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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.

Mid South Waffles, Inc.,
d/b/a Waffle House #1283,

Respondent.

OSHRC Docket No. **13-1022**

Appearances: Matt S. Shepherd, Esquire and Joseph B. Lockett, Esquire, U.S. Department of Labor, Nashville, Tennessee

J. Larry Stine, Esquire and Peter Steckel, Esquire, Schneider & Stine, P.C.,
Atlanta, Georgia

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Mid South Waffles, Inc., d/b/a Waffle House #1283 (Waffle House) contests a six-item Citation and Notification of Penalty issued to it by the Secretary of Labor (Secretary) on May 15, 2013. The Secretary issued the Citation and Notification of Penalty (Citation) following an inspection conducted by the Occupational Safety and Health Administration (OSHA) during the period February 21, 2013, through May 15, 2013, as a result of a complaint filed after a fire at the worksite located at 2501 Florence Boulevard, Florence, Alabama. The Citation alleges a serious general duty clause violation under section 5(a)(1) of the Act, contending Waffle House failed to properly maintain the grease drawer of a natural gas griddle, exposing employees to burn hazards. The Secretary proposed as a feasible means of abatement that Waffle House ensure the grease drawer is inspected, emptied, and cleaned on a regular and timely basis in accordance with the Operator's Manual for the griddle and NFPA 96, "Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations," 2011 Edition. The Citation also alleges serious violations of section 5(a)(2) of the Act and the standards thereunder found at 29 C.F.R. §§ 1910.133(a)(1), 1910.151(c), 1910.138(a), 1910.157(g)(1), and 1910.1200(e)(1).

The Secretary proposed penalties in the total amount of \$34,000.00 for the alleged violations. Waffle House timely contested the Citation.

A hearing was held in this matter January 21-22, 2014, in Florence, Alabama. Both parties filed post-hearing briefs.

For the reasons that follow, Citation 1, Items 1, 2a, and 3 instance (a) are affirmed and a penalty in the total amount of \$20,000.00 is assessed as set forth herein. Citation 1, Items 2b, 3 instance (b), 4 and 5 are vacated.

Jurisdiction

The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act (Tr. 11-12). Waffle House also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 12).

Background

Waffle House Structure

Waffle House, a limited service restaurant, is a subsidiary of Mid South Waffles, Inc. (Tr. 126, 128). Mid South Waffles, Inc., was incorporated in 2009 (Tr. 129). It purchased Southeast Waffles which had several restaurant locations in Mississippi, Alabama, Tennessee, and Georgia (Tr. 129). In February 2013, Mid South Waffles, Inc., consisted of 124 to 126 restaurants and employed approximately 25 employees per restaurant, 2600 employees company-wide (Tr. 25, 129, 334). Twenty-five employees worked for Waffle House during the period covered by the inspection (Tr. 129). Anna Risner was District Manager, and supervised three stores. Shequetta Johnson was Restaurant Manager, and only supervised this Waffle House restaurant (Tr. 262, 352, 353, 354). When Johnson was not at the restaurant, the grill operator for the shift managed the restaurant (Tr. 352, 353, 354).

Waffle House is a 24-hour restaurant, where employees work in three shifts (Tr. 128). The first shift is from 7:00 a.m. to 2:00 p.m.; the second shift is from 2:00 p.m. to 9:00 p.m.; and the third shift is from 9:00 p.m. to 7:00 a.m. (Tr. 59, 426).

Fire

¹ The terms “grill” and “griddle” were used interchangeably at the hearing to refer to Waffle House’s cooking appliance.

On the night of February 16, 2013, a fire started on the griddle at Waffle House as Cameron Cunningham was cooking on it. Cunningham was the grill operator and night shift manager at the time (Tr. 42, 61, 95, 138). He and server Victoria Batts attempted to extinguish the fire (Tr. 61-62, 64). Cunningham apparently used salt in his attempt to put out the fire, but the fire quickly escalated (Tr. 52, 61-62, 64-65). Patrons and employees were evacuated from the restaurant and the fire department arrived (Tr. 65, 66). Once the fire department arrived, the fire was extinguished (Tr. 31, 362). Batts called manager Johnson, who is her sister, and informed her of the fire at the restaurant. Afterwards, Johnson called District Manager Risner and left a message for her about the fire (Tr. 67, 361). Both Johnson and Risner went to the site the night of the fire. Johnson arrived first and Risner arrived at approximately 11:30 p.m. (Tr. 361). Waffle House employees were still on site, but remained outside of the restaurant (Tr. 362-363).

Fire Investigation

Lt. Ryan Orrick, Fire Investigator for the Florence Fire Department, was dispatched to the fire at 10:52 p.m. that night to conduct an investigation of the fire (Tr. 27, 30). The fire had been extinguished by the fire department before he arrived at the site (Tr. 31). As a part of his investigation Lt. Orrick talked to the fire department officer in charge and then entered the restaurant to inspect and take pictures (Tr. 31). Once inside, he observed two griddles: on the left, a gas operated griddle with a slide-out drawer; and on the right, a smaller griddle. According to Lt. Orrick, the larger griddle had four gas burners which burned “pretty hot.” He also observed a waste collection tray, known as the grease trap or grease pit², which slides inside the griddle and fits underneath, next to the controls (Tr. 43). The grease trap was not inside the griddle when he arrived, but instead had been removed and was placed on the top of the griddle (Tr. 34).

Lt. Orrick inspected the griddle and found the gas griddle on the left-hand side had a lot of damage from the heat from the fire (Tr. 43). His inspection of the grease traps revealed the trap on the left was filled with food waste (Tr. 43-44). According to Lt. Orrick, from all indications, including burn patterns present on the griddle and the adjacent wood plank, and rust indicators on the metal discolored from the heat, most of the damage was on the griddle and grease trap area on the left side (Tr. 40, 44). He observed that the edge of the wood where they

² The terms “grease trap” and “grease pit” were used interchangeably with the term “grease drawer” at the hearing.

set plates was charred. Lt. Orrick testified this indicated the fire was below there at some point. According to him, there was not as much damage to the top of the wood, however, the edge of the corner above the grease trap had the most damage. Lt. Orrick testified this means the fire likely started in the grease trap area (Tr. 35-36, 40).

Lt. Orrick interviewed Cunningham, night shift manager at the time of the fire. Cunningham told him he was at the griddle on the left-hand side when the fire occurred, and that he saw flames coming from the area where the grease trap was located (Tr. 42). Further, he stated the fire started “under the grill by the grill controls,” which is the area near the grease trap (Tr. 43, Exh. C-1). Lt. Orrick believed the griddle caught on fire at or near the grease trap, which was full of food and oil materials (Tr. 44-45).

Lt. Orrick’s interviews revealed the grease traps were to be changed every shift (Tr. 49). As a result of his investigation, Lt. Orrick concluded the grease trap he observed during his investigation had been emptied somewhere around the start of the shift during which the fire occurred (Tr. 50). According to him, oil and grease possibly came over the side of the grease trap. Over time, grease or oil gets heated up and ignites (Tr. 45). Lt. Orrick determined the fire was accidental in nature, and the waste container probably should have been emptied again. Lt. Orrick concluded because the grease drawer was not emptied, this caused or contributed to the fire (Tr. 48-49; Exh. C-1).

Griddle

The griddle where the fire started is used at Waffle House to cook food for customers. It is manufactured by Wells Manufacturing Company. The griddle operates on natural gas and has several features, including a “grease drawer” and a “grease trough.” The “grease drawer” feature is a large-capacity drawer, removable from the front, and includes a *reminder* hole in the center of the drawer to indicate when the drawer is full. It is located on the left side of the front of the griddle, above the griddle legs, and is adjacent to the gas safety valve and thermostat controls which are accessible through the fold-down front control panel (Tr. 43; Exhs. C-11, p. 2; C-6 and C-7). The “grease drawer” contains a spigot in the bottom of the drawer for draining oil (Exhs. C-11, p. 2, C-6 and C-7; Tr. 39, 114, 325, 378). The “grease trough” feature is located at the top of the griddle, above the grease drawer. It slopes to a large waste hole in the center, which empties into the removable grease drawer (Exh. C-11, p.2).

The cleaning instructions for the “grease drawer” and “grease trough” features provide:

5. At least once each day, the grease trough must be thoroughly cleaned. Using a scraper, remove all grease and food waste from the grease trough by pushing it down the waste hole and into the grease drawer.
6. After scraping all cooking waste from grease trough into the grease drawer, take the grease drawer to kitchen cleaning area and properly dispose of all waste.
 - a. Clean drawer with hot water and a mild detergent.
 - b. Dry drawer thoroughly and reinstall in griddle.

(Exh. C-11, p. 11)

Waffle House Cleanup

The cleanup after the fire was initiated during the early morning hours of February 17, 2013, and continued for several days. By the time of the OSHA inspection, all cleanup had been completed. The cleanup on February 17th occurred in two phases that day. The first phase occurred immediately after the fire investigation was completed on February 17th and continued until approximately 4:00 that morning. Johnson and Risner were managers present during the first phase. The second phase began sometime later during that day. The evidence reveals District Manager Tina Miller was present during that phase.

During the initial phase of the cleanup District Manager Risner assessed the site, after which she went to Walmart and purchased dust masks and Krud Kutter³ for the cleanup (Tr. 364). Management and employees immediately began cleanup by clearing tables, discarding food, stacking dishes in the sink area and taking out garbage. Dishes were washed in the dish washer until there was no more hot water. At that point, the employees and managers stopped cleaning. Employees went home, but Risner and Johnson remained at the restaurant for a locksmith to arrive to make a key so the doors of the restaurant could be locked. Since Waffle House never closes, there was no key to lock the door. After the key was made, Johnson and Risner locked the door and left at approximately 4:00 a.m. (Tr. 363, 365).

During the second phase later that day, Division Manager Tina Miller provided gloves she purchased from Lowes for employees to use during the cleanup (Tr. 419). During that phase, employees used Dawn dishwashing liquid, Windex and Krud Kutter to clean (Tr. 419). Miller testified she diluted the Krud Kutter in spray bottles, and the only degreasers used were Tuf-Enuf and Krud Kutter (Tr. 428). According to her, ZEP was not used during the cleanup.

³ The transcript reflects the spelling of this cleaner as "Crud Cutter."

Jacson White, second shift grill operator testified, however, ZEP was used during the cleanup (Tr. 396). According to Miller, employees who cleaned with the Krud Kutter wore gloves which extended up their arms, and the other employees engaged in the cleanup used latex gloves (Tr. 421).

The evidence does not detail the specifics involved in the remaining days during which the restaurant was being cleaned before it re-opened for business.

OSHA Inspection

As a result of a complaint following the fire at Waffle House, OSHA Industrial Hygienist Joselito Sto Tomas (CSHO Tomas) initiated an inspection of the restaurant on February 21, 2013. The complaint alleged hazardous conditions due to a grease trap overflowing with grease, and the use of hazardous chemicals without proper protective equipment (Tr. 121, 126, 127). CSHO Tomas testified that when he arrived for the inspection, everything in the restaurant had been cleaned up from the fire and the restaurant was “spic and span” (Tr. 130-131). During the inspection, he interviewed employees and management, spoke with the fire investigator, reviewed portions of the surveillance video, and reviewed documentation (Tr. 131, 132, 133). CSHO Tomas determined the fire began approximately two hours into the second shift (which started at 9:00 p.m.) between 10:30 and 11:00 and, because it was a weekend night, restaurant traffic was heavy (Tr. 137). CSHO Tomas concluded the grease drawer had not been emptied during the third shift. He also determined employees involved in the cleanup and who operated the waffle iron did not have appropriate personal protective equipment or an eye wash station available. In addition, CSHO Tomas found employees were not trained on how to use fire extinguishers, and Waffle House did not have a hazard communication program at the site. Accordingly, he recommended the issuance of the Citation at issue in this proceeding.

DISCUSSION

Credibility

Ten witnesses testified at the two-day hearing in this matter. The undersigned observed the demeanor of each and assessed their credibility, considering their motivation, and whether the testimony was plausible, consistent and corroborated. Four employees with management responsibility testified at the hearing: Elizabeth Baily, Vice President of Workers Compensation and Safety; Tina Miller, Division Manager; Dan Worrell, Division Manager; and Anna Risner, District Manager. Each management witness testified with confidence, specificity, and certainty.

They reflected a forthright and truthful demeanor. The testimony of each was consistent and favorable to Waffle House, which is not surprising considering Waffle House was contesting the citation. Importantly, however, their testimony generally was not contradicted by testimony elicited at the hearing from other witnesses subject to cross-examination whom the undersigned found credible. Accordingly, the undersigned credits the testimony of each of the management witnesses, unless it was contradicted by reliable evidence adduced at the hearing.

Four employee witnesses testified at the hearing: Lisa Hazelip, Cook/Server; Roger Spires, Grill Operator; Jacson White, Cook; and Victoria Batts, Server. The cooks and grill operators testified confidently and candidly. Their testimony was generally consistent and corroborated by the credible evidence elicited at the hearing from other witnesses subject to cross examination. Accordingly, the undersigned credits the testimony of Hazelip, Spires, and White regarding operations at the restaurant in general and regarding their participation in the cleanup after the fire. None were present when the fire started.

Server Victoria Batts was working at the restaurant when the fire started. During her testimony, Batts displayed a hostile demeanor and appeared to have an ax to grind with Waffle House. The undersigned's assessment of her demeanor and motivation was substantiated by testimony at the hearing that Batts had been involuntarily separated from her employment with Waffle House and had filed legal action against them (Tr. 58, 72, 98, 295). Batts's testimony seemed disingenuous, self-serving, and designed to support the charges she had brought against Waffle House. Rarely was Batts's testimony corroborated by the testimony of other witnesses. Accordingly, the undersigned discredits Batts's testimony and credits it only where it was corroborated by witnesses who were subject to cross examination.

Fire Investigator Lt. Ryan Orrick's testimony at the hearing was certain, specific and supported by his investigation findings. He was a neutral witness with no stake in the outcome of the proceedings. Lt. Orrick's conclusion as to the cause of the fire was not challenged at the hearing, nor were his investigation findings. The undersigned fully credits the testimony of Lt. Orrick.

CSHO Tomas's testimony regarding his inspection of Waffle House was in many instances conclusory and not specific. For example, when questioned about the employees he interviewed, he could not specify with certainty the number of employees he interviewed or recall which employees provided him information to substantiate the alleged violations.

Although the identity of the persons who did not testify was protected from disclosure pursuant to the informer's privilege, the CSHO's lack of recall did not appear to have been to protect the identity of those who provided information to him. Rather, it appeared he did not know who they were, or they did not exist at all. In addition, specifically regarding documents CSHO Tomas requested during the inspection, the evidence adduced, including his own testimony, indicates he was not specific when requesting Waffle House's hazard communication program. Further, CSHO Tomas's inspection findings appear to be based substantially on the information gathered from server Batts, whose testimony the undersigned finds unreliable and discredits. CSHO Tomas's uncertainty, lack of specificity and reliance on information from a biased employee leads the undersigned to question the veracity of his findings. Accordingly, the undersigned discredits any testimony of CSHO Tomas not corroborated by credible evidence.

Alleged Violation of § 5(a)(1) of the Act

The Secretary alleges Waffle House violated § 5(a)(1) of the Act, also known as the general duty clause. Section 5(a)(1) of the Act mandates that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower*, 21 BNA OSHC 1190, 1191, 2005 CCH OSHD ¶ 32,861, p. 53,077 (No. 01-0547, 2005).

Erickson Air-Crane, Inc., 2012 WL 762001 at *2 (No. 07-0645, 2012).

In addition to the above-quoted elements of a § 5(a)(1) violation, the Secretary also must establish the employer had either actual or constructive knowledge of the hazardous condition.

Deep South Crane & Rigging Co., 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff'd Deep South Crane & Rigging Co. v. Seth D. Harris*, 24 BNA OSHC 1089 (5th Cir. 2013).

Citation 1, Item 1

Citation 1, Item 1 alleges a violation of section 5(a)(1) as follows:

On or about 02/16/13- In the kitchen area, the grease drawer of a 3-foot Wells natural gas griddle, Model #WG-3036G, SN #JJ09810101, the grease drawer was not properly maintained to prevent a grease fire.

As a feasible means of abatement, the Secretary proposes Waffle House:

[E]nsure that the grease drawer is inspected, emptied, and cleaned on a regular and timely basis in accordance with the Operator's Manual for the griddle as well as NFPA 96, "Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations", 2011 Edition.

Whether an Activity or Condition at the site Constituted a Hazard

The Secretary contends Waffle House allowed the grease drawer to fill up with oil and waste and that this was a hazard, alleging in the citation the grease drawer was not properly maintained to prevent a grease fire (Secretary's brief, pp. 6, 7; Citation). Cooks and servers worked in proximity to the griddle and therefore had access to the alleged violative conditions (Tr. 153).

Waffle House does not dispute that a full grease drawer constitutes a hazard. Elizabeth Bailey, Vice President of Workers' Compensation and Safety, testified it is hazardous to have a grease drawer fill up with grease on a natural gas griddle (Tr. 321-322, 345). Bailey's testimony is substantiated by that of Lt. Orrick who conducted the fire investigation. His investigation revealed the grease trap on the left side of the grill was filled with oil and food, and the griddle received the most damage during the fire (Tr. 43-44). It was in this area Cunningham told Lt. Orrick he was at when he saw flames coming from the grease trap area, starting out small but quickly escalating (Tr. 42).

Lt. Orrick concluded the griddle caught on fire at or near the grease trap. According to him, over time grease or oil gets heated up and ignites (Tr. 45). He concluded the grease drawer probably should have been emptied again, and because of not being emptied, caused or contributed to the fire (Tr. 48-49). The Secretary has established a grease drawer filled with grease and waste constitutes a hazard.

Whether Waffle House or its Industry Recognized the Activity or Condition was Hazardous

A recognized hazard is a practice, procedure or condition under the employer's control that is known to be hazardous by the cited employer or the employer's industry. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). The Secretary contends Waffle House recognized the hazard because it established a work rule requiring the grease drawer to be emptied once per shift (Secretary's brief, p. 7).

Waffle House disputes it recognized the hazard. It contends the general duty clause item should be vacated because "there is no hazard recognized by the industry or the Respondent that cleaning the grill three times in a day -- three times as often as the manufacturer recommends --

would result in serious injury or death” (Waffle House’s brief, p. 13)(emphasis in original). Waffle House misses the point. At issue is whether Waffle House implemented a work rule to prevent hazardous conditions resulting from a grease drawer filled with oil and waste, and if it did, such rule would demonstrate its recognition of the hazard. As noted by the Secretary, the Commission has held issuance of a work rule specifically addressing a hazard equates to employer recognition of the hazard under section 5(a)(1). *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012 (No. 13390, 1981).

As Bailey’s testimony indicates, a full grease drawer is a hazard. Waffle House does not disagree it has a policy or work rule addressing cleaning the grease drawer. In fact, Waffle House asserts its policy requires the grease drawer to be emptied once per shift, which it contends, is more than what the manufacturer recommends. Both management and employees of Waffle House testified cleaning the grease drawer once per shift was the requirement.

Dan Worrell, Division Manager,⁴ testified the policy is uniform for all the stores in the region to clean out the grease trap at least three times a day. According to Worrell there was no set time to clean the grease trap, but because the rush begins at 7:30 p.m. and carries into the third shift, cleanup is typically done before the rush (Tr. 436). Elizabeth Bailey, Vice President of Workers Compensation and Safety, testified it is hazardous to have a grease drawer fill up with grease on a natural gas griddle and the process is to check it three times a day (Tr. 345). District Manager Anna Risner testified the grease drawer is cleaned and emptied every day on every shift, but there is no practice or policy regarding the particular time to empty it (Tr. 355, 356). Manager Johnson told CSHO Tomas the grease trap is to be cleaned at the end of the shift and then the next cook is supposed to check it upon arrival to make sure it has been done. If not, that person is supposed to clean it (Tr. 136-137). According to Jacson White, cook, the grease drawer is cleaned every shift at least once a shift unless it was busier, then it was done twice (Tr. 388). Lisa Hazelip, cook and server, testified the grease drawer is cleaned every shift (Tr. 400). And server Victoria Batts testified the policy is to empty the grease trap after every shift and the cook is responsible for cleaning out the grease trap (Tr. 63, 78).

Waffle House was so cognizant of the hazard of a full grease drawer, it implemented a policy requiring the grease drawer to be cleaned during every shift. The undersigned finds Bailey’s testimony establishes the policy was implemented to prevent hazardous conditions

⁴ At the time of the fire, Worrell was Regional Manager for Mid South Waffles (Tr.433)

created by a full grease drawer on a natural gas griddle. Employer recognition of the hazard is established.

Whether the Hazard Caused or was Likely to Cause Death or Serious Physical Harm

There is no dispute a fire started on the griddle in the area of the grease drawer. Grill operator Cunningham was at the grill when the fire began. There were four other employees in the restaurant (Tr. 62-63). The fire escalated quickly and the fire department came to extinguish it (Tr. 65,66). CSHO Tomas testified employees were exposed to burns and smoke inhalation and the possibility of the gas line exploding. He further testified such injuries would likely cause death or serious physical harm (Tr. 143, 144, 153). Although the record does not indicate any serious harm resulting to the five employees onsite at the time of the fire, the fire resulting from the grease drawer filled with oil and waste was likely to cause death or serious physical harm. The violation is properly characterized as a serious violation. The Secretary has established the third element of his burden of proof.

Whether Feasible Means Existed to Eliminate or Materially Reduce the Hazard

A method of abatement is feasible under section 5(a)(1) if the Secretary “demonstrate[s] both that the measure[] [is] capable of being put into effect *and* that [it] would be effective in materially reducing the incidence of the hazard.” *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190 (No. 91-3344, 2000) (consolidated); *see Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) (“It is the Secretary’s burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred.”). The Secretary is not required to show that the proposed abatement would completely eliminate the hazard. *Acme Energy Servs.*, 23 BNA OSHC 2121, 2127 (No. 08-0088, 2012), *aff’d*, 542 F. App’x. 356 (5th Cir. 2013); *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1122 (No. 88-572, 1993).

The Secretary asserts the grease drawer was not properly maintained to prevent a grease fire. As a feasible means of abatement, the Secretary proposes Waffle House ensure the grease drawer is inspected, emptied, and cleaned on a regular and timely basis in accordance with the Operator’s Manual for the griddle and NFPA 96 (Citation).

The Operation Manual provides instructions for cleaning the grease drawer; however, as the Secretary concedes it does not indicate how often the grease drawer should be cleaned (Secretary’s brief, p. 8, n. 8). NFPA (National Fire Protection Association) 96, which is the

Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations also relied upon by the Secretary to establish abatement feasibility, also provides guidance on cleaning the grease drawer. NFPA 96 provides:

11.7.2 Cooking equipment that collects grease below the surface, behind the equipment, or in cooking equipment flue gas exhaust, such as griddles or charbroilers, shall be inspected and if found with grease accumulation, cleaned by a properly trained, qualified, and certified person acceptable to the authority having jurisdiction.

Neither the Operation Manual nor NFPA 96 specifies the frequency for cleaning the grease drawer. They do support it should be inspected for grease accumulation and cleaned if accumulation is found (Exhs. C-11, C-12). The testimony reveals that when the restaurant was busier, the grease drawer was changed more than once during the shift to remove the accumulation (Tr. 388). This shows Waffle House could accomplish inspecting and cleaning the grease drawer when grease accumulation was present. Waffle House does not dispute feasibility of compliance with the Operation Manual or NFPA 96. Further, as Lt. Orrick's testimony demonstrates, had the grease drawer been emptied, the fire would have not occurred (Tr. 45, 48-49). The undersigned finds the Secretary has established a feasible means of abatement which would materially reduce the hazard.

Whether Waffle House had Knowledge of the Violative Condition

An essential requirement for meeting the Secretary's burden of proof is establishing the employer had knowledge of the hazard. "As part of the Secretary's *prima facie* case, [he] must show that the employer had actual knowledge of the violation or could have discovered it with the exercise of reasonable diligence." *Otis Elevator Co.*, 21 BNA OSHC at 2207. The Secretary must establish actual or constructive knowledge of the violative conditions by Waffle House in order to prove a violation of the standard. It is the Secretary's burden to adduce sufficient evidence to establish the knowledge element of his case.

The Court of Appeals for the Eleventh Circuit recently discussed the Secretary's knowledge element in the *ComTran Group, Inc.* decision:

As for the knowledge element [], the Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer (citations omitted). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. See e.g., *Secretary of Labor v. Kansas Power & Light Co.*, 5 O.S.H.

Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, “his knowledge and approval of the work methods employed will be imputed to the respondent”). An example of constructive knowledge is where the supervisor may not have directly seen the subordinate’s misconduct but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073 *17-19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer’s failure to implement an adequate safety program, see *New York State Elec. & Gas Corp.*, 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted), with the rationale being that ---in the absence of such a program ---the misconduct was reasonably foreseeable.

ComTran Group Inc., 722 F.3d 1304, 1307-1308 (11th Cir. 2013).

Further, in *Comtran, id.* the court held for the first time in the Eleventh Circuit that “if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the conduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct.” *Id.* at 1318. Previously, a supervisor’s actual or constructive knowledge of a violation could be imputed to the employer. “[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer’s safety program.” *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The Secretary does not contend Waffle House had actual knowledge of the violative conditions on the night of the fire. The evidence demonstrates the grease drawer was not inspected to determine if it should be emptied. Cunningham, who was responsible for cleaning the grease drawer, testified he was too busy and had not done it during his shift (Tr. 138). Instead, the Secretary contends Waffle House had constructive knowledge, arguing it should have known of the violative conditions. The Secretary contends because the restaurant was busier that shift, Cunningham should have known the grease drawer was potentially a hazard, and if effective procedures for checking and timely cleaning the grease drawer were in place, the fire would not have occurred (Secretary’s brief, p. 9).

The evidence at the hearing is uncontroverted that the restaurant was busy on the night of the fire. It was third shift on Saturday night, and the restaurant being busy was not unusual. Worrell testified that the restaurant was usually very busy from 7:30pm., into the third shift (Tr. 436). Cook and shift manager Cunningham told CSHO Tomas he was extremely busy on the

night of the fire and because he was busy setting up for the shift, he did not check the grease drawer or empty it (Tr. 138). Although surveillance video shows the grease drawer purportedly being emptied on the night of the fire, the evidence after the fire shows the grease drawer contained a significant amount of grease and waste (Tr. 43-44, 45). Therefore, even if it had been emptied, it needed to be emptied again prior to the fire. If Cunningham, shift manager, had checked the grease drawer he could have known it was full. The undersigned credits Lt. Orrick's testimony regarding his findings after the fire, over the speculative testimony that the surveillance video showed the grease drawer being emptied. The evidence fails to show Cunningham inspected the grease drawer or emptied it prior to the fire.

The evidence reveals it was Cunningham's responsibility to clean the grease drawer; however, he failed to do so. As shift supervisor in charge at the time of the fire, his knowledge could be imputed to Waffle House. Under *ComTran, supra*, Cunningham's knowledge of his own misconduct as a supervisory employee is imputed to Waffle House where the Secretary puts forth evidence independent of the misconduct demonstrating the misconduct was foreseeable. However, such evidence is not necessary here, because although Waffle House alleged employee misconduct as an affirmative defense in its Answer, it abandoned the issue by failing to brief it. The briefing order in this matter issued February 18, 2014, provides that "any issues not briefed will be deemed abandoned." (Notice of Receipt of Transcript).

Rather than relying on employee misconduct, Waffle House relies heavily on evidence that the grease drawer was emptied consistently with its policy on the day of the fire, arguing "even if the grease drawer had not yet been emptied at the time of the fire, the shift had not ended and Respondent was still in compliance with the Waffle House policy." (Waffle House brief, p. 16). Compliance with Waffle House's policy is not the issue. Waffle House was not cited for failing to comply with its policy. It was cited for failing to maintain a grease drawer to prevent hazards of a full grease drawer, thereby failing to furnish to each of its employees employment and a place of employment which was free from recognized hazards that are causing or are likely to cause death or serious physical harm as required by § 654(a)(1) of the Act.

Although Waffle House abandoned its employee misconduct defense, the undersigned feels it is important to note that despite implementing a work rule addressing the hazard, Waffle House failed to effectively establish and communicate its work rule. Employees were aware of

the requirement to clean and empty the grease drawer once every shift, however, testimony at the hearing demonstrated confusion as to whether it was to be done at the beginning or end of the shift, and even whether it should be emptied more than once during a shift. Such confusion indicates an ineffective safety program from which it would be foreseeable that violations could occur.

With reasonable diligence, Waffle House could have known of the condition of the grease drawer. “Reasonable diligence” includes the employer’s “obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence.” *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). 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). Waffle House failed to exercise reasonable diligence in inspecting the worksite and taking measures to prevent hazards to its employees. Constructive knowledge is established.

For the foregoing reasons, the undersigned finds the Secretary has met his burden of proving a violation of the general duty clause. The violation is affirmed.

Alleged Violations of Citation 5(a)(2) of the Act

The Secretary alleges Waffle House violated standards found in 29 C.F.R. Part 1910, Subpart I - Personal Protective Equipment; Subpart K- Medical and First Aid; Subpart L- Fire Protection; and Subpart Z- Toxic and Hazardous Substances. The Secretary has the burden of establishing the employer violated each 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).

Citation 1, Item 2(a)

The Secretary cited Waffle House for a serious violation of 29 C.F.R. §1910.133(a)(1), alleging violations on February 17, 2013, during the cleanup the day after the fire, and on February 21, 2013, the day of the OSHA inspection. Citation 1, Item 2(a) alleges “protective eye

equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment” in that:

(a) On or about 02/21/13 -2501 Florence Boulevard, Florence, AL, employees were exposed to eye injuries while using Spartan Waffle Iron Cleaner to clean waffle irons.

(b) On or about 02/17/13 -2501 Florence Boulevard, Florence, AL, employees were exposed to eye injuries while using commercial cleaners and degreasers to clean fire and smoke damage following a grease fire.

(Citation).

The standard found at 29 C.F.R. § 1910.133(a)(1) provides:

(a) *General requirements.* (1) The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

Instance (a)

Waffle House does not dispute that managers and employees of Waffle House used Spartan Waffle Iron Cleaner, a caustic chemical substance, approximately three times a week to clean waffle irons used in the restaurant. The managers’ office was only two to three feet from the area where the waffle irons were cleaned (Tr. 173). The cited standard is a general industry standard and the type of industry Waffle House was engaged in as a restaurant and the type of hazard involved falls under the general industry standards (Tr. 161-162). Applicability, exposure, and knowledge are established. The only issue for determination is whether the terms of the standard were violated.

Waffle House utilizes three sets of waffle irons which are rotated for cooking and cleaning (Tr. 376). The waffle irons are cleaned with Spartan Waffle Iron Cleaner, a spray cleaner, which includes instructions on spraying it onto the waffle iron (Tr. 83; Exhs. C-9, C-10). District Manager Risner described the Waffle Iron Cleaning procedure as follows:

Take it to the back. We have a rolling cart that we sit on. You spray the bottom griddle with your waffle spray, close it, plug it in and let it sit for maybe 20 or 30 minutes, depending on how bad it is. You rinse it out, turn it upside down to drain and it dries for 24 hours.

(Tr. 357). Risner testified she has used the waffle iron cleaner for 15 years, and has never heard of an employee taking the spray top off and pouring the cleaner on the hot waffle iron (Tr. 359, 360). She stated step-by-step instructions on cleaning the waffle iron are on the bulletin board in

the back of the restaurant. This was not disputed. According to Risner, these instructions were on the bulletin board on February 16, 2013, and have been up for a while (Tr. 359-360).

With the exception of Batts and White, witnesses described the waffle iron cleaning procedure similarly and denied pouring the cleaner onto the waffle iron (Tr. 390, 421). Batts testified she poured the cleaner onto the waffle iron (Tr. 83-84). She and White testified the cleaner was applied to the waffle iron while it was hot (Tr. 83-84, 85-86, 389). CSHO Tomas testified employees told him they poured the cleaner directly onto the waffle iron while the waffle iron was hot (Tr. 165). On cross examination he testified Batts was the only one who said it was poured (Tr. 276). The evidence reveals waffle iron cleaning was done by managers and cooks. Batts was neither. However, her testimony revealed she cleaned it 6 to 8 times during her employment. Testimony that the Spartan Waffle Iron Cleaner was poured onto the waffle iron is outweighed by a preponderance of the credible evidence which shows the Spartan Waffle Iron Cleaner was sprayed onto the waffle iron which was then heated for the cleaner to work. However, whether the waffle iron cleaner was sprayed or poured does not impact whether the standard was violated.

The Spartan Waffle Iron Cleaner contains sodium hydroxide, which CSHO Tomas testified is known as Lye or caustic soda and can cause severe irritation, burns of the cornea, or blindness (Tr. 167, 196). The manufacturer of the Spartan Waffle Iron Cleaner recommends splash goggles to prevent contact (Tr. 171; Exh. C-10). Evidence adduced at the hearing demonstrates employees who cleaned the waffle irons did not wear any eye protection (Tr. 163-164, 173). Waffle House asserts that since they were spraying the waffle iron cleaner and not pouring it, there was no splash hazard warranting the splash goggles recommended by the manufacturer. Waffle House's argument is not persuasive. The Spartan Waffle Iron Cleaner manufacturer's recommendation of wearing splash goggles when using indicates the manufacturer anticipated a splash hazard for which eye protection was necessary even considering the cleaner was dispensed from a spray bottle. The cited standard requires appropriate eye or face protection when exposed to hazards such as liquid chemicals, acids or caustic liquids, or chemical gases or vapors such as those posed by the Spartan Waffle Iron Cleaner. The evidence adduced at the hearing demonstrates whether spraying or pouring the Spartan Waffle Iron Cleaner, employees were exposed to the caustic chemicals in the cleaner as

well as any vapors produced during the cleaning process. The Secretary has established a serious violation of instance (a).

Instance (b)

Waffle House admits its employees did not wear goggles during the cleanup from the fire (Waffle House's brief, p. 17). Managers supervised employees during the cleanup (Tr. 193). Division Manager Miller testified Waffle House employees used Dawn dishwashing liquid, Windex, and Krud Kutter when cleaning the restaurant during the second phase of the cleanup on February 17, 2013 (Tr. 419). She further testified she diluted the Krud Kutter in spray bottles. According to Miller, ZEP was not used during the cleanup. She testified the only degreaser used was Tuf-Enuf⁵ and Krud Kutter (Tr. 428). Jacson White testified on cross examination that ZEP was used during the cleanup (Tr. 396). When shown Exhibit C-14, he identified it as the products he used during the cleanup. He testified confidently and believably regarding having used ZEP. CSHO Tomas testified other employees told him they used ZEP during the cleanup, and while he was at the site, they retrieved the ZEP containers and brought them to him (Tr. 191). Two ZEP products were presented to CSHO Thomas: one was ZEP 505 Industrial Cleaner & Degreaser; the other was ZEP All-Purpose Cleaner & Degreaser (Tr. 191; Exhs. C-14, C-15 and C-16). The labeling on both products cautions to "avoid contact with the eyes" (Exhs. C-16 and C-17).

The Material Safety Data Sheets for the ZEP All-Purpose Cleaner & Degreaser also cautions against eye contact providing such contact "Causes eye irritation. Inflammation of the eyes is characterized by redness, watering and itching." (Exh. C-17). It further provides safety glasses with side shields should be used (Exh. C-17). The Material Safety Data Sheets for the ZEP 505 Industrial Cleaner & Degreaser cautions against eye contact providing such contact "Causes eye irritation. Liquid in eye may cause irritation with possible damage if not rinsed immediately." (Exh. C-18). It recommends wearing safety glasses (Exh. C-18). The Material Safety Data Sheets for these products provides the pH levels for the products as being 8.5 – 9.5 for the All Purpose Cleaner and 12.75 – 13.25 for the Fast 505 (Exhs. C-17 and C-18). A corrosive chemical is one with a pH greater than 7 (Tr. 166, 169-170).

A preponderance of the evidence shows ZEP, a caustic or corrosive chemical, and Krud Kutter were used during the cleanup. Although Waffle House disputes using ZEP, it does not

⁵ No evidence was adduced at the hearing regarding the chemical compounds of Tuf-Enuf or whether it was caustic.

dispute employees used diluted Krud Kutter, during the cleanup, suggesting that dilution reduces the hazards. The record is void of evidence regarding whether dilution reduces the hazard. Regardless, the standard is violated where the evidence demonstrates employees without wearing required eye protection during the cleanup used ZEP which posed eye hazards. The undersigned finds the terms of the standard were violated. The Secretary has established a violation of the standard alleged in instance (b).

Citation 1, Item 2(a) is affirmed as issued.

Citation 1, Item 2(b)

The Secretary cited Waffle House for a serious violation of §1910.151(c), alleging “[w]here employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the work area for immediate emergency use” in that:

(a) On or about 02/21/13 - 2501 Florence Boulevard, Florence, AL, employees were exposed to a corrosive chemical while cleaning waffle irons (Spartan Waffle Iron Cleaner) and suitable facilities for quick drenching of the eyes and body were not provided.

(Citation).

The Standard found at 29 C.F.R. § 1910.151(c) provides:

(c) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

Management of Waffle House was aware that managers and employees of Waffle House used Spartan Waffle Iron Cleaner, a caustic chemical substance, approximately three times a week to clean waffle irons used in the restaurant. Applicability, exposure, and knowledge are established. Whether the terms of the standard were violated is at issue.

The evidence substantiates the Secretary’s contention that while cleaning the waffle irons, employees and management do not use eye protection. While cleaning, they are exposed to contact and vapors from the caustic Spartan Waffle House Cleaner (Tr. 163, 167, 196). There was no dedicated eye-wash station in the restaurant. However, Waffle House contends there are six sinks with faucets (a hand washing sink in the kitchen area, a 3-bay sink in the back room and a sink in each bathroom) in the restaurant within arm’s reach, arguing the standard does not require a dedicated eye-wash station (Waffle House brief, p. 22). The undersigned agrees.

As both parties argue in their briefs, under Commission precedent, whether an employer has provided suitable facilities depends on the totality of the relevant circumstances, including the nature, strength, and amounts of corrosive material to which employees are exposed, the configuration of the work area, and the distance between the area where any corrosive chemicals are used and the eye-wash facilities. *Atlantic Battery Company, Inc.* 16 BNA OSHC 2131 (No. 90-1747, 1994).

The Spartan Waffle Iron Cleaner indisputably is caustic and can cause serious injuries such as burns and blindness. It is used undiluted and is sprayed directly onto the waffle iron, which is closed after spraying and turned on so the chemical can work. Employees then return to their regular duties for the approximately twenty minutes it takes for the waffle iron to clean. The duration of exposure to the chemical is brief. Cleaning occurs in the back room of the restaurant in proximity to the food prep area and sink, and bathrooms with sinks (Tr. 173, 357). There is no evidence that the sinks in proximity to the area where the waffle irons were cleaned were inoperable. CSHO Tomas testified only that they were unsuitable because it would be difficult for an employee to position their head under one of the sinks (Tr. 202-203). He did not however testify it could not be done.

Waffle House is a small restaurant. CSHO Tomas agreed on cross examination, the dimensions of the restaurant are 25 by 756, and water sources were only two to three feet away from where the waffle iron is cleaned (Tr. 292, 293). The number of sinks in the restaurant and proximity to the waffle cleaning area, for the size of the restaurant must be taken into consideration. Further, the evidence fails to reveal any injuries sustained by employees during the cleaning of the waffle iron. The undersigned finds the totality of the circumstances demonstrates Waffle House provided suitable eye washing facilities for employees potentially exposed to hazards which could affect their eyes while cleaning the waffle iron with the Spartan Waffle Iron Cleaner. The terms of the standard were not violated. Item 2b is vacated.

Citation 1, Item 3

The Secretary cited Waffle House for a serious violation of 29 C.F.R. §1910.138(a), alleging violations on February 17, 2013, during the cleanup the day after the fire, and on February 21, 2013, the day of the OSHA inspection. Citation 1, Item 3 specifically alleges “[t]he employer did not select and require employee(s) to use appropriate hand protection when

⁶ The dimensions of the restaurant were not stated in feet; however, the context of the testimony indicates the reference was to feet.

employees' hands were exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes” in that:

(a) On or about 02/21/13- 2501 Florence Boulevard, Florence, AL, employees were exposed to skin injuries while using Spartan Waffle Iron Cleaner to clean waffle irons.

(b) On or about 02/17/13 -2501 Florence Boulevard, Florence, AL, employees were exposed to skin injuries while using commercial cleaners and degreasers to clean fire and smoke damage following a grease fire.

(Citation).

The standard found at 29 C.F.R. § 1910.138(a) provides:

(a) *General requirements.* Employers shall select and require employees to use appropriate hand protection when employees’ hands are exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes.

Instance (a)

Management of Waffle House was aware that managers and employees of Waffle House used Spartan Waffle Iron Cleaner, a caustic chemical substance, to clean waffle irons used in the restaurant. Applicability, exposure, and knowledge are established. Violation of the terms of the standard must be determined.

The evidence adduced at the hearing shows that while cleaning the waffle irons, employees did not use hand protection such as gloves, and were exposed to contact from the caustic Spartan Waffle House Cleaner (Tr. 87-88, 89, 207-208, 221). Waffle House does not dispute that its employees did not wear gloves when cleaning the waffle irons.

The Spartan Waffle Iron Cleaner undeniably is caustic and can cause serious injuries such as burns. It was used undiluted. Waffle House contends that Batts’s testimony regarding irritation and injuries to her hands from the Waffle Iron Cleaner should not be credited. The undersigned agrees. Batts’s testimony regarding her alleged injuries and those she alleges were sustained by other employees, appeared self-serving and is determined to be unreliable. Accordingly, no weight is put on her testimony on those matters. CSHO Tomas testified the Spartan Waffle Iron Cleaner could cause chemical burns (Tr. 222). The Material Safety Data Sheet for the Spartan Waffle Iron Cleaner provides rubber gloves or other impervious gloves are

recommended to prevent skin contact (Tr. 213). None were used by Waffle House employees. The Secretary has established a serious violation of Item 3, instance (a).

Instance (b)

The Secretary contends Waffle House employees were exposed to skin injuries while using commercial cleaners and degreasers to clean the restaurant following the fire. Waffle House contends during the cleanup its employees were provided two types of gloves: kitchen gloves and latex gloves (Waffle Houses' brief, p.18). However, it asserts chemical-resistant gloves were not necessary when using household cleaners. The credible evidence shows ZEP and Krud Kutter, caustic and corrosive chemicals, were used during the cleanup on February 17, 2013, during phase two.

The Material Safety Data Sheets for the ZEP All-Purpose Cleaner & Degreaser Does not caution against skin contact and does not provide that impervious or any other gloves are required when using it (Exh. C-17). However, the Material Safety Data Sheets for the ZEP 505 Industrial Cleaner & Degreaser cautions against skin contact and provides: "wear appropriate protective clothing to prevent skin contact. Chemical-resistant gloves." (Exh. C-18). Both of these products are considered corrosive chemicals because they each have a pH greater than 7 (Tr. 166, 169-170). Jacson White testified he used gloves during the cleanup when using the ZEP products (Tr. 391-392). CSHO Thomas testified the kitchen gloves used were chemical resistant (Tr. 221). However, according to CSHO Tomas at least four employees were not provided chemical-resistant gloves, and employees told him they experienced skin irritation as a result of the cleanup (Tr. 209, 218, 221). Miller testified employees who used Krud Kutter during the cleanup wore the kitchen type gloves (Tr. 421). Her testimony is corroborated by Whites'. Although Miller disputes employees used ZEP during the cleanup, it was clear from her testimony that employees who used the corrosive chemicals were provided the kitchen gloves, which CSHO Tomas testified were appropriate, to protect them. The undersigned credits Millers' and Whites' testimony over that of the CSHO which was not specific regarding the use of the gloves. The undersigned finds the terms of the standard were not violated. The Secretary has not established a violation of the standard alleged in instance (b). Instance (b) of Item 3 is vacated.

Citation 1, Item 3 instance (a) is affirmed.

Citation 1, Item 4

The Secretary cited Waffle House for a serious violation of 29 CFR 1910.157(g)(1) alleging “[a]n educational program was not provided for all employees to familiarize them with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting” in that:

(a) On or about 02/16/13 -In the kitchen area, the grease drawer of a 3-foot natural gas griddle caught fire and employee(s)[sic] had not been trained on how to operate the portable Class K fire extinguisher provided.

(Citation).

The standard found at 29 C.F.R. § 1910.157(g)(1) provides:

(g) *Training and education.* (1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

Waffle House contends it provided fire extinguisher training to its employees. The record evidence reveals there were two portable fire extinguishers in the restaurant. One was a Class K fire extinguisher and was mounted inside the kitchen. The other was an ABC Chemical fire extinguisher and was located in the rear of the restaurant (Tr. 46, 47, 337).⁷

Bailey, Vice President of Workers Compensation and Safety, testified she oversees, among other departments, the training department (Tr. 321-322). According to Bailey, employee safety training consists of safety videos for new hires, a safety and Security Manual, Ops Planning Calendar featuring a safety topic, the Waffle House Way which contains the fire safety system regarding the type of equipment and how to use the extinguishers, and the Coach N Train binder which is rotated every two weeks and covers 14 topics (Tr. 335-336; Exh. R-9). Bailey testified fire safety is one of the topics included in Coach N Train. It covers the types of extinguishers to use (Tr. 336).

According to server Batts, on the night of the fire she grabbed a fire extinguisher but nothing happened, so she asked customers for help (Tr. 64). Batts further testified she was not trained on how to use fire extinguishers when she first started working at the restaurant, and she was not aware of any coworkers receiving training on how to use portable fire extinguishers (Tr.

⁷ An additional fire extinguisher was installed in the hood over the grill (Tr. 225, 367). This fire extinguisher was not a portable fire extinguisher; it was a component of the hood over the grill (Tr. 51-52).

65). CSHO Tomas testified Cunningham told him he had not been trained regarding the use of fire extinguishers (Tr. 226-227). He also testified that Manager Johnson told him she had not done any fire extinguisher training, and she could not remember the last time they were trained (Tr. 227, 230). Johnson's testimony does not establish fire extinguisher training was not done. Batts's testimony is discredited; Cunningham and Johnson did not testify at the hearing, therefore they were not subject to cross examination. Further, CSHO Tomas's recollection of events relating to his inspection were not detailed, was conclusory and inconsistent and he did not appear certain when testifying. The undersigned finds his testimony regarding Johnson and Cunningham as it related to fire safety training unreliable and places no weight on it.

The Secretary argues that since Batts was unable to operate the fire extinguisher during the fire and since neither Batts nor Cunningham knew how to put out the fire shows that they had not been trained. The undersigned is not willing to make this leap because of the unreliability of the testimony regarding fire extinguisher training. The reliable evidence shows Waffle House trained its employees regarding the use of fire extinguishers. The Secretary has failed to establish a violation as alleged. Item 4 is vacated.

Citation 1, Item 5

The Secretary cited Waffle House for a serious violation of 29 CFR § 1910.1200(e)(1) alleging "[t]he employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met" in that:

(a) On or about 02/17/13 – 2501 Florence Boulevard, Florence, AL, a written hazard communication program was not maintained at the establishment, material safety data sheets were not available for materials covered by the standard such as, but not limited to, Zep Fast 505 Industrial Cleaner and Degreaser, Zep All Purpose Cleaner and Degreaser, and Spartan Waffle Iron Cleaner, nor were employees trained in accordance with the requirements of 29 CFR 1910.1200 (h).

(Citation).

The standard found at 29 C.F.R. § 1910.1200(e)(1) provides:

(e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:

- (i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,
- (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

Waffle House contends its hazard communication program and material safety data sheets were located in a wire basket hanging on the commissary door of the restaurant (Tr. 367). According to Bailey, the hazard communication program is maintained in most restaurants in a hanging basket/folder with the Safety and Security Manual (Tr. 338, 339). CSHO Tomas testified that during his inspection on February 21, 2013, he asked Hazelip, who was the lead supervisor at the time, if they have any documentation such as any “Health and Safety Programs” (Tr. 130, 131). According to CSHO Tomas, she said “no idea” (Tr. 234). He testified he also asked manager Johnson “what Safety and Health program do you have onsite, and she said ‘no programs’” (Tr. 233). He also testified he asked the same question of District Manager Risner and she also said “no” (Tr. 234). At the hearing, CSHO Tomas testified “safety and health programs would include the hazard communication program” (Tr. 233). However, he did not testify he provided this explanation to the Waffle House staff during his inspection on February 21, 2013.

CSHO Tomas’s testimony during direct examination regarding the hazard communication program was confusing at best. Despite testifying, Risner responded “no” when he asked her what Safety and Health program Waffle House had onsite, he later testified during direct examination that he telephoned Risner regarding the location of the hazard communication program and she told him she did not know where it was located (Tr. 234, 442). CSHO Tomas’s testimony was inconsistent and as a result, the undersigned concludes he did not specifically ask for the Waffle House Hazard Communication Program. Even if the evidence can be construed to find he asked for it, the evidence adduced at the hearing fails to show he asked anyone whether the Hazard Communication Program was present on February 17, 2013, the date specified in the Citation for the alleged hazard communication program violation.

Assuming arguendo the alleged violation description in Item 5 can be construed to include February 17, 2013, Risner testified the written hazard communication program was in the basket where she told CSHO Tomas it could be found, which according to her is where it

was always located (Tr. 368). Moreover, the Waffle House Hazard Communication Program and the specific material safety data sheets sought by CSHO Tomas were subsequently provided to him by Bailey (Tr. 340; Exh. R-10). CSHO Tomas's recollection of events relating to his request for documentation regarding the hazard communication program was conclusory and inconsistent. The undersigned finds his testimony regarding the hazard communication program unreliable and places no weight on it.

Contrary to CSHO Tomas, the employees and management testified consistently about training and instruction materials, and safety related documents including its hazard communication program being located in the basket in the back of the restaurant. The Secretary has not established the hazard communication program was not present on the date alleged or on the date of the inspection. Accordingly, the Secretary has not established a violation of Item 5. Item 5 is vacated.

Penalty Determination

The Secretary proposed a penalty of \$34,000.00 for the alleged violations cited. As set forth herein, however, the undersigned vacates Items 2(b), 3 instance (b), 4 and 5. For the remaining Items, the penalty proposed by the Secretary is \$20,000.00.

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Waffle House, owned by Mid South Waffles, employed 25 employees (Tr. 129). Mid South Waffles, company-wide, employs approximately 2600 people (Tr. 25). On the night of the fire, 5 employees were at work at the Waffle House restaurant (Tr. 62-63). Approximately 6 employees were onsite during the cleanup after the fire (Tr. 221).

Citation 1, Item 1 is directly related to the fire which occurred on February 16, 2013, and alleges a serious violation of section 5(a)(1) of the Act. In assessing the gravity of the violation, CSHO Tomas testified it was high severity because serious injuries could result including burns, smoke inhalation or death if there were an explosion (Tr. 156). He rated the probability as

greater because of the number of employees present at the time of the fire and the circumstances which were present which would make it more likely that the fire was going to occur (Tr. 156). The undersigned concurs with this high gravity assessment for item 1.

Citation 1, Item 2a alleges a violation for failure to provide eye protection when cleaning the waffle iron with caustic chemicals and during the cleanup following the fire. In assessing the gravity of this violation, CSHO Tomas testified it was high severity because of the possibility of eye injuries which would result in blindness or other serious physical harm (Tr. 194). He assessed the probability as greater due to the number of people exposed during the cleanup (Tr. 195). A high gravity assessment is appropriate.

Citation 1, Item 3 instance (a) alleges a serious violation for Waffle House's failure to provide hand protection for employees using the caustic waffle iron cleaner. Employees could sustain chemical burns and other skin irritation when using the Spartan Waffle Iron Cleaner. Several employees used the cleaner. High gravity is appropriate.

Waffle House acted in good faith, as demonstrated by its cooperation during the inspection. Good faith supports a smaller penalty. However, it has a history of OSHA violations resulting in the issuance of serious violations during the five year period prior to issuance of the instant citation (Tr. 202). This history supports a high penalty.

In consideration of the statutory penalty factors, the undersigned finds the Secretary's proposed penalty of \$20,000.00 for the items affirmed herein is appropriate.

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 1 of Citation 1, alleging a serious violation of Section 5(a)(1) of the Act, is affirmed, and a penalty of \$7,000.00 is assessed.
2. Item 2a, of Citation 1, alleging serious violations of 1910.133(a)(1) is affirmed, and a penalty of \$7,000.00 is assessed.
3. Item 2b of Citation 1, alleging a serious violation of 1910.151(c) is vacated, and no penalty is assessed.

4. Item 3 of Citation 1, instance(a) alleging serious violations of 1910.138(a) is affirmed; instance (b) is vacated. A penalty of \$6,000.00 is assessed for item 3 instance (a).
5. Item 4 of Citation 1, alleging a serious violation of 1910.157(g)(1) is vacated, and no penalty is assessed.
6. Item 5 of Citation 1, alleging a serious violation 1910.1200(e)(1) is vacated, and no penalty is assessed.

SO ORDERED.

Date: November 24, 2014
Atlanta, Georgia

/s/
SHARON D. CALHOUN
Judge