he had been performing that job for three weeks. He had been trained to use and provided a metal tool to clear the product, but because the tool was heavy, he used his hands (Tr. 130).

CSHO Young observed employees cleaning the equipment used in the freezing process as well (Tr. 134). He observed an employee cleaning Freezer No. 2 while it was running (Tr. 125).[7] He noted this process brought the employee in proximity to a moving chain and sprocket (Tr. 135). When CSHO Young asked Craig Coberley, Director of Operations, about his observation, Mr. Coberley told him the employee hadn't "broken the plane." (Tr. 135)

Based upon his findings, CSHO Young recommended three serious citation items be issued to Southern Hens. CSHO Young concluded Southern Hens's lockout procedures for the Tumbler and Freezer No. 2 did not comply with the requirements of § 1910.147(c)(4)(i)(B) because the procedures did not explain when the machines should be locked out (Tr. 120). He believed this was necessary because part of the sanitation process was performed while the equipment was running (Tr. 119-20). CSHO Young recommended a citation be issued for a violation of § 1910.147(d)(4)(i) for failure to lock out the Tumbler during the scrubbing process (Tr. 124). He based his findings of a violation on information he received from the injured employee (Tr. 122-23). He recommended these two violations be grouped for penalty purposes.

[6] The area is depicted in Exhibits C-10 and R-28; the pinch point can be seen in Exhibit C-10.
[7] This employee is depicted in Exhibit C-13.

CSHO Young recommended a separate serious citation be issued for a violation of § 1910.212(a)(1). He based this recommendation on his observation of the employee using his hands to clear product on Chiller No. 2 during production operations exposing the employee to a pinch point (Tr. 128-30). Southern Hens contested all three citation items arguing its lockout procedures comply with the standard's requirements; the injured employee's failure to lock out the Tumbler was the result of unpreventable employee misconduct; and the Secretary failed to meet his burden to establish a violation of § 1910.212(a)(1). In its brief, Southern Hens argued the alleged violation of § 1910.212(a)(1) should be vacated because the standard is unconstitutionally vague.

DISCUSSION

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

Item 1a, Citation 1: The Alleged Violation of 29 C.F.R. § 1910.147(c)(4)(ii)(B)

Section 1910.147(c) governs the requirements of a lockout/tagout program. Section 1910.147(c)(4)(ii) specifies the requirements for the written procedures for locking out equipment under that program. The cited subpart, § 1910.147(c)(4)(ii)(B), states such procedures must contain "[s]pecific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy."

In Item 1a, Citation 1, the Secretary alleges Southern Hens was in violation of § 1910.147(c)(4)(ii)(B) for failure to have "clear and specific" procedures for shutting down the Tumbler and Freezer No. 2. The Secretary alleges Southern Hens procedures were inadequate because they failed to specify when in the sanitation process the procedures were to be implemented. Southern Hens contends the standard does not require the information the Secretary alleges is lacking and, even if it did, its procedures have that information.

Applicability of the Standard

Southern Hens does not dispute the applicability of § 1910.147 to the sanitation process for either the Tumbler or Freezer No. 2. The requirements of § 1910.147 apply where employees

are engaged in "servicing and/or maintenance of machines and equipment." 29 C.F.R. § 1910.147(a)(2)(i). Cleaning machines and equipment is included in the standard's definition of "servicing and/or maintenance" "where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy." 29 C.F.R. § 1910.147(b). The procedures applicable to the Tumbler and Freezer No. 2 identify multiple hazardous energy sources for the equipment (Exhs. C-8 and C-14). These energy sources could cause unexpected energization or startup of the equipment, exposing employees performing servicing or maintenance to hazards such as electrical shock or being struck by moving machine parts (Exhs. C-8 and C-14). The standard applies to the cleaning operations performed by Southern Hens's sanitation employees.

Violation of the Terms of the Standard

Section 1910.147(c)(4)(ii) requires an employer's lockout procedures to "clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy…" In promulgating the standard, the Secretary retained the word "specifically" to "emphasize the need to have a detailed procedure, one which clearly and specifically outlines the steps to be followed. Overgeneralization can result in a document which has little or no utility to the employee who must follow the procedure." *Control of Hazardous Energy Sources*, 54 FR 36644-01 (September 1, 1989) at p. 36670. The Secretary also emphasized the importance of having those procedures be in writing. *Id*. In interpreting the requirements of the standard, the Commission has recognized the purpose of the written procedure is "to guide an employee through the lockout process." *Drexel Chemical Co*., 17 BNA OSHC 1908, 1913 (No. 94-1460, 1997).

Item 1a, Citation 1, alleges a violation of § 1910.147(c)(4)(ii)(B) which requires the employer's written lockout procedures to contain "specific procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy." Exhibits C-8 and C-14 contain Southern Hens's written steps for shutting down and locking out the Tumbler and Freezer No. 2, respectively. I find no deficiency in these procedures. These documents describe the sources of energy and provide the steps necessary to shut down, isolate, lock out, and neutralize the equipment. Both explain the procedure for verifying isolation of the energy sources. They contain all the elements required under the cited standard and track the

model procedures contained in Appendix A to the standard. The procedures provide sufficient specificity to "guide the employee through the lockout process."

The Secretary argues the procedures do not meet the requirements of the standard because they fail to identify when in the sanitation process lockout is to occur.[8] As evidence of this lack of clarity, the Secretary points out employees did not implement lockout procedures before performing cleaning operations and performed some of the cleaning operations while the equipment was running. Southern Hens's procedures state only that the lockout procedures are to be implemented prior to servicing or maintenance. This, the Secretary contends, creates confusion.

Although I agree with the Secretary the record revealed a lack of consistency in understanding and implementation of Southern Hens's lockout procedures for the two sanitation operations, I do not agree this constitutes a violation of the cited standard. By its terms, the cited standard addresses only the requirement that the procedures articulate lockout steps. It is concerned with the "how" of the lockout procedures, not the "when." Southern Hens's procedures explain how to lock out the Tumbler and Freezer No. 2. They, therefore, comply with the cited standard.

The lockout procedures developed by Southern Hens for the Tumbler and Freezer No. 2, contained in Exhibits C-8 and C-14, meet the requirements of the cited standard. The Secretary has failed to meet his burden to show Southern Hens violated § 1910.147(c)(4)(ii)(B). Item 1a, Citation 1, is vacated.

Item 1b, Citation 1: The Alleged Violation of 29 C.F.R. § 1910.147(d)(4)(i)

Section 1910.147(d) governs the application of energy controlling measures required by the standard. Section 1910.147(d)(4)(i) specifically requires a lockout or tagout device be affixed to each energy isolating device. The Secretary alleges Southern Hens failed to install a lockout device on the Tumbler while the injured employee was performing her cleaning operation. Respondent does not deny the injured employee did not perform the required lockout but argues her failure to do so was the result of unpreventable employee misconduct.

[8] The violative condition described in the citation is the lack of clarity "as to when the shutdown is required during the sanitation process" for the Tumbler and Freezer No. 2. CSHO Young testified when he reviewed Southern Hens lockout procedures he found they were "not specific as to when should I lock it out. Should I do it when I rinse? When should I do it? Should I do it at the start of the operation? When do I do it?" (Tr. 120)

Applicability of the Standard

Southern Hens does not dispute the applicability of the lockout standard to the sanitation process for the Tumbler. For the reasons discussed with regard to Item 1a, Citation 1, the standard applies to the cited conditions.

Violation of the Terms of the Standard

There is no dispute the injured employee did not deenergize the Tumbler prior to beginning the cleaning process. Nor did she affix a lock to the energy isolating device. The Secretary has established Southern Hens violated the cited standard.

Employee Exposure

There is no dispute employees are exposed to the hazards of unexpected energization of the Tumbler during the cleaning process. The scrubbing process places the employee cleaning the Tumbler within 7 inches of the drive mechanism. The injured employee's accident is evidence of the hazard associated with exposure to the activated drive mechanism. Employees engaged in the cleaning process were exposed to the hazard associated with contact with the drive mechanism should the Tumbler unexpectedly energize during that process.

Employer Knowledge

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). Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving a supervisory employee knew of or was responsible for the violation. *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 actual or constructive knowledge of an employer's foreman can be imputed to the employer); *see also W.G. Yates & Sons v. OSHRC*, 459 F.3d 604, 607 (5th Cir. 2006). The Secretary contends Southern Hens had constructive knowledge of the injured employee's failure to lock out the Tumbler.

Constructive knowledge is shown where the Secretary establishes the employer could have known of the cited condition with the exercise of reasonable diligence. *Par Electrical Contractors, Inc*., 20 BNA OSHC 1624, 1627 (No. 99-1520).

> Whether an employer was reasonably diligent involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations.

Id. citing Precision Concrete Constr. 19 BNA OSHC 1404, 1407 (No. 99-707, 2001). "Reasonable diligence implies effort, attention, and action not mere reliance upon the action of another." *Carlisle Equipment Co. v. Secretary of Labor*, 24 F.3d 790, 794 (6th Cir. 1994). The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000 (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). The Secretary has met his burden to establish Southern Hens failed to exercise reasonable diligence.

The injured employee testified much of the cleaning process on the Tumbler is performed while the Tumbler is energized and running. Cleaning the Tumbler in this manner was consistent with the instructions she had received from Jessie, who had previously performed the job. It was also consistent with instructions from Manager Webb (Tr. 27). Although she performed the cleaning alone, other employees, including Manager Webb, walked in and out of the room throughout the process (Tr. 51-52, 77). Safety Coordinator Lee had observed the cleaning process for the Tumbler while the machine was energized and moving (Tr. 225). The Secretary has established Southern Hens had constructive knowledge employees were engaged in the cleaning process while the Tumbler was energized and not locked out.

To meet his burden in this case, however, the Secretary must show more. The Secretary must establish Southern Hens had constructive knowledge employees were not locking out the Tumbler during the scrubbing process. I find he has met that more exacting burden of proof.

The Secretary correctly points out nowhere in Southern Hens's lockout procedures are employees specifically instructed when in the cleaning process to initiate lockout of the Tumbler.[9] Southern Hens does not deny during the rinsing and foaming process, the Tumbler is

[9] The procedures state lockout should be initiated "before any servicing or maintenance where the unexpected energization or start-up of the machine or equipment or release of stored energy could cause injury." (Exh. C-8) This is not a directive sufficient to notify employees when lockout is required in the cleaning process. This simply tells employees to follow the lockout procedures when lockout is required.

energized and running. None of the written procedures or training materials contain an explicit instruction to shut down and lock out the equipment after rinsing and foaming but before scrubbing. Southern Hens points to a single sentence in a third-party training document that states "Always follow proper lock-out/tag-out procedures before beginning any cleaning process, or any other process, which requires contact with equipment." (Exh. R-25) This document is not specific to any equipment and provides no further explanation. It is not a clear directive.[10] More importantly, the injured employee never received this document, or the accompanying training provided by the third party (Tr. 98).[11] Safety Director Lee admitted he had no evidence the injured employee had received this training (Tr. 209). The record is devoid of any documentation as to when this training occurred or who attended it. Nor is there any detail as to its contents.

The injured employee testified she performed the cleaning process on the Tumbler in the same manner every night (Tr. 55). She performed it in the manner instructed by the employee who had previously performed the job and who Southern Hens entrusted to provide the injured employee with all the necessary training on the Tumbler. Manager Webb was in the out of the room in which she worked throughout her shift, including times when she was scrubbing the Tumbler energized. The record contains no evidence to the contrary. That the Tumbler is running is apparent (Tr. 241-42). A reasonably diligent employer would have recognized the injured employee was not locking out the Tumbler before scrubbing it, exposing her to hazards associated with the energized drive mechanism.

In 2014, a sanitation employee sustained a similar injury while working on the Tumbler (Exh. C-6). The record contains no evidence Southern Hens took any action following that incident.

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[10] Even vaguer and unhelpful are the instructions produced by the same third party for the Tumbler at Exhibit R-25. The only indication lockout is required is a chart titled "Recommended Equipment" with a column containing the term "Scrub Pads" under which is listed "Lock Out Tag." Without further explanation, this provides little, if any, guidance to employees.

[11] Southern Hens provides no explanation as to how the injured employee would be aware of any of these third-party documents. In its brief, Southern Hens refers to Exhibits R-23 (which was neither offered nor admitted into the record), R-24; and R-26 as "equipment brochures" located in the employee locker room (Respondent's brief at p. 8). This misstates the record. Safety Director Lee testified the lockout procedures (Exhs. C-8 and C-14) were kept in the employee locker room (Tr. 207-08). "Service manuals" were kept in the QA manager's office and were available "upon request." (Tr. 208) There is no evidence employees were provided information regarding the location and availability of service manuals.

I find the preponderance of the evidence establishes Southern Hens failed to exercise reasonable diligence to ensure the Tumbler was locked out during the cleaning process. The Secretary has established Southern Hens had constructive knowledge the injured employee had failed to lock out the Tumbler in violation of the cited standard.

The Secretary has met his burden to establish Southern Hens was in violation of § 1910.147(d)(4)(i) for failure to lock out the Tumbler during the cleaning process.

Unpreventable Employee Misconduct

Southern Hens does not deny the injured employee failed to lock out the Tumbler. Rather, it alleges her failure to do so was the result of unpreventable employee misconduct. To prevail on the affirmative defense of unpreventable employee misconduct, an employer must show that it has (1) established work rules designed to prevent the violation, (2) adequately communicated those rules to its employees, (3) taken steps to discover violations, and (4) effectively enforced the rules when violations have been discovered. *See, e.g., Stark Excavating, Inc.*, 24 BNA OSHC 2218 (Nos. 09-0004 and 09-0005, 2014), *citing Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007). Southern Hens has failed to meet its burden to establish the first two elements of that defense.

As previously discussed, Southern Hens cannot show it had an established rule, communicated to employees that, if followed, would have prevented the violation. Contrary to Southern Hens's contention, there was no written policy in place specifying lockout is to be performed prior to the scrubbing process. Southern Hens provided no evidence employees were so instructed. The general rule to which Southern Hens points is not specific to the Tumbler and insufficient to provide guidance to employees. Nor did Southern Hens provide evidence the injured employee received these instructions. To the contrary, the only evidence regarding the training the injured employee received on cleaning the Tumbler was her testimony she was only told to lock out the Tumbler prior to climbing into the drum.

Southern Hens relies on the orientation training received by the injured employee and the fact she had attended safety meetings during which lockout was discussed. The Secretary does not dispute the injured employee received lockout training when she was first hired and attended safety meetings during which lockout was a covered topic (Exh. R-3). All the initial training was provided prior to the injured employee being assigned any specific task and was general in nature. Safety Coordinator Lee admitted the video used in the initial lockout training is not

specific to Southern Hens's operations (Tr. 206). There is no evidence regarding the specific contents of the safety meetings.[12] There is no evidence the injured employee was instructed during any of those meetings or her initial lockout training when in the Tumbler cleaning process to initiate lockout procedures.

Southern Hens contends the injured employee violated its rule that reads "Keep hands off moving machinery." (Exh. R-37) This contention does nothing to support its affirmative defense. The work rule to which an employer points must be designed to prevent the violation alleged. Here the violation is the failure to lock out the Tumbler. The rule prohibiting placing one's hand near moving machinery would not have prevented the violation.[13]

Southern Hens has failed to meet its burden to establish its affirmative defense of unpreventable employee misconduct. Item 1b, Citation 1, is affirmed.

Characterization

The Secretary alleges the violation 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 demonstrated by the injured employee's partial amputation, the likely injury should an employee be in the zone of danger while cleaning the Tumbler when it is not locked out is serious physical harm. The violation is serious.

Item 2, Citation 1: The Alleged Violation of 29 C.F.R. § 1910.212(a)(1)

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

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those

[12] Southern Hens has the burden to establish it communicated its rules to employees. The only testimony regarding training Southern Hens presented was the testimony of Safety Coordinator Lee. Safety Coordinator Lee admitted he had no first-hand knowledge of any of the training received by the injured employee (Tr. 234).

[13] Southern Hens also suggests the injured employee was distracted by personal matters on the day of the accident. As evidence of this, Southern Hens submitted statements written on the night of the accident by Jamie Gibbs, a supervisor, and Safety Coordinator Lee (Exh. R-4). I give these statements little weight. According to Safety Coordinator Lee, the injured employee was "hysterical" when she made the statements. Supervisor Gibbs's statement indicates the injured employee had started "to go in shock." (Exh. R-4, p. 1) Comments made under such circumstances lack reliability. Nor do they necessarily support Southern Hens's contention. The injured employee admitted she had had an argument prior to reporting for work on the day of the accident. She did not admit any resulting distraction caused her to deviate from her standard procedures. To the extent any distraction caused her to place her hand close to a moving part, this is exactly the type of hazard from which compliance with the lockout standard would have protected her. *See* 54 FR at p. 36646, Example No. 1.

> created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are barrier guards, two-hand tripping devices, electronic safety devices, etc.

The Secretary alleges Chiller No. 2 at Plant No. 3 was not properly guarded. Specifically, CSHO Young testified he observed operation of Chiller No. 2 during which product backed up, requiring the operator to push the product with his hand. This exposed the employee to an ingoing nip point on the underside of the conveyor from which the product dropped. Southern Hens contends employees are provided a tool to push the product that prevents exposure to the zone of danger.

Applicability of the Standard

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding.* Section 1910.212 is captioned "General requirements for all machines." This standard applies to all machines not covered by a more specific standard. Southern Hens did not dispute the applicability of the standard. To the extent employees are exposed to injury from the ingoing nip point of the conveyor on Chiller No. 2, it must be guarded under § 1910.212(a)(1). The standard applies to the cited conditions.

Employee Exposure

Because § 1910.212(a) is a performance standard, the Secretary must establish the hazard addressed by the standard existed. *Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1147 (No. 88-1250, 1993). In this case, the Secretary must establish employee exposure to the ingoing nip point of the conveyor.

In *Fabricated Metal Products, Inc*., 18 BNA OSHC 1072 (No. 93-1853, 1997), the Commission considered the question of employee exposure to the hazards posed by inadvertent contact with rotating machine parts. The Commission considered its prior holding in *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976), and *Rockwell Inter'l Corp.,* 9 BNA OSHC 1092 (No. 12470, 1980). In *Gilles & Cotting* the Commission addressed the general question of employee exposure to hazards. The Commission set forth a test for employee exposure based on the principle of "reasonable predictability." 3 BNA OSHC at 2003. The Commission held that the Secretary bore the burden of proving "that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Id*. In *Rockwell Inter'l Corp.,* 9 BNA OSHC 1092 (No. 12470, 1980), the Commission specifically

addressed employee exposure to hazards associated with machine operation. The Commission held,

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

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

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

Fabricated Metal Products, 18 BNA OSHC at 1074 (citations omitted).

The question to be answered is whether employee exposure to the ingoing nip point of the conveyor is reasonably predictable. The preponderance of the evidence establishes it was. Clearing product from the front of the conveyor was part of the normal operation of Chiller No. 2. Southern Hens knew product jammed in Chiller No. 2 and the operator cleared these jams "all day." (Tr. 130-32; Exh. C-11) CSHO Young observed the operator performing this task with a tool[14] and his hands (Tr. 126). He used his hands when he was "getting behind." (Tr. 126) During this process, the employee's hand came within 1 -2 inches of the ingoing nip point on the conveyor. The opening of the ingoing nip point was approximately ½ inch, sufficient for an employee's finger to become caught (Tr. 127).

Southern Hens contends operators of the Chiller are not exposed to a hazard because the proper way to perform the task of clearing product is to use a 2- to 3-foot metal rake-like tool. Southern Hens's argument fails. Even if using the tool, the employee's hand would be in proximity to the ingoing nip point on the conveyor. Although use of the tool makes the potential for injury more remote, it does not eliminate it. That employees would be in proximity to the unguarded ingoing nip point during normal operations of Chiller No. 2 was reasonably predictable.

Southern Hens focuses on the lack of injuries attributable to the cited operation. The

[14] The tool is depicted in Exhibit R-28.

Commission has held the occurrence or absence of injuries caused by a machine is probative evidence of whether the machine presents a hazard. *Rockwell Inter'l Corp.,* 9 BNA OSHC at 1098. Here, however, the objective facts concerning the operation of the machine show the presence of a hazard. The existence of the hazard is not negated by a favorable safety record. *A. E. Burgess Leather Company, Inc.*, 5 BNA OSHC 1096, 1097 (No. 12501, 1977), *aff'd*, 576 F2d 948 (1st Cir. 1978).

Violation of the Terms of the Standard

The Commission has long recognized the cited standard "requires physical guarding of hazards." *B.C. Crocker Cedar Products*, 4 BNA OSHC 1775, 1777 (No.4387, 1976); *see also Slyter Chair, Inc*. 4 BNS OSHC 1100, 1113 (No. 1263, 1976); and *Western Steel Manufacturing Co.*, 4 BNA OSHC 1640, 1643 (No. 3528, 1976). There is no dispute the ingoing nip point on Chiller No. 2 had no physical guard covering it.

Southern Hens suggests the use of the rake-like tool provided sufficient protection. Southern Hens cannot rely on human behavior to protect employees from the hazards addressed in the machine guarding standard. In his statement to CSHO Young the employee stated he had been told to use the tool but reverted to using his hands because the tool is heavy. The record contains no evidence of a rule requiring the tool be used at all times. As the Commission noted in *B.C. Crocker*, the requirement to physically guard employees from hazards of machine operations "recognizes that human characteristics such as skill, intelligence, carelessness, and fatigue, along with many other qualities play a part in an individual's job performance, and it avoids dependence on human conduct for safety." 4 BNA OSHC at 1777; *see also Akron Brick & Block Co.*, 3 BNA OSHC 1876, 1878 (No. 4859, 1976) ("The plain purposes of the standard are to avoid dependence upon human behavior and to provide a safe environment for employees in the machine area from the hazards created by the machine's operation."); and *H.B. Zachry Company*, 8 BNA OSHC 1669, 1674 (No. 76-2617, 1980) ("Although there is little chance of an injury if the machines are operated properly, the standard is plainly intended to eliminate danger from unsafe operating procedures."). Southern Hens cannot rely on employees consistently using a heavy hand tool to provide protection from hazards of the Chiller operation.

The Secretary has established Southern Hens violated the terms of the standard.

Employer Knowledge

The Secretary has the burden to establish Southern Hens was aware Chiller No. 2 was not

properly guarded. The Secretary has met that burden. The lack of a physical guard on the conveyor would have been easily observed by any management employee passing by the area. The identical conveyor next to Chiller No. 2 in the plant had a plastic guard covering the ingoing nip point. During the walk around inspection, Scott French, the plant manager, told CSHO Young the company was aware of problems with jamming on Chiller No. 2 (Tr. 131-32). Southern Hens does not deny it was aware of a need for employees to clear product from the front of the conveyor. The company had provided a tool for that purpose. The Chiller Operator told CSHO Young he performed that task "all day." (Tr. 130; Exh. C-11) A reasonably diligent employer would have been aware its employees were exposed to the unprotected ingoing nip point on the conveyor. The Secretary has established Southern Hens had constructive knowledge of the violative condition.

Due Process

Southern Hens raised the affirmative defense that § 1910.212 violates its right to due process because it does not specify the means of compliance. I find no merit to Southern Hens argument.

> When considering remedial legislation such as the OSH Act and its implementing regulations, the purported vagueness of a standard is judged not on its face but rather in the light of its application to the facts of the case. *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 897 (1st Cir. 1981); *McLean Trucking Co. v. OSHRC*, 503 F.2d 8, 10-11 (4th Cir. 1974). Moreover, the regulations will pass constitutional muster even though they are not drafted with the utmost precision; all that due process requires is a fair and reasonable warning. *Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 30 (7th Cir. 1976).

Faultless Div., Bliss & Laughlin Ind. v. Secretary of Labor, 674 F.2d 1177, 1185 (7th Cir. 1982). When considering the constitutionality of performance standards such as the machine guarding standard, the Commission has held such standards "are not constitutionally infirm on due process grounds so long as a reasonableness requirement is read into them." *Siemens Energy and Automation Inc.*, 20 BNA OSHC 2196, 2198 (No. 00-1052, 2005), *citing W. G. Fairfield Co. v. OSHRC*, 285 F.3d 499, 507 (6th Cir. 2002). "A standard is not invalid merely because an employer must exercise reasoning and judgment to decide how to apply the standard in a particular situation." *Western Waterproofing Co*., 7 BNA OSCH 1625, 1629 (No. 1087, 1979).

The standard at issue provides sufficient guidance to employers as to its applicability and compliance requirements. It provides a non-exhaustive list of the types of hazards it is intended

to protect against and methods of compliance. That Southern Hens would have to exercise some judgment as to how to best protect its operators from the ingoing nip point hazard does not render the standard unconstitutionally vague. Southern Hens's affirmative defense of lack of due process is rejected.

The Secretary has met his burden to establish a violation of § 1910.212(a)(1). Item 2, Citation 1, is affirmed.

Characterization

The Secretary alleges the violation was serious. As previously noted, the opening under the conveyor that posed the pinch point hazard was large enough for an employee's finger. Movement of the conveyor could draw in an employee's gloved hand. CSHO Young testified such an event could result in amputation. The likely injury should an employee be in the zone of danger while operating Chiller No. 2 is serious physical harm. The violation is serious.

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. 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* 20 BNA OSHC at 2201.

The gravity of the violation alleged in Item 1b, Citation 1, is high. The injured employee testified she cleaned the Tumbler in the same manner every night. Exposure to the hazard of moving machine parts was frequent and the likelihood of injury substantial. The severity of the possible injury is manifest. A high gravity-based penalty is warranted. Southern Hens is entitled to some reduction for its size (700 employees) and lack of history of violations. Although the

company promptly reported the accident and cooperated in the inspection, its response to a prior similar injury and to this accident weigh against a significant reduction for good faith. A penalty of $7,000.00 is assessed for Item 1b, Citation 1.

Item 2, Citation 1, warrants a less severe penalty. The Chiller Operator was exposed nightly during his entire shift. The possible injury was severe, but the possibility of injury remote. As Southern Hens points out, it has no history of injury on Chiller No. 2. Southern Hens is entitled to consideration for its size and lack of violation history. A penalty of $5,000.00 is assessed for Item 2, Citation 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1a of Citation No. 1 is vacated.
2. Item 1b of Citation No. 1, alleging a serious violation of § 1910.147(d)(4)(i), is **AFFIRMED** and a penalty of $7,000.00 is assessed.
3. Item 2 of Citation No. 1, alleging a serious violation of § 1910.212(a)(1), is **AFFIRMED** and a penalty of $5,000.00 is assessed.

SO ORDERED.

/s/

Date: March 20, 2018

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia