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

SECRETARY OF LABOR, Complainant, v. WAL-MART DISTRIBUTION CENTER #6016, Respondent.	OSHRC Docket No. 08-1292

ON BRIEFS:

Scott Glabman, Senior Appellate Attorney; Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Steven R. McCown, Esq.; Littler Mendelson, P.C., Dallas, TX
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

In 2008, the Occupational Safety and Health Administration inspected Wal-Mart Distribution Center #6016 in New Braunfels, Texas, one of approximately 120 such centers operated by Wal-Mart nationwide. As a result, OSHA issued Wal-Mart a four-item citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging serious violations of four provisions of the general industry personal protective equipment ("PPE") standard—29 C.F.R. § 1910.132(d)(1) (requiring a PPE hazard assessment); 29 C.F.R. § 1910.133(a)(1) (requiring eye and face PPE); 29 C.F.R. § 1910.136(a) (requiring foot PPE); and 29 C.F.R. § 1910.138(a) (requiring hand PPE). OSHA proposed a single grouped penalty of $1,700 for the four items.

Following a hearing, Administrative Law Judge Patrick B. Augustine affirmed the two items related to the hazard assessment and eye and face PPE (Items 1a and 1b), vacated the two items related to foot and hand PPE (Items 1c and 1d), and assessed the $1,700 proposed penalty. Both parties filed petitions for review, and all four citation items are at issue before us. For the reasons that follow, we affirm Item 1a, vacate Items 1b, 1c, and 1d, and assess the $1,700 penalty.

DISCUSSION

I. Serious Citation 1, Item 1a – PPE Hazard Assessment[1]

The cited provision states that "[t]he employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of [PPE]." 29 C.F.R. § 1910.132(d)(1). The Secretary alleges that Wal-Mart violated this provision by failing to physically examine the New Braunfels Center to assess whether hazards necessitating PPE were present. Wal-Mart claims that it complied with the cited provision by performing a PPE hazard assessment at one of its other distribution centers, located in Searcy, Arkansas.[2] According to Wal-Mart, this served as a "global" assessment for each of Wal-Mart's distribution centers nationwide, including the one at New Braunfels.

The judge rejected this argument, concluding that the plain language of § 1910.132(d)(1), its preamble, and the provision's non-mandatory Appendix B, all support the Secretary's reading of the standard as requiring a hazard assessment at each particular workplace. He also found that the Searcy Center assessment did not constitute an assessment of the New Braunfels Center because Wal-Mart failed to verify that work conditions at New Braunfels were equivalent to those at Searcy. The judge reasoned that while Wal-Mart's reliance on the Searcy Center assessment assumed physical uniformity among all Wal-Mart distribution centers, the standard

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[1] Commissioner MacDougall dissents from this portion of the decision and her dissenting opinion follows.

[2] The New Braunfels Center is located in the Fifth Circuit, and Wal-Mart is headquartered in the Eighth Circuit. Pursuant to the OSH Act, either the Secretary or an employer may appeal a Commission decision to "any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office . . . ." *See* §§ 11(a)-(b) of the OSH Act, 29 U.S.C. §§ 660(a)-(b). Where it is probable that a decision will be appealed to a certain circuit, the Commission generally applies the law of that circuit. *Kerns Bros. Tree Serv.,* 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000).

addresses work conditions, not simply workplace layout. For the following reasons, we agree with the judge and affirm this citation item.

On review, Wal-Mart first argues that because OSHA intended the cited standard to be performance-oriented, employers have the discretion to comply by using a global hazard assessment. *See* Personal Protective Equipment for General Industry; Revisions ("PPE Revisions"), 59 Fed. Reg. 16,334, 16,336 (Apr. 6, 1994) ("Paragraph (d) of [§ 1910.132] is [a] . . . performance-oriented provision which simply requires employers to use their awareness of workplace hazards to enable them to select the appropriate PPE for the work being performed."). The Secretary responds that while the PPE selection portion of the standard is performance-oriented, the hazard assessment requirement is not, and the phrase "assess the workplace" in the provision plainly means that the employer must perform an on-site, individualized assessment of the subject worksite, thus precluding use of a "global assessment."[3]

[3]Although the Secretary asserts on review that Wal-Mart's "global assessment" argument constitutes an affirmative defense, the question of whether the Searcy Center assessment was sufficient to meet the requirements of the standard relates to the issue of noncompliance, which is a part of the Secretary's prima facie case. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981) (to establish a violation of a specific OSHA standard, Secretary must prove (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Therefore, this argument cannot constitute an affirmative defense. *See United States Postal Serv.*, 24 BNA OSHC 2066, 2068, 2014 CCH OSHD ¶ 33,413, pp. 57,391-92 (No. 08-1547, 2014) (citing *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986) ("An affirmative defense raises matters extraneous to the plaintiff's prima facie case . . . ."); *Sanden v. Mayo Clinic*, 495 F.2d 221, 224 (8th Cir. 1974) ("[I]f the defense involved is one that merely negates an element of the plaintiff's prima facie case, it is not truly an affirmative defense . . . .") (internal quotation marks and citation omitted)); *see generally* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1270-71 (3d ed. 2004); 61A Am. Jur. 2d *Pleading* § 279 (2010).

Section 1910.132(d)(1) is silent regarding the method an employer must use to assess its workplace for hazards, but the preamble indicates that the assessment must take into account the conditions specific to each worksite:

> [A] hazard assessment . . . produces the information needed to select the appropriate PPE for the hazards present or likely to be present at *particular workplaces*. The Agency believes that the employer will be capable of determining and evaluating the hazards of *a particular workplace*.
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> [T]he Agency has determined that employers can adequately verify compliance with § 1910.132(d) of the final rule through a written certification which identifies *the workplace evaluated* . . . .

PPE Revisions, 59 Fed. Reg. at 16,336 (emphasis added). *See also id.* ("OSHA proposed to require employers to select the PPE for their employees based on an assessment of the hazards in *the workplace*, and *the hazards which employees are likely to encounter.*") (emphasis added). This concept is also reflected in the preamble's reference to an example of a compliant hazard assessment procedure in non-mandatory Appendix B, which entails conducting "a *walk-through* survey" of the areas in question, "*observ*[*ing*]" the sources of PPE hazards, and selecting the appropriate PPE for the *identified* hazards. *Id.* at 16,336, 16,362-63 (emphasis added); *see* App'x B to Subpart I of Part 1910 ("PPE Standards"), 29 C.F.R. § 1910.132, et seq. Consequently, if the Secretary can show that the Searcy Center assessment did not take account of the conditions specific to the New Braunfels Center, he will have established Wal-Mart's noncompliance irrespective of whether, under other circumstances, there may be an effective substitute for conducting an assessment on-site. *See*, *e.g.*, *Gen. Motors Corp.*, 22 BNA OSHC 1019, 1028, 2004-09 CCH OSHD ¶ 32,928, p. 53,610 (No. 91-2834E, 2007) (consolidated) (preamble is best and most authoritative statement of the Secretary's legislative intent for standard susceptible to different interpretations) (citing *Am. Sterilizer Co.*, 15 BNA OSHC 1476, 1478, 1991-93 CCH OSHD ¶ 29,575, pp. 40,015-16 (No. 86-1179, 1992) (internal quotation marks omitted)).

According to Wal-Mart, the Secretary has failed to make this showing on two grounds. First, the company claims that the testimony of its Logistics Division Safety and Environmental Director ("Safety Director"), whose office monitors injuries and illnesses for Wal-Mart distribution centers nationwide, establishes that the "design and operations" of the two Centers

are similar. Specifically, Wal-Mart points to the Safety Director's response to the question, "from your observations of both [the Searcy and New Braunfels] Distribution Centers, from your personal observations, are the order [filler] functions identical?" He responded, "[y]es, they are," and indicated that the functions and job requirements identified in the citation are the same and involve the same equipment. But the Safety Director subsequently testified that he had not been to the New Braunfels Center *prior to the inspection*. We find, therefore, that he had not determined from personal observation that the conditions at New Braunfels were the same as those at Searcy as of the relevant period.

Second, Wal-Mart contends that the document it refers to as the "Searcy Center assessment"—which found, among other things, that Searcy Center box-cutter employees needed PPE—was made accessible to all Wal-Mart distribution centers via the company's intranet.[4] Wal-Mart argues that the applicability of this document to New Braunfels is corroborated by the fact that New Braunfels management testified that they understood the intranet document to represent corporate policy and that PPE was, in fact, provided to box-cutter employees at New Braunfels. However, this does not mean that either corporate or New Braunfels management had verified that the conditions at New Braunfels were equivalent to those at Searcy. Moreover, as Wal-Mart's own Safety Director acknowledged, "process or equipment changes" can cause "the circumstances or conditions at . . . distribution centers [to] differ in some way from Searcy, Arkansas[.]"[5] Despite this potential for difference, the record shows that Wal-Mart never verified the equivalency of conditions between the two facilities. The New Braunfels general manager testified that prior to the OSHA inspection, neither he nor his subordinates had any communications with anyone at the corporate level about a hazard assessment at the New Braunfels Center. In addition, the general manager identified the "asset protection manager" as

[4] We note that the document referred to here as "the Searcy Center assessment" contains no reference to Searcy—it is titled "Personal Protective Equipment"—and the New Braunfels managers were unaware at the time of the alleged violation that it was an assessment of the Searcy Center.

[5] Wal-Mart argues that the Safety Director's testimony shows that his office conducted on-site PPE assessment visits whenever there were process or equipment changes at a particular distribution center. However, we find that the Safety Director's testimony was that such changes *could* prompt his team to conduct an on-site field visit, not that a change in process or equipment would necessarily result in such a visit.

the only official at the New Braunfels Center qualified to perform a hazard assessment, and that manager had no involvement with the Searcy Center assessment.[6]

Finally, we find the Secretary has shown that Wal-Mart did not otherwise conduct a hazard assessment of the New Braunfels Center. Although Wal-Mart asserts that its "asset protection managers" frequently conduct physical inspections of its workplaces and discuss safety issues with employees, the company does not allege that any of these officials specifically assessed the New Braunfels Center for PPE hazards. In addition, the New Braunfels general manager's testimony shows that: (1) he does not consider himself qualified to perform a PPE hazard assessment; (2) neither he nor his staff conducted a comprehensive assessment at the New Braunfels Center; and (3) he was unaware of any other Wal-Mart official having conducted one.[7]

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[6] To the extent our dissenting colleague asserts that the lack of notice of any hand, eye/face, or foot hazards requiring PPE establishes that Wal-Mart's Searcy Center assessment was sufficient for purposes of New Braunfels, we disagree. An after-the-fact determination that Wal-Mart lacked notice of any such hazards cannot excuse the company's failure to verify the similarity of conditions at Searcy and New Braunfels *at the time* it purportedly relied on the Searcy Center assessment. *See Sec'y of Labor v. Trinity Industr., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007) (affirming violation of asbestos standard's requirement to test for asbestos, court stated that Secretary did not have to prove actual exposure to asbestos because the failure to test "made it possible that workers could unwittingly stumble into large amounts of asbestos without adequate protection . . . .").

Similarly, we disagree with our dissenting colleague's view that this violation should be classified as de minimis. Because the cited standard addresses the risk that there may be a hazard present in the workplace, the relationship of the violation to safety or health must be measured by that risk, not on whether it turns out that a hazard was indeed present. *Cf. id.* (explaining that irrespective of the lack of actual exposure to asbestos, violation for failure to test for asbestos is properly characterized as "serious" because of the potential consequences of exposure). Here, we find that the record demonstrates that the handling of the pallets and other materials posed the possibility that such hazards might have been present. Moreover, we note that with respect to the hand, eye/face, and foot PPE citation items, we have declined to reach the issue of whether a hazard was indeed present.

[7] Wal-Mart claims that this citation item should be vacated in light of the Safety Director's testimony regarding Wal-Mart's application for recognition of the Searcy Center under OSHA's Voluntary Protection Program ("VPP"). Specifically, the company asserts that during OSHA's review of the application, Wal-Mart informed OSHA that the Searcy Center assessment was applicable to all its distribution facilities, and OSHA subsequently approved the application. To the extent Wal-Mart is arguing that this evidence precludes the Secretary from enforcing the cited provision here, we find the argument without merit. The record shows that the VPP application was only for recognition of the Searcy Center. Therefore, OSHA's grant of VPP status to the Searcy Center did not constitute a representation by the Secretary that Wal-Mart had complied with § 1910.132(d)(1) with regard to workplaces other than Searcy. *Compare Miami*

In sum, the Secretary has shown that the Searcy Center assessment was insufficient to establish compliance with the cited standard at the New Braunfels Center because Wal-Mart never verified that conditions at New Braunfels were equivalent to those at Searcy, and Wal-Mart did not otherwise conduct a hazard assessment of the New Braunfels Center. Accordingly, we find that Wal-Mart failed to comply with § 1910.132(d)(1) and affirm Item 1a.

II. Serious Citation 1, Item 1b – Eye/Face PPE

The cited provision states that "[t]he employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards . . . ." 29 C.F.R. § 1910.133(a)(1). Under this citation item, the Secretary alleges that Wal-Mart failed to provide PPE to protect employees who work as "order fillers" at the New Braunfels Center from eye/face hazards.[8] Order fillers label merchandise and unload it from wooden pallets stacked on multi-level shelving systems ("modules"). These employees work 10-hour shifts separating the contents of the pallets onto conveyer belts and ultimately into boxes, and then placing the emptied pallets in a return area.

According to the compliance officer, order fillers are exposed to eye hazards from wood chips and debris. This debris, she explained, originates from damaged pallets as they slide forward within the module system. The debris then falls through metal grating onto lower levels within the modules where order fillers might be working. In addition, the compliance officer testified that pallets stacked higher than eye-level on the third level of the module system present the possibility of objects falling off of them and striking order fillers in the eyes and/or face. She also stated that the tops of the pallets are covered in dust, which she determined could get into order fillers' eyes.

To establish the applicability[9] of a PPE standard that, by its terms, applies only where a hazard is present, the Secretary's burden includes demonstrating that there is a significant risk of

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Industr., Inc., 15 BNA OSHC 1258, 1991-93 CCH OSHD ¶ 29,465 (No. 88-671, 1991), *aff'd in relevant part*, 983 F.2d 1067 (6th Cir. 1992) (finding employer lacked fair notice of standard's requirements based on "a regular and consistent pattern of conduct over a 10-year period" by OSHA).

[8] The citation identifies these employees by work activity, but not by job title. Nonetheless, throughout this case, the parties have referred to the relevant employees as "order fillers," as has the judge in his decision.

[9] Commissioner MacDougall does not limit the reasonably prudent employer test to the element of *applicability* as part of the Secretary's burden. In her opinion, when assessing an alleged

harm[10] and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the circumstances surrounding the hazardous condition,

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violation of a PPE standard, which does not presume a hazard, the reasonably prudent employer test applies to the entire analysis. *E.g. Philadelphia, Bethlehem & New England R.R. Co.*, 11 BNA OSHC 1345, 1346, 1983 CCH OSHD ¶ 26,512, p. 33,736 (No. 77-2200, 1983) ("a hazardous condition requiring the use of personal protective equipment exists . . . if a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment."). Commissioner MacDougall fears that her colleagues' attempt to limit the application of the reasonably prudent employer test to a specific element of the Secretary's case will create confusion. The potential for confusion is illustrated by the apparent contradiction in footnote 11 below, where her colleagues suggest that the test relates to a different element—*whether the standard was violated*, i.e., compliance. *See infra* note 11.

[10] *See, e.g., Anoplate Corp.*, 12 BNA OSHC 1678, 1681, 1986-87 CCH OSHD ¶ 27,519, p. 35,680 (No. 80-4109, 1986) ("[W]here a standard is not expressly or impliedly based on a finding that noncompliance will result in a significant risk of harm . . . there must be a showing that a significant risk of harm exists in the particular case."); *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259, 2002-04 CCH OSHD ¶ 32,672, p. 51,450 (No. 98-0701, 2003) ("Whether there exists a significant risk depends on both the severity of the potential harm and the likelihood of its occurrence . . . ."); *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1141-42, 1993-95 CCH OSHD ¶ 30,045, p. 41,234 (No. 88-1250, 1993), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994). As we rest our decision here on the Secretary's failure to establish that Wal-Mart had "notice" of the alleged hazards, we do not address whether the Secretary established significant risk. *See Corbesco, Inc. v. Dole*, 926 F.2d 422, 427 (5th Cir. 1991) (where cited standard does not presume a hazard, Secretary has burden to prove "actual or constructive notice" that protection is required); *Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d 1285, 1288 (5th Cir 1981) ("Due process requires that employers be given reasonably clear advance notice of what is required of them [under generally worded standards].").

Commissioner MacDougall disagrees with her colleagues' assertion above that "we rest our decision here on the Secretary's failure to establish that Wal-Mart had 'notice' of the alleged hazards . . . " and that "we do not address whether the Secretary established significant risk." Rather, Commissioner MacDougall's conclusion is that the Secretary failed to prove the existence of a hazardous condition requiring the use of PPE because he failed to prove that Wal-Mart recognized or that a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition—including any facts relevant to an injury rate or number of injuries and facts unique to a particular industry—should have recognized a significant risk of harm warranting the use of PPE. *See Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2065, 1984-85 CCH OSHD ¶ 26,961, p. 34,611 (No. 78-1443, 1984) (in the absence of evidence of actual knowledge, "a hazardous condition requiring the use of personal protective equipment exists . . . if a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment.").

including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE.[11] *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2065, 1984-85 CCH OSHD ¶ 26,961, p. 34,611 (No. 78-1443, 1984) (consolidated) (citation omitted), *aff'd*, 764 F.2d 32 (1st Cir. 1985); *Armour Food Co.*, 14 BNA OSHC 1817, 1820, 1987-90 CCH OSHD ¶ 29,088, p. 38,881 (No. 86-247, 1990); *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1140, 1993-95 CCH OSHD ¶ 30,045, p. 41,233 (No. 88-1250, 1993).[12] "Commission precedent also holds that

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Commissioner MacDougall agrees with her colleagues that the Secretary was required to show Wal-Mart recognized a hazard or should have recognized a hazard requiring PPE. However, Commissioner MacDougall notes that her colleagues rely upon the concept of notice, a constitutional concept involving due process which is not at issue here. *E.g.*, *Corbesco*, 926 F.2d at 426-28 (in order to satisfy the constitutional requirement of due process, the Secretary is required to prove that respondent had actual or constructive notice); *Peterson Bros. Steel Erection Co. v. Reich*, 26 F. 3d 573, 576 (5th Cir. 1994) (Secretary required to prove actual or constructive notice in order to satisfy constitutional due process). This case is not about whether Wal-Mart had fair notice regarding the Secretary's interpretation of a vague or ambiguous standard. Rather, it is about whether Wal-Mart violated the cited standard, a question requiring the Secretary to show that Wal-Mart recognized or should have recognized a hazard that required the use of PPE—in other words, the Secretary must prove that Wal-Mart had actual or constructive knowledge. Indeed, Wal-Mart's petition for discretionary review and its brief before this Commission do not make a constitutional notice or vagueness attack and, instead, focus on the Secretary's failure to show that Wal-Mart knew or should have known of a hazard requiring the use of PPE. Commissioner MacDougall believes that, simply put, the citation should be vacated because the Secretary failed to meet his burden of proof. Commissioner MacDougall believes that her colleagues' choice to frame the issue as one of notice, rather than knowledge, is likely to add confusion to an area of the law where confusion already abounds. *See B&B Insulation, Inc. v. OSHRC*, 583 F.2d 1364, 1368 (5th Cir. 1978) (stating that in cases addressing the PPE requirement of a similar standard, 29 C.F.R. § 1926.28(a), each "decision by the Commission has produced as many conflicting interpretations as there were participating commissioners.").

[11] The Commission has previously determined that "section 1910.133(a)(1) [the eye/face PPE standard] . . . is so broadly-worded that it is appropriate to apply [a] reasonable person test in assessing compliance with the standard." *Philadelphia, Bethlehem & New England R.R. Co.*, 11 BNA OSHC at 1347, 1983-84 CCH OSHD at p. 33,736. We find that this test also applies to 29 C.F.R. §§ 1910.136(a) (the foot PPE standard) and 1910.138(a) (the hand PPE standard), given the similarity in language between these provisions.

[12] The Fifth Circuit has held that constructive notice of such a standard's requirements may be shown through evidence of industry custom and practice, injury rate, obviousness of the hazard, or interpretations of the regulation by the Commission. *Corbesco*, 926 F.2d at 427. The Eighth Circuit applies a reasonable person test. *Arkansas-Best Freight Sys., Inc. v. OSHRC*, 529 F.2d 649, 655 (8th Cir. 1976) (discussing "requirement of foreseeability[—]whether a reasonable man would recognize a danger warranting the use of [PPE] . . . .").

evidence of industry custom and practice will aid in determining whether a reasonable person familiar with the circumstances would perceive a hazard, though it is not necessarily determinative."[13] *GM Parts*, 11 BNA OSHC at 2065, 1984-85 CCH OSHD at p. 34,611 (citing *Owens-Corning Fiberglass Corp*., 7 BNA OSHC 1291, 1295, 1979 CCH OSHD ¶ 23,509, p. 28,491 (No. 76-4990, 1979), *aff'd*, 659 F.2d 1285 (5th Cir. Unit B 1981)). *See also Armour Food Co.*, 14 BNA OSHC at 1820, 1987-90 CCH OSHD at p. 38,881.[14]

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[13] Commissioner MacDougall disagrees with her colleagues' suggestion above—that "evidence of industry custom and practice . . . is not necessarily determinative." The cited statement of the law fails to acknowledge that the Fifth Circuit, where this case may be appealed, has held that industry custom and practice *is dispositive* to the reasonably prudent employer inquiry. *E.g., B&B Insulation*, 583 F.2d at 1370 (in the absence of specific evidence of customary procedures in the industry, Secretary could not establish that respondent failed to act as a reasonably prudent employer). *See also Owens-Corning*, 659 F.2d at 1288 (stating that "we have today reaffirmed . . . [that] the Secretary's argument that industry custom should not be controlling is without merit."). Even Commission precedent has not been a model of clarity on the issue of whether industry custom and practice is dispositive to the reasonably prudent employer inquiry or whether industry custom is merely one factor in the reasonably prudent employer test. Commissioner MacDougall notes that in *GM Parts*, relied upon by her colleagues, the Commission expressly refused to endorse the cited proposition, recognizing that two different iterations of the reasonably prudent employer test exist. 11 BNA OSHC at 2065, 1984-85 CCH OSHD at p. 34,611 ("We do not decide at this time whether the Commission's reasonable person/actual knowledge test or the Fifth Circuit's industry custom/actual knowledge test is more appropriate."). We, as Commissioners, in order to maintain the integrity of the adjudicative process should consider the most relevant precedent—not only Commission authority but authority from the potential controlling jurisdiction as well.

[14] Chairman Rogers and Commissioner Attwood note that Commissioner MacDougall cites *B&B Insulation* as contrary, controlling Fifth Circuit precedent. In *B&B Insulation*, the court noted that under Fifth Circuit precedent, "[w]here the reasonable man is used to interpolate specific duties from general OSHA regulations, the character and purposes of the Act suggest a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry[,]" and vacated the citation "[i]n the absence of evidence that B&B's conduct fell below the demonstrated practice in the industry . . . ." 583 F.2d at 1370, 1372. However, the most recent Fifth Circuit decision on this issue is consistent with Commission precedent. *See Corbesco*, 926 F.2d at 427 (indicating that industry custom and practice is but one of several means of establishing employer had notice that a hazard requiring PPE was present). Chairman Rogers and Commissioner Attwood also note that Commissioner MacDougall reads *GM Parts* as recognizing an inconsistency in Commission precedent rather than endorsing the concept that evidence of industry custom and practice is not necessarily determinative. Chairman Rogers and Commissioner Attwood disagree. *GM Parts* was decided before the Fifth Circuit issued *Corbesco*. When the Commission stated in *GM Parts* that it would "not decide at this time whether the Commission's reasonable person/actual knowledge test or the Fifth Circuit's industry custom/actual knowledge test is more appropriate," it may well

In affirming this citation item, the judge concluded that despite what he characterized as a low incidence of four eye/face injuries at New Braunfels, the severity of potential harm was sufficient to give Wal-Mart constructive notice of a hazard requiring eye/face protection. In reaching this conclusion, the judge cited Commission precedent for the proposition that "the eye is an especially delicate organ and . . . any foreign material in the eye presents the potential for injury." *See Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1060, 1983-84 CCH OSHD ¶ 26,372, p. 33,453 (No. 79-4945, 1982) (citing *Stearns-Roger, Inc.*, 7 BNA OSHC 1919, 1921, 1979 CCH OSHD ¶ 24,008, p. 29,156 (No. 76-2326, 1979)), *aff'd*, 723 F.2d 410 (5th Cir. 1984). He also credited the compliance officer's testimony that employers in Wal-Mart's industry "h[ad] a blanket policy of [requiring] safety glasses . . . ." Thus, the judge concluded that the cited standard was applicable to Wal-Mart and was violated. We vacate this item for the following reasons.

With regard to injury rate, Wal-Mart argues that the eye/face injuries relied upon by the judge were "infrequent and incidental," and thus a reasonable person would not have recognized a hazard requiring the use of eye/face protection. Both the number of injuries and number of workers exposed are in dispute on review. The Secretary argues that Wal-Mart's injury logs reflect "at least seven" pertinent eye/face injuries from 2006 to early 2008, among an order filler population at the New Braunfels Center of approximately 60 workers.[15] Using these numbers,

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have been addressing the fact that the Eleventh Circuit (which has held that Fifth Circuit decisions issued prior to October 1, 1981, are considered binding precedent) was one of several circuits to which the case could be appealed, and that because the evidence was insufficient under any of the relevant tests, the Commission did not have to decide if the Fifth's Circuit's rule at the time was controlling. *See Kerns Bros. Tree Serv.*, 18 BNA at 2067, 2000 CCH OSHD at p. 48,003.

As already discussed in footnote 10 above, Commissioner MacDougall notes that *Corbesco* involves a respondent's constitutional due process challenge. No such constitutional challenge has been raised by Wal-Mart here. *See Peterson Bros.*, 26 F.3d at 575-77 (noting that *Corbesco* and *Peterson Bros.* both addressed the inquiry of whether the "employer had constructive notice of the duties imposed upon it" by the cited standard and, thus, whether "its constitutional rights were . . . violated[,]" which is separate from the analysis of whether the Secretary has proven the prima facie requirements for establishing a violation of the standard).

[15] The New Braunfels general manager testified that there are approximately 20 order fillers per shift. The Secretary acknowledges that there might be as many as three shifts per day.

the Secretary calculates the eye/face injury rate as between 11⅔ percent and 17½ percent. Wal-Mart asserts that the injury rate was .32 percent.

The Secretary argues that Wal-Mart's figure is flawed because it is based on a comparison between total reported injuries at the New Braunfels Center and total employee-hours worked, rather than order filler injuries and total order filler hours worked. However, the Secretary's figures are also questionable because they do not account for the number of hours worked and, as discussed below, they are based in part on non-pertinent incidents.[16] Neither the Secretary, who has the burden of proof on this issue, nor the company, has provided expert or other relevant evidence describing accepted injury rate calculation methodologies. In the absence of such evidence, we find that the record does not establish the injury rate claimed by either the Secretary or Wal-Mart.[17] Accordingly, our assessment of the record is limited to consideration of how many pertinent injuries occurred over an approximately two-year period in light of an estimate of the total number of order fillers.[18]

While the Secretary has alleged that there were seven such injuries, we find that he has failed to establish that four of those seven incidents are pertinent. Wal-Mart's Safety Director offered unrebutted testimony that three of these incidents were wholly unrelated to order fillers.[19] With regard to a fourth incident, the Secretary acknowledges that the injury records are too

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[16] We note that the Secretary, in objecting to Wal-Mart's injury rate calculation methodology, does not contest consideration of the number of employee-hours worked during the relevant time frame—the Secretary just asserts that the number of employees relied upon by Wal-Mart is overinclusive. But the Secretary's own calculation fails to account for the number of employee-hours worked by order fillers or the time period over which the injuries in question occurred.

[17] Commissioner MacDougall notes that any deficiencies in Wal-Mart's rate calculation are of no consequence, as Wal-Mart does not bear the burden of proof on this issue. Because the burden of proof falls upon the Secretary, Commissioner MacDougall does not join in attempting to calculate an injury rate based on incomplete information. Rather, she simply concludes that the Secretary failed to meet his burden, which is fatal to his case.

[18] Commissioner MacDougall agrees with her colleagues' conclusion that the Secretary failed to establish a reliable injury rate. In her opinion, in consideration of all the record evidence, the Secretary has failed to establish a significant risk of harm. *See supra* note 10.

[19] The Safety Director testified that two of these incidents—those involving Employee Nos. C7227084 and C7232547—did not occur where order filler operations take place. He also testified that the employee in a third incident (Employee No. C8219705) was a "non-conveyance order filler," and that this type of order filler has different equipment, job tasks and working conditions than those of the employees referred to in the citation.

imprecise in their description of the employee's work or how the injury occurred to determine whether the incident involved an order filler.[20] Consequently, we find that the Secretary has established the existence of only three pertinent incidents.[21]

We agree with Wal-Mart that these incidents furnish an insufficient basis for finding that the company had actual or constructive notice of the alleged hazards. With only three eye/face incidents in an order filler population of approximately 60 workers over a period of more than two years—one of which appears to have resulted in a very slight injury, and two of which lack information about the extent of injury—we cannot find that the evidence is sufficient to show that Wal-Mart had actual knowledge of a hazard requiring eye/face protection. *See GM Parts*, 11 BNA OSHC at 2065-66, 1984-85 CCH OSHD at p. 34,611; *see also Cotter & Co. v. OSHRC*, 598 F.2d 911, 915 (5th Cir. 1979) (finding "no evidence in the record of a specific, confirmed knowledge on [employer's] part regarding a hazard warranting [PPE]."). Indeed, the evidence in the instant case is no more supportive of the Secretary's position than the evidence was in *GM Parts*, in which the Commission rejected the Secretary's claim that actual knowledge had been established by what was found to be a very low incidence of injuries. *Id.* at 2065, 1984-85 CCH OSHD at p. 34,611. In that case, the injuries sustained by employees at two separate auto parts warehouses were, for one warehouse, five out of 150 employees over a 2½-year period, and for the other warehouse, 12 out of 25 employees over an eight-year period. *Id.* at 2063-64, 1984-85 CCH OSHD at pp. 34,609-10. The Commission was "unconvinced that the number of injuries incurred gave [GM] actual knowledge that a hazard warranting [PPE] existed." *Id.* at 2065,

[20] This incident involved Employee No. C6255805. The OSHA Form 300 log entry pertaining to this employee indicates that his job title was "warehouse-replenishment," not order filler. Furthermore, Wal-Mart's Safety Director, through unrebutted testimony, stated that this incident occurred on the loading dock, not in the order filling area. Therefore, the Secretary has not shown that this was a pertinent injury.

[21] The injury records show that Employee Nos. C7242546 and C6219386 were order fillers who suffered eye/face injuries while performing order filler duties. Furthermore, the compliance officer testified that during the inspection she learned of an incident in which ant poison granules fell down off a pallet and spattered in an order filler's eyes. Although this event was not recorded and there is no other evidence to confirm the existence or extent of any injury, Wal-Mart did not object to this testimony and did not cross-examine the compliance officer about it. Therefore, we consider this a pertinent incident.

1984-85 CCH OSHD at p. 34,611. Similarly here, the record is insufficient to establish that Wal-Mart had actual knowledge of a hazard warranting the use of eye/face protection.

The evidence regarding injury rate is also insufficient to establish that Wal-Mart had constructive notice of a hazard requiring the use of eye/face protection. Absent sufficient evidence establishing a reliable injury rate, there is no basis to conclude here that a reasonably prudent employer should have known that employees were exposed to eye/face injuries. The remaining evidence is equally unpersuasive in establishing that Wal-Mart should have recognized the need for eye/face protection. We agree with Wal-Mart that recognition of a hazard requiring PPE cannot be based on industry practice here because there is insufficient evidence of industry custom. Although the compliance officer testified that in her experience employers in Wal-Mart's industry "[t]ypically . . . have a blanket policy of [requiring the use of] safety glasses," the Secretary failed to establish that the compliance officer was knowledgeable about Wal-Mart's industry.[22] Moreover, the compliance officer's testimony in this regard was contradicted by Wal-Mart's Safety Director, who testified that the company's decision not to require the use of eye/face protection was in line with the rest of its industry. As a consequence, the Secretary failed to show that industry practice required the use of eye/face protection. Therefore, we find that neither industry custom nor injury rate provides a basis here for finding that a reasonable person familiar with the circumstances in the industry would have recognized a hazard requiring the use of eye/face protection at the New Braunfels Center.[23]

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[22] *See B&B Insulation*, 583 F.2d at 1370 (criticizing the Commission for deciding what a "reasonable prudent employer would do" under similar PPE standard "without reference to the actual conduct" of those in the industry at issue).

Commissioner MacDougall also notes that in *B&B Insulation*, the court found that a compliance officer's bare testimony, unsupported by specific facts, was insufficient to establish industry custom. *Id.*, 583 F.2d at 1372.

[23] The Secretary also argues—with respect to not just this item but also the other two PPE items at issue here—that Wal-Mart had constructive notice of the PPE hazards because its failure to perform a PPE hazard assessment at the New Braunfels Center constituted a lack of reasonable diligence. For the PPE citation items, it is the Secretary's burden, as part of his prima facie case, to establish recognition that sufficient indications of a hazard *were present* at the New Braunfels Center, which he has not done. Only upon this proof can constructive notice be established by showing a failure to exercise reasonable diligence to discover them. *See GM Parts*, 11 BNA OSHC at 2066, 1984-85 CCH OSHD at pp. 34,611-12 (finding no constructive notice of hazard requiring PPE, Commission determined that a reasonable person would not have recognized employees' practices as indicative of a need for PPE).

In sum, we conclude the Secretary has failed to establish the applicability of the cited provision because he did not show that Wal-Mart had actual or constructive notice of an eye/face hazard for which PPE would be necessary. Accordingly, we vacate Item 1b.

III. Serious Citation 1, Item 1c – Foot PPE

The cited provision states that "[t]he employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries . . . ." 29 C.F.R. § 1910.136(a). Under this citation item, the Secretary alleges that Wal-Mart failed to provide PPE to protect its order filler employees from hazards to their feet. The compliance officer testified that while conducting the inspection, she observed numerous damaged pallets, which were splintered and/or had exposed nails, and she became aware that order fillers were trained to "kick up" pallets once they were emptied—this required the employee to position the empty pallet partly over the edge of the module shelf, then step on the pallet so that it would stand up on its edge. Wal-Mart states that this practice allowed order fillers to grab the pallets without having to repeatedly bend over to pick them up, thus minimizing potential back strain. According to the compliance officer, the pallets could splinter and injure an employee's feet while being kicked up, or an employee's feet could be injured by heavy objects dropping on them. The judge identified six pertinent foot injuries among order fillers at the New Braunfels Center but vacated this item based on what he found was a lack of evidence indicating the requisite degree of harm. The judge also determined that the evidence of industry custom with regard to foot protection was "at best, inconclusive." For the following reasons, we affirm the judge.

On review, the Secretary argues that Wal-Mart had actual knowledge of hazards requiring foot protection because its managers knew first-hand of injuries from having reviewed the company's injury records. The Secretary also argues that the foot injury rate at the New Braunfels Center was sufficient to have provided a reasonable person with notice of a hazard requiring foot protection. Specifically, the Secretary asserts that, among approximately 60 order fillers, there were a "minimum of eight" foot injuries, with a resulting injury rate of between 13⅓

As previously noted, Commissioner MacDougall would frame the issue as one of "knowledge," rather than "notice." *See supra* note 10; *see also GM Parts*, 11 BNA OSHC at 2065, 1984-85 CCH OSHD at p. 34,611 ("We conclude that the Secretary failed to establish that GM had actual knowledge of a hazard requiring safety shoes.").

percent and 20 percent. Wal-Mart acknowledges that foot injuries have occurred at the New Braunfels Center but asserts that they have been too infrequent to indicate the presence of a hazard, and also contends that the Secretary failed to establish industry custom. As noted above, we are unable to rely on the parties' calculated injury rates, but we conclude that the evidence only establishes three of the injuries claimed by the Secretary, which we find is too few to have provided Wal-Mart with notice of a hazard.[24]

With respect to four of the injuries identified by the Secretary, the injury records show that they are not pertinent here: the incidents involving Employee Nos. C6200294 and C7235096 did not involve the order filler position; those involving Employee Nos. C6219338 and C7224578 involved leg injuries but, due to a lack of detail about the incidents, the records do not demonstrate that there was a potential for foot injury. Consequently, the Secretary has established three relevant foot injuries among these employees during this period.[25] As with the eye/face PPE item, we conclude that, in the circumstances of this case, there was an insufficient number of injuries to establish either actual knowledge of a hazard requiring foot protection, or that a reasonable person would have recognized such a hazard. *See GM Parts*, 11 BNA OSHC at 2065-66, 1984-85 CCH OSHD at pp. 34,611-12; *Armour Food Co.*, 14 BNA OSHC at 1820, 1987-90 CCH OSHD at pp. 38,881-82; *ConAgra*, 16 BNA OSHC at 1140-42, 1993-95 CCH OSHD at pp. 41,233-35.

The Secretary argues that "where the evidence establishes . . . a hazard, a low injury rate does not negate it," citing *Hamilton Fixture*, in which the Commission recognized that a " 'low number of recorded injuries has probative value regarding the [absence] of a hazard, but does not

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[24] Although the Secretary alleges that there were eight total incidents involving foot injuries, it appears that the same injury involving Employee No. C8204825 may have been asserted as two separate incidents. We therefore find that the evidence is insufficient to establish the purported eighth incident.

In discussing the pertinent number of injuries and injury rate for our consideration, Commissioner MacDougall notes that the Commission has not set forth any magic number or clear line of the number of incidents or injury rate that will give rise to a finding of knowledge, either actual or constructive, of a hazard requiring the use of PPE. She further notes that our findings here should not be construed as an indication of any such magic number. Rather, we have simply found that, upon review of the record evidence, the Secretary has failed to meet his burden on this issue.

[25] Specifically, the injury records show that Employee Nos. C6206827, C7244204, and C8204825 were order fillers who suffered foot injuries while performing order filler duties.

rebut . . . objective evidence of exposure to a hazard.' " 16 BNA OSHC 1073, 1095-96, 1993-95 CCH OSHD ¶ 30,034, p. 41,191 (No. 88-1720, 1993) (quoting *Dayton Tire & Rubber Co.*, 8 BNA OSHC 2086, 2092, 1980 CCH OSHD ¶ 24,842, p. 30,639 (No. 16188, 1980)). But *Hamilton* is inapposite because we find that, regardless whether a hazard existed here, the number of injuries is so low that Wal-Mart lacked the requisite *notice* of a hazard.[26]

In addition, the Secretary has not shown that Wal-Mart had the requisite notice through industry custom evidence. The compliance officer testified that she had "normally" seen foot protection in "warehouse-type" worksites where pallets were used, but also stated that she had only been to "a few" such facilities. The only other evidence of industry custom is the testimony of Wal-Mart's Safety Director, who denied that protective footwear was customary in its industry, and said that Wal-Mart had knowledge, both by sharing information with a trade association and by participating in academic research, that it was not customary in Wal-Mart's industry to provide such PPE. Thus, we find that the weight of the evidence on this issue is contrary to the Secretary's position.[27]

Accordingly, we conclude that the Secretary has failed to establish a violation of § 1910.136(a), and we vacate Item 1c.

IV. Serious Citation 1, Item 1d – Hand PPE

The cited provision states that "[e]mployers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards . . . ." 29 C.F.R. § 1910.138(a). Under this citation item, the Secretary alleges that Wal-Mart failed to provide PPE to protect its order filler employees from hazards to their hands. The compliance officer testified that she believed splinters from damaged pallets posed potential hand hazards to order fillers, who were required to handle the pallets with their bare hands while placing them in the return area, as well as while removing jammed pallets from the shelving modules. The judge

[26] As noted with respect to Serious Citation 1, Item 1b, Commissioner MacDougall would frame the issue as one of "knowledge," rather than "notice." *See supra* note 10.

[27] Additionally, with regard to both the foot and hand PPE citation items, the Secretary argues that Wal-Mart had actual knowledge of hazards requiring PPE because the hazards were, by their very nature, "generic." To the extent the Secretary is arguing that the hazards were obvious, we disagree; the types of facts necessary to show that a hazard is obviously present are absent here. *Compare Hamilton Fixture,* 16 BNA OSHC at 1095-96, 1993-95 CCH OSHD at pp. 41,191-92; *and Arkansas-Best*, 529 F.2d at 655.

vacated this item, finding that the Secretary failed to establish industry custom requiring the use of hand protection in warehouse facilities that use wood pallets, and that the record indicates that hand injuries were both fewer in number and of lesser severity than foot injuries. We affirm the judge.

On review, the parties make essentially the same arguments that they made with regard to the foot PPE item. The Secretary argues that Wal-Mart had actual knowledge of hazards requiring hand protection and that the hand injury rate was sufficient to have provided a reasonable person with notice of such hazards. The Secretary asserts that the injury logs reflect "a minimum of two" relevant hand injuries, resulting in a hand injury rate of between 3⅓ and 5 percent. Wal-Mart acknowledges that hand injuries have occurred at the New Braunfels Center, but maintains that it lacked actual knowledge of hazards requiring hand protection, and that a reasonable person would not have had notice of such hazards, claiming the hand injury rate was only .32 percent.

In reviewing the evidence which, as previously noted, excludes the parties' injury rate calculations, we find that the Secretary has only established that one of the alleged hand injuries is pertinent.[28] The other, involving Employee No. C8220322, has not been established as pertinent as the Safety Director's unrebutted testimony establishes that it did not involve an order filler. We determine that a single hand injury is insufficient to support a conclusion that Wal-Mart recognized a hazard requiring the use of PPE. In addition, the Secretary has not shown that Wal-Mart had the requisite notice through industry custom evidence, as the compliance officer conceded that she saw a lack of hand protection in other facilities using wooden pallets, and Wal-Mart's Safety Director testified to the same observation. In sum, the Secretary's evidence is inadequate to establish actual or constructive notice of a hand hazard for which PPE would be necessary.[29] As a result, we conclude that the Secretary has failed to establish a violation of § 1910.138(a), and we vacate Item 1d.

[28] With regard to the other, the compliance officer testified at the hearing that during the inspection she was made aware of a puncture wound to an order filler's hand that required surgery. There is no written record of this injury, but the compliance officer's testimony is unrebutted, and, therefore, we construe it as a pertinent injury.

[29] As noted with respect to Serious Citation 1, Item 1b, and Serious Citation 1 Item 1c, Commissioner MacDougall would frame the issue as one of "knowledge," rather than "notice." *See supra* note 10.

V. Characterization and Penalty

The judge characterized both of the violations he affirmed as serious based upon the duration of exposure and number of employees exposed. He also assessed the Secretary's proposed penalty of $1,700 for the two grouped items. On review, Wal-Mart does not challenge the characterization or penalty for the hazard assessment violation that we affirm, and we find no reason to disturb the judge's findings concerning the penalty amount. *E.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2004-09 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming alleged characterization and assessing proposed penalty where characterization and penalty were not in dispute). Accordingly, we affirm Item 1a as serious and assess the $1,700 proposed penalty.

ORDER

We affirm Serious Citation 1, Item 1a, and assess a penalty of $1,700. We vacate Items 1b, 1c, and 1d.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Heather L. MacDougall
Commissioner

Dated: April 27, 2015

MACDOUGALL, Commissioner, dissenting in part:

This case raises the important issue with regard to § 1910.132(d)(1) of whether an employer must conduct separate PPE hazard assessments of each facility it owns when it claims that an assessment conducted of another virtually identical facility serves as the assessment for the facility at issue. *See* 29 C.F.R. § 1910.132(d)(1). The Secretary claims that an employer must conduct separate PPE hazard assessments because an employer must perform an on-site, individual assessment of the subject worksite, thus precluding use of a "global assessment." I find that the standard's requirement that an employer "assess the workplace" does not necessitate a site-specific, walk-through survey to determine if hazards are present; that any construction of the standard by the Secretary to the contrary is unreasonable; and that the Secretary has failed to prove Wal-Mart's noncompliance with the cited standard. Rather, Wal-Mart complied with the cited provision by conducting a global assessment that met the standard's requirements and which served as the workplace assessment for the New Braunfels facility. For these reasons, I dissent from my colleagues on the issue presented in Serious Citation 1, Item 1a regarding the asserted PPE hazard assessment violation.

DISCUSSION

Section 1910.132(d)(1) states that "[t]he employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of [PPE]." 29 C.F.R. § 1910.132(d)(1). The preamble to the PPE final rule adds:

> OSHA believes that a hazard assessment is an important element of a PPE program because it produces the information needed to select the appropriate PPE for the hazards present or likely to be present at particular workplaces. The Agency believes that the employer will be capable of determining and evaluating the hazards of a particular workplace.

PPE for General Industry, Final Rule, Revisions, 59 Fed. Reg. 16,334, 16,336 (Apr. 6, 1994) ("PPE Revisions"). The PPE Revisions also contain a non-mandatory Appendix B that provides examples of compliant hazard assessment procedures. PPE Revisions, 59 Fed. Reg. at 16,336. Those procedures may include "a walk-through survey of the areas in question." *Id.*; App'x B to Subpart I of Part 1910 ("PPE Standards"), 29 C.F.R. § 1910.132, et seq.

While Appendix B suggests that an employer conduct a "walk-through survey of the areas in question," OSHA placed this language in a *non-mandatory* appendix rather than in the standard itself, which is consistent with the agency's decision to promulgate § 1910.132(d)(1) as a performance standard. *See* 59 Fed. Reg. at 16,336 (stating that § 1910.132(d)(1) is "a performance-oriented provision which simply requires employers to use their awareness of workplace hazards to enable them to select the appropriate PPE for the work being performed."). A performance standard differs from a specification standard in that, rather than directing specific measures to be taken whenever a hazard identified by the Secretary is present, it allows the employer, within the standard's general guidelines, flexibility to identify the hazards particular to its own working conditions and determine the steps necessary to abate them. *See Diebold, Inc., 3 BNA OSHC 1897, 1900, 1975-76 CCH OSHD ¶ 20,333, p. 24,250 (No. 6767, 1976) (consolidated), rev'd on other grounds, 585 F.2d 1327 (6th Cir. 1978).* In other words, performance standards state the required result without specifically mandating how that result is to be achieved. *Id.*

Because the phrase "assess the workplace" in § 1910.132(d)(1) does not state with specificity what an employer must do to comply with the standard, we are to apply the well-established principle that a broadly-worded regulation may be given meaning in a particular situation by reference to objective criteria, including the knowledge and perception of reasonable persons knowledgeable about the industry.[30] *See ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1140, 1993-95 CCH OSHD ¶ 30,045, p. 41,233 (No. 88-1250, 1993) (citing *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974)), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994). Such broad performance-oriented standards may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry. *See Brooks Well Servicing, Inc., 20 BNA OSHC 1286, 1291, 2002-04 CCH OSHD ¶ 32,675, p. 51,475 (No. 99-0849, 2003); Siemens Energy & Automation, Inc., 20 BNA OSHC 2196, 2198,* 2004-09 CCH OSHD ¶ 32,880, p. 53,228 *(No. 00-1052, 2005)* (both cases finding employer's exercise of discretion with performance-based standard is evaluated according to what would be reasonable for a particular situation).

[30] I thus reject the Secretary's contention that a plain reading of the provision excludes Wal-Mart's claim that it did not have notice of the requirement to perform a site-specific, walk-through assessment of the New Braunfels facility.

Based upon the text of the standard and governing precedent, I find that the Secretary improperly attempts to transform § 1910.132(d)(1) from a performance-oriented standard into a specification standard and has failed to prove Wal-Mart's noncompliance with the cited standard.[31] Section 1910.132(d)(1)'s requirement to "assess the workplace" does not specify how the assessment is to be accomplished, and I conclude that "assess the workplace" does not equate with "conduct a site-specific, walk-through survey." The Secretary's reading does not sensibly conform to the purpose and wording of the standard, ignores the fact that the only reference to a walk-through survey is in the non-mandatory part of the standard, and fails to give Wal-Mart fair notice that a site-specific, walk-through survey was required to comply with it.[32] *See Martin v. OSHRC* (*CF&I Steel Corp.*), 499 U.S. 144, 158-159 (1991) (reviewing courts must defer to the Secretary's interpretation of his own regulations where that interpretation is reasonable, taking into account such factors as the consistency with which the interpretation has been applied, "the adequacy of notice to regulated parties," and "the quality of the Secretary's

[31] The Secretary has the burden of proving: (1) the applicability of the cited standard; (2) the employer's noncompliance with the standard's terms; (3) employee access or exposure to the violative conditions; and (4) the employer's actual or constructive knowledge of the violation. *Ormet Corp.*, 14 BNA OSHC 2134, 2135, 1991-93 CCH OSHD ¶ 29,254, p. 39,199 (No. 85-531, 1991). I find that the burden to prove a violation of § 1910.132(d)(1) remains with the Secretary and reject his contention that the burden shifted to Wal-Mart to prove that it complied with the standard even though it did not complete a site-specific, walk-through assessment of the New Braunfels facility. I likewise reject any contention that the global hazard assessment is an affirmative defense for which Wal-Mart bears the burden of proof. The question of whether the global hazard assessment is sufficient to meet the requirements of the standard relates to the issue of noncompliance, which is part of the Secretary's prima facie case. *See United States Postal Serv.*, 24 BNA OSHC 2066, 2068, 2014 CCH OSHD ¶ 33,413, p. 57,391-92 (08-1547, 2014) (citing *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986) ("An affirmative defense raises matters extraneous to the plaintiff's prima facie case.")).

[32] There is no Commission precedent addressing the PPE hazard assessment requirement. Nor do I find that the Secretary's interpretation letters cited by the parties and my colleagues provide guidance on the particular facts presented here. Moreover, "a regulation cannot be construed to mean what an agency intended but did not adequately express . . . . [T]he Secretary as enforcer of the Act has the responsibility to state with ascertainable certainty what is meant by the standards he has promulgated." *See Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). *See also S.G. Loewendick & Sons Inc. v. Sec'y of Labor*, 70 F.3d 1291, 1297 (D.C. Cir. 1995) ("Congress and the courts require that agency action reflect clear, rational decision making that gives regulated members of the public adequate notice of their obligations."); *Cardinal Industr.*, 14 BNA OSHC 1008, 1011, 1987-90 CCH OSHD ¶ 28,510, p. 37,801 (No. 82-427, 1989) ("[a]s a general principle, an employer cannot be found in violation of the Act for failing to comply with a requirement of which it lacked fair notice.").

elaboration of pertinent policy considerations"). *See also Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 n.2, 2002-04 CCH OSHD ¶ 32,667, p. 51,417 n.2 (No. 96-1043, 2003); *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069, 1995-97 CCH OSHD ¶ 31,445, p. 44,472 (No. 96-0563, 1997).

The record shows the relevant facts. The New Braunfels facility at which the citation was issued is one of approximately 120 distribution centers owned by Wal-Mart where approximately 33,000 employees work. As the judge noted, the New Braunfels facility is virtually identical in physical layout and operations to other Wal-Mart distribution centers, including one located in Searcy, Arkansas. Employees working as order fillers perform the same job functions, use the same equipment, and work in virtually identical workspaces in the 120 distribution centers owned by Wal-Mart across the country. These order fillers are responsible for labeling and unloading freight, merchandise, and materials from wood pallets. Wal-Mart has a safety department that develops safety policies and procedures for all distribution centers to follow. The asset protection regional teams and managers are responsible for carrying out Wal-Mart's safety policies and procedures at each distribution center. Each distribution center, including New Braunfels, has a PPE hazard assessment and safety program, which is developed in consideration of industry standards, agency guidance, and interpretative letters on the necessity of PPE.

In conducting the PPE hazard assessment at issue, Wal-Mart's asset protection managers reviewed the job functions and working conditions of order fillers (and other positions working in its facilities). In developing the assessment for its distribution centers, Wal-Mart concluded that there are two items of PPE required for employees using box knives, but no PPE required for the order filler employees at issue in this case. Wal-Mart trained new hires and current employees, such as those required to use box knives, on the use of any required PPE. However, the PPE hazard assessment concluded that no hazards existed that required order filler employees to wear eye or face, foot, or hand PPE.

In vacating the other items at issue (involving eye and face, foot, and hand PPE for order fillers), my colleagues and I have concluded today that Wal-Mart's assessment of a lack of need for eye or face, foot, or hand PPE was correct based on the record evidence and Wal-Mart's reference to objective criteria, including industry custom and practice. Thus, the record establishes that Wal-Mart met § 1910.132(d)(1)'s requirement of identifying the specific job

tasks necessitating use of PPE. Despite Wal-Mart's accurate assessment, the Secretary cites Wal-Mart for reaching this conclusion utilizing a global assessment to determine the appropriateness of PPE at the New Braunfels facility. However, there is nothing in the standard that requires each facility to conduct a site-specific, walk-through survey to determine if hazards are present. In addition, the Secretary has failed to show that Wal-Mart's global assessment as applied to the New Braunfels facility was unreasonable under the circumstances. Rather, I find it was a reasonable exercise of discretion based on Wal-Mart's awareness of hazards in its workplace to select the appropriate PPE for the work being performed at all its distribution centers, including the New Braunfels facility. *See* PPE Revisions, 59 Fed. Reg. at 16,336 (granting discretion to employers "to use their awareness of workplace hazards to enable them to select the appropriate PPE for the work being performed.").

Given that no eye or face, foot, or hand PPE was necessary for the order fillers, I do not see how Wal-Mart's assessment can be deemed unreasonable. *See* PPE Revisions, 59 Fed. Reg. at 16,336 ("OSHA can best determine whether the employer conducted an adequate hazard assessment by inspecting the areas where PPE is required."). *See also White Wave, Inc.*, 20 BNA OSHC 1784, 1786, 2004-09 CCH OSHD ¶ 32,744, p. 51,982 (03-0962, 2004) (ALJ) (judge's decision addressing § 1910.132(d)(1) and finding that where the evidence showed that the employer considered the hazard but found no hazard requiring the use of PPE, there could be no violation, because the standard "requires only that hazards requiring PPE be identified," and "there can be no violation of the cited standard if the Secretary fails to show the existence of such a hazard by the preponderance of the evidence."). Further, if there are any differences between the New Braunfels facility and the distribution center used as the benchmark for the global assessment, the record does not identify them as the Secretary offered no evidence to contradict Wal-Mart's evidence that all 120 distribution centers are "cookie cutter" and "virtually identical," or, likewise, Wal-Mart's evidence that the operations and order fillers' job duties are "identical."

As Wal-Mart's Logistics Safety and Environmental Director ("Safety Director") repeatedly and consistently testified, based on his own observation, the order fillers' jobs and tasks "are the same," whether they perform their duties in "New Braunfels, Texas; Searcy, Arkansas; Bentonville, Arkansas; [or] Lewiston, Maine," and the hazards they face, which were

considered for the appropriateness of PPE, "are the same," right "down to the same pallets."[33] Further, the Safety Director testified that Wal-Mart intended for the global PPE hazard assessment conducted at the Searcy facility to apply to its other "cookie cutter" distribution centers, including the one at New Braunfels.[34]

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[33] My colleagues disregard this testimony because the Safety Director had not visited the New Braunfels Center prior to the compliance officer's inspection. It is true that the hazard assessment was conducted even prior to the commencement of the Safety Director's tenure. However, the time at which the Safety Director visited the New Braunfels Center is of no consequence. There is no dispute that he had personal knowledge of the similarities between the two locations, which is not happenstance; rather, it appears that all of Wal-Mart's distribution centers were deliberately designed in such a way so as to facilitate centralized operating procedures like the global PPE assessment. Given the evidence presented by Wal-Mart that it considered and intended the Searcy Center assessment to apply to New Braunfels, which was not contradicted by the Secretary (and consistent with the Safety Director's testimony), I find that the Secretary has failed to carry his burden to show noncompliance with the cited standard. Thus, in answering the question to be decided as presented by my colleagues—"if the Secretary can show that the Searcy Center assessment did not take into account . . . the conditions specific to the New Braunfels Center, he will have established Wal-Mart's noncompliance irrespective of whether, under other circumstances, there may be an effective substitute for conducting an assessment on-site"—I find that the Secretary did not make the requisite showing.

In addition, my colleagues place much emphasis on the testimony of the New Braunfels facility's general manager, who testified that he was not involved in a hazard assessment there. However, given that he also testified that Wal-Mart's "corporate office" is responsible for such matters and he "does not have authority" regarding PPE, it does not appear that this would have been a part of his job responsibilities, even if a site-specific, walk-through survey had been conducted that met my colleagues' reading of § 1910.132(d)(1)'s requirements for a PPE hazard assessment.

[34] Such testimony included:

> Q: Do each of the Distribution Centers, including New Braunfels, have a personal protective equipment hazard assessment?
>
> A: They do.
>
> . . . .
>
> Q: Is R-1 the PPE Hazard Assessment for New Braunfels?
>
> A: Yes, it is.
>
> Q: Who did it?
>
> A: Well, my department is responsible for it. It was done prior to my tenure with Wal-Mart Logistics. It was in place when I came on board, and it does serve as the Policy and Procedure and Hazard Assessment for New Braunfels as well as our other Distribution Centers in the network.

My colleagues disregard the ample record evidence that Wal-Mart intended the global assessment to include other "cookie cutter" facilities, including the one at New Braunfels. Instead, they take out of context the Safety Director's testimony that if there were "process or equipment changes," which would cause "the circumstances or conditions at . . . distribution centers [to] differ in some way from Searcy, Arkansas," they would be considered by the company. My colleagues somehow construe this testimony to mean that because Wal-Mart acknowledged that potential, but unidentified, differences between two "cookie cutter" facilities would be considered, the Secretary has proven noncompliance with the cited standard. However, in remaining mindful of who has the burden to show noncompliance, I conclude that the Secretary failed to meet his burden to show that the global assessment conducted by Wal-Mart was unreasonable and insufficient to identify hazards at the New Braunfels facility.[35] Therefore, I would vacate Serious Citation 1, Item 1a.

/s/
Heather L. MacDougall
Commissioner

Dated: April 27, 2015

The Safety Director also testified that "because of their extreme likeness and similarity, [the distribution centers were] looked at as a group. Again, the same job description, the same equipment, the same set up was in place, not only at New Braunfels, but all of our regional Distribution Centers, so they were looked at as a group."

[35] Even if I were to find, as my colleagues do, that there was not strict compliance with the standard—something which is a bit of an oxymoron with regard to a performance standard—I believe they erred in finding a serious violation and assessing a penalty of $1,700. As we are all in agreement that there was no hazard necessitating the use of PPE, any violation bears a negligible relationship to employee safety or health as to render the assessed penalty inappropriate and, at most, should be affirmed as a de minimis violation. *See Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2156, 1987-90 CCH OSHD ¶ 28,501, p. 37,771 (No. 87-1238, 1989) ("A violation should be classified as *de minimis* when there is technical noncompliance with a standard but the violation has such a negligible relationship to the safety or health of employees that it is not appropriate to order abatement or assess a penalty.").

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WAL MART DISTRIBUTION CENTER #6016 and its successors, Respondent.	OSHRC DOCKET NO. 08-1292

Appearances:

Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas
For Respondent.

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (the Act). The Occupational Safety and Health Administration (OSHA) conducted an inspection of a Wal Mart Distribution Center #6016 (Respondent or NB DC), on February 20, 2008, in response to an employee complaint. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging four serious violations of the Personal Protective Equipment (PPE) general industry standard with a proposed grouped penalty of $1.700.00. Specifically, the Secretary determined that Respondent: (i) failed to assess the NB DC to determine if hazards were present or likely to be present at that facility, and (ii) failed to require the use of personal protective equipment for its order fillers' eyes and/or face,

feet and hands. Respondent timely contested the citation and a trial was conducted May 19-20, 2009, in Austin, Texas.

Legal Standard Applicable to Alleged Violations

To establish a violation of a safety standard, the Secretary must prove by preponderance of the evidence: (a) the applicability of the cited standard; (b) the employer's noncompliance with the standard's terms; (c) employee access to the violative conditions; and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Jurisdiction

The parties stipulated: (i) jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act and (ii) Respondent 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). (Complaint and Answer).

Factual Findings

The NB DC, located in New Braunfels, Texas, is "massive" – measuring roughly 1.2 million square feet or "somewhere around 20 acres." (Vol. I, Tr. 40, 71, 206; Vol. II, Tr. 64). It is one of approximately 120 Wal Mart owned distribution centers (Centers) in the continental United States, which employ more than 33,000 individuals. (Vol. II, Tr. 28, 105-106) It is similar in design and operations to the other Wal Mart Centers, including one located in Searcy, Arkansas. (Vol. I, Tr. 192; Vol. II, Tr. 35, 44, 45, 78, 90).

Robert Damarodas (Damarodas) has been the General Manager of the NB DC at various times since 1990. Damarodas is responsible for ensuring that merchandise remains in sellable condition throughout the distribution process. (Vol. I, Tr. 154-156). Craig Lindley (Lindley) is the current Asset Protection Manager at NB DC. (Vol. I, Tr. 216). Lindley is responsible for safety at NB DC. As part of his duties, he reports injuries to regional and corporate personnel for analysis on a weekly basis. (Vol. I, Tr. 217; Vol. II, Tr. 32). Michael Trusty (Trusty) is the Safety and Environmental Director for Wal Mart Logistics Division. Trusty develops safety policy, procedures and practices for Wal Mart Centers and warehouses nationwide. (Vol. II, Tr. 27, 29). Trusty works in the Wal Mart corporate headquarters in Bentonville, Arkansas. (Vol. II, Tr. 29). The NB DC and the Searcy Center are located in different regions, and therefore, are subject to separate regional oversight. (Vol. I, Tr. 192; Vol. II, Tr. 29-30, 112).

Employees at the NB DC perform three principal functions – receiving, order filling and shipping and support functions - maintenance, security, quality assurance and data processing. (Vol. I, Tr. 155). This case focuses on employee's performance of the "order filling" function. (Vol. I, Tr. 156).

The order filling function at the NB DC is primarily performed in the vicinity of nine modules (large shelving systems) which are divided into three levels. Each level contains three layers of shelving upon which pallets or merchandise are stacked. (Vol. I, Tr. 42, 71, 215). Order fillers label and unload stacked merchandise from primarily wooden pallets on the shelves onto conveyor belts for distribution to individual Wal Mart stores. (Vol. I, Tr. 42, 44-45, 46, 71; Ex. C-2). Most pallets are stacked with items to a height of 40 inches, but some reach shoulder level or higher. (Vol. I, Tr. 49, 52-53; Ex. C-2). In such instances, order fillers use hooks to pull the items towards them for removal. (Vol. I, Tr. 52). Moreover, to facilitate the forward

movement of the pallets, the shelves are slightly inclined toward the order fillers on rollers. (Vol. I, Tr. 43, 51, 71; Ex. C-5).

Once the pallets are emptied, order fillers remove them – sometimes by "kicking–up" pallets with their feet to their hands – and carry them to a nearby pallet return area of the modules where they are restacked four to five pallets high. (Vol. I, Tr. 45, 76, 101; Vol. II, Tr. 60; Ex. C-2). Order fillers then pull the next loaded pallet forward and repeat the process - usually more than twenty times a day. (Vol. I, Tr. 55, 74). Order fillers are subject to a processing quota of close to 425 boxes an hour. (Vol. I, Tr. 54).

Order fillers at the NB DC typically perform this function without hand, eye, face or foot protection as none is required by the Respondent. (Vol. I, Tr. 45, 46, 49, 75, 76, 91, 98, 186). Some of the wood pallets that the order fillers handle are splintered, have exposed nails, and weigh as much as seventy pounds. (Vol. I, Tr. 47, 74, 92, 100, 127, 130, 208; Vol. II, Tr. 98-99; Ex. C-3). In fact, of the roughly 90,000 pallets inside the facility, approximately 2,000 damaged pallets are repaired by a third party at the NB DC every day. (Vol. I, Tr. 125, 189, 206, 214).

OSHA Compliance Safety and Health Officer Miller (CSHO) conducted an inspection of the NB DC (Vol. I, Tr. 67, 123-124, 140). Accompanied by Damarodas and Lindley, among others, the CSHO conducted a walk-around of the warehouse area where the order filling function is performed. (Vol. I, Tr. 69). At the time of the inspection, the CSHO also requested hazard assessment documentation for the NB DC. (Vol. I, Tr. 76). Respondent did not provide any documentation of an NB DC Hazard Assessment until after the issuance of the instant citations. (Vol. I, Tr. 120). Based upon the CSHO's inspection, the Secretary issued the Citation alleging the four grouped serious items.

Hazard Assessment Discussion

Citation 1 Item 1(a): 29 C.F.R. § 1910.132(d)(1) (Hazard Assessment)

The Secretary alleges that Respondent violated 29 C.F.R. § 1910.132(d)(1) because it did not assess the NB DC. For hazards, section 1910.132(d)(1) provides in part:

> *Hazard assessment and equipment selection.* (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE).

The Respondent does not dispute that the standard applies. (Vol. I, Tr. 159). Respondent's primary argument is that it did not violate the standard. Respondent maintains that a 2006 hazard assessment conducted of the Searcy Center (Searcy Hazard Assessment) which Respondent considers "virtually identical" in operation and size to the NB DC) is a "Global Hazard Assessment" that also applied to the NB DC. (Resp't Br. at 7, 11; Ex. R-1). Because of the similarities between the facilities, and because the Commission and Secretary recognize that 29 C.F.R. 1910.132(d)(1) is a performance-oriented standard, Respondent argues that its Searcy Hazard Assessment satisfies its hazard assessment obligation with regard to the NB DC. (Resp't Post-Hr'g Br. at 9-10, 13-14; Ex. R-1). Respondent argues that the standard "confers discretion to employers on how to achieve the objective of the standard: identifying hazards that necessitate the selection and implementation of appropriate PPE to ensure the safety of employees". (Resp't Post-Hr'g Br. at 10). Respondent also argues that the "Secretary's disagreement with the results . . . is not a basis for finding that no assessment was conducted". (Resp't Post-Hr'g Br. at 11). Finally, Respondent argues that a Department of Labor interpretation letter,[36] as well as a Michigan case that interpreted a similar state plan provision

[36] *See* Letter from Raymond E. Donnelly to Mitchell S. Allen, Esq. (July 3, 1995), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21847; *United Parcel Svc. v. Bureau of Safety and Regulation*, 745 N.W.2d 125 (Mich. Ct.

and upheld a global hazard assessment application, support its position.[37] (Resp't Post-Hr'g Br. at 14-15).

The Secretary argues that Respondent's Searcy Hazard Assessment is not a hazard assessment of the NB DC because the term 'workplace' within section 132(d)(1) means an assessment must be done for each specific work site location at which Respondent has exposed employees. (Sec'y Post-Hr'g Br. at 9). Noting the language of the applicable preamble, the Secretary continues that "[s]uch interpretation is reasonable [and] consistent with the terms and purposes of the cited regulation." (*Id).* The Secretary argues that Respondent's position is suspect given the absence of a required certification document that an assessment of NB DC was in fact performed.[38]

The intent of the Secretary, as set out in the relevant preamble, can be considered in interpreting and determining the appropriate enforcement of a performance-oriented standard. *See Am. Cyanamid Co.*, 15 BNA OSHC 1497, 1500-1502 (No. 86-681, 1992) (relying on the reasonable intent of the Secretary to determine the appropriate enforcement of a performance-oriented requirement in the Hazard Communication Standard as that intent was explained in

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App. 2008). The court notes that this letter acknowledges that "similar analyses" will be performed where "multiple sites are involved."

[37]*See United Parcel Svc. v. Bureau of Safety and Regulation*, 745 N.W.2d 125 (Mich. Ct. App. 2008). The regulation at issue, Mich. Admin. Code, R 408.13308(1), provides in relevant part:

> (1) An employer shall assess the workplace to determine if hazards that necessitate the use of personal protective equipment are present or likely to be present.

[38] Section 1910.132(d)(2) provides:

> The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

preamble), *rev'd on other grounds*, 5 F.3d 140 (6th Cir. 1993). Moreover, the Commission stated that it "will defer to the reasonable intent of the Secretary in promulgating the standard, as that intent is authoritatively explained in the standard's Preamble." *Id.* at 1502. *Cf., Martin v. OSHRC (CF & I)*, 499 U.S. 144, 158 (1991) (holding the Commission should defer to the Secretary's reasonable interpretation of ambiguous standards).

The court finds that the *Personal Protective Equipment for General Industry* preamble (Preamble) supports the Secretary's argument that the benchmark of any hazard assessment for a workplace must be its consideration of the hazards at the *particular* workplace. It states that:

> OSHA believes that a hazard assessment is an important element of a PPE program because it produces the information needed to select the appropriate PPE for the hazards present or likely to be present at *particular workplaces*. The Agency believes that the employer will be capable of *determining and evaluating the hazards of a particular workplace*.

59 Fed. Reg. 16334, 16336 (April 6, 1994) (emphasis added).

Indeed, the Non-mandatory Appendix A to the standard - that is also referenced in the Preamble as "providing an example of procedures that satisfy the hazard assessment requirement" - suggests a similar focus by its reference to "a walk-through *of the area in question*."[39] *See generally Article II Gun Shop, Inc., d/b/a Gun World*, 16 BNA OSHC 2035, 2039 n. 12 (Nos. 91-2146, 1994 (consolidated) (noting that statements made in a non-mandatory appendix to a standard may be used to clarify the intent of that standard). Finally, the

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[39] Specifically, the Appendix states in part:

> 3. *Assessment guidelines*. In order to assess the need for PPE the following steps should be taken.
>
> a. Survey. Conduct a walk-through survey of the areas in question. The purpose of the survey to identify sources of hazards to workers and coworkers.

See Appendix A to § 1910.132(d), *Non-mandatory Compliance Guidelines for Hazard Assessment and Personal Protective Equipment Selection.*

Secretary's emphasis on an assessment of each workplace first and foremost under this standard finds support in a change in the wording of the proposed standard - "for the sake of clarity" - from a more generic "assessment of the *workplace hazards*" to the finally adopted wording that requires the employer to "*assess the workplace* . . . ." *See* 59 Fed. Reg. 16334, 16336; 54 Fed. Reg. 33832, 33842 (August 16, 1989). Moreover, the Secretary's construction furthers the policy underlying the Act. *See generally Brennan*, 513 F.2d 1032, 138 (2d Cir. 1975) (noting that "[i]t was the intention of Congress to encourage reduction of safety hazards to employees at *their places of employment*")(emphasis added).

The record establishes that in 2004 and 2008, OSHA audited the Searcy, Arkansas Center. (Vol. I, Tr. 121; Vol. II, Tr. 47, 51-54; Exs. R-8, R-9). It is also undisputed that in May 2008, OSHA granted the Searcy Center Voluntary Protection Program (VPP) status – an award that both parties agree is site specific and was based on an inspection of the Searcy facility by OSHA. (Vol. I, Tr. 123; Vol. II, Tr. 45, 109-110). However, while the record suggests that a hazard assessment of the Searcy Center was conducted prior to the February 20, 2008 inspection, it equally establishes that a hazard assessment of the NB DC was not. (Vol. II, Tr. 50-51; Exs. R-1, R-8).

Trusty admitted that he had no involvement with the Searcy Hazard Assessment because it was "in place prior to [his] tenure" in his division. (Vol. II, Tr. 35, 38). As such, his testimony primarily focused on what his team currently considers in assessing hazards,[40] as opposed to whether the Respondent specifically considered the NB DC during the Searcy Hazard Assessment. (Vol. II, Tr. 38, 90-92). Indeed, Trusty was unable to identify who in fact

[40] Trusty testified that Wal Mart Logistics Division *currently* employs a "multi-tiered approach" to reporting injuries and analyzing hazards that includes input from local and regional Asset Protection Managers, as well as employees. (Vol. II, Tr. 30-33).

conducted that assessment or describe with any specificity how it was conducted. (Vol. II, Tr. 38, 88, 90). In addition, General Manager Damarodas specifically testified that he never conducted a hazard assessment of the NB DC, and that prior to the inspection resulting in the issuance of the Citation in this case, he had not met with anyone from corporate about conducting one. (Vol. I, Tr. 191). Trusty's testimony confirmed the general manager's lack of involvement in any hazard assessments. (Vol. II, Tr. 78). Similarly, Trusty specifically testified that the NB DC Asset Protection Manager Lindley – the only individual at the NB DC qualified to perform a hazard assessment - had no involvement with the Searcy Hazard Assessment. (Vol. I, Tr. 216; Vol. II, Tr. 78, 80). Finally, Trusty admitted that prior to the 2008 inspection, he had neither communicated with Lindley about any NB DC hazard assessment issues nor had he ever visited the NB DC. (Vol. II, Tr. 79-78).

Trusty maintains that Wal Mart's "cookie cutter" approach to constructing and operating Centers obviated any need to assess the particular order filling function at the NB DC. (Vol. II, Tr. 78). Our footprint as a building. . . is substantially *similar*. . . .

> And so an order filling module is an order filling module, whether you're in New Braunfels, Texas, Searcy, Arkansas, Bentonville, Arkansas, Lewiston, Maine.

(Tr. Vol. II 35). (emphasis added).

The court finds, however, that this corporate approach - which by its own terms simply *assumed* a uniformity of workplace and thus hazards with Searcy - belies Respondent's claim that the Searcy Hazard Assessment was also a hazard assessment of the NB DC under this standard. The flaw in this approach is apparent from Trusty's admission that conditions at other distribution centers differ from those at Searcy. (Vol. II, Tr. 93-94). It is an assessment of work conditions that is the focus of the standard; not whether the physical layout of one facility is similar to the layout of another facility. In this case, Trusty has never been to the NB DC. Trusty

is not familiar with the plant's layout except by viewing it on paper. Trusty is not familiar with the machines, equipment and processes of the NB DC. Respondent did not designate anyone to conduct a comparison of different distribution centers, namely the Searcy and NB DC, to determine the appropriateness of applying the Searcy Hazard Assessment to other Centers. These facts distinguish the present case from the *Drexel Chemical Co. and United Parcel Svc. v. Bureau of Safety and Regulation* cases cited by the Respondent.

Finally, Trusty testified that Exhibit R-1 in and of itself establishes the existence of a NB DC hazard assessment because it "resided" in Wal Mart's overall safety manual and was posted on the corporate intranet. (Vol. II, Tr. 35, 40, 81; Ex. R-1). The court is not persuaded.

First, Trusty testified that R-1 does not specifically identify or address the NB DC, and that there is no documentation that certifies that R-1 is the hazard assessment for the NB DC or for that matter any other Center pursuant to section 1910.32(d)(2). (Vol. II, Tr. 80, 88). Second, Trusty's credibility with regard to the significance of R-1 to the NB DC in view of Wal Mart's delay in providing it to the CSHO must be assessed. Trusty testified that the CSHO caused the delay by failing to reduce the request to writing. (Vol. II, Tr. 36-37). However, Respondent provided other verbally requested documentation to the CSHO prior to the issuance of the Citation. (Vol. II, Tr. 37). Moreover, the CSHO testified that Trusty's subordinate agreed to send her the documentation. (Vol. I, Tr. 76-77). At best, Trusty's testimony regarding the delay instead raises a reasonable inference that Respondent's hesitation reflected its realization that no NB DC hazard assessment had in fact been performed and for that reason is Trusty's testimony is not credible on this fact *See generally A. G. Mazzocchi, Inc.*, 22 BNA OSHC 1377, 1387 (No. 98-1696, 2008) (relying on motive, conflicting testimony, and the failure to provide certain documentation to the compliance officer, to establish an inference relative to the respondent's

failure to provide OSHA with a report); 1 Clifford S. Fishman, Jones on Evidence §§ 1.5, 4.2 (7th ed. 1972) (drawing reasonable inferences from circumstantial evidence).

Based upon the findings set forth, the court finds that the Secretary: (i) has established that employees engaged in order filling at NB DC were exposed to actual and potential hazards as a result of Respondent's failure to conduct a hazard assessment, and (ii) that Respondent knew or could have known of the violative condition in view of its knowledge that its employees were exposed to hazards resulting from the failure to perform a hazard assessment at the NB DC. (Exs. C-11, C-13, C-15). The Secretary has established a violation of § 1910.132(d)(1). The weight of the evidence shows that Respondent's cookie cutter "hazard assessment" was not merely deficient – it was instead a "failure to evaluate" the NB DC. (Exs. C-11, C-13, C-15).

PPE DISCUSSION

The Commission found the former Section 1910.133(a)(1) to be "broadly-worded." *See Atlantic Battery Co., Inc.*, 16 BNA OSHC 2131, 2153 (No. 90-1746, 1994).[41] Because of the similarities between that standard and the current Section 1910.133(a), the court finds the current section to be "broadly-worded." Under Commission precedent, the Secretary typically demonstrates the violation of a broadly-worded standard by showing that a reasonable person familiar with the situation would recognize a hazardous condition requiring the use of protective measures. *See Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793 (No. 90-998, 1992). However, in the Fifth Circuit, where this case arises, the Court has held that "[i]f the language of

[41] The prior standard provided in relevant part:

> Suitable eye protectors shall be provided where machines or operations present the hazards of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

29 C.F.R. § 1910.133(a)(1)(1993). The standard was revised effective April 6, 1994. *See* 59 Fed. Reg. 16334.

the regulation is not specific enough . . . other sources may provide constructive notice: industry custom and practice; the injury rate for that particular type of . . . work; the obviousness of the hazard; and the interpretations of the regulation by the Commission." *Corbesco Inc.*, 926 F.2d at 427 [14 BNA OSHC at 2119].

Because the foot and hand protection standards are also similar to the former Section 1910.133(a)(1), the court finds these sections to be broadly worded as well. Moreover, that interpretation may even be stronger as it relates to foot protection because the standard only requires protective foot equipment "where there is a danger of foot injuries." *Compare Weirton Steel Corp.,* 20 BNA OSHC at 1259 (citing case law that requires the Secretary to prove significant risk under standard requiring protective equipment "where danger exists." In conclusion, a violation of the PPE standards will only be found where industry custom and injury rate, among other factors, provide the employer with either constructive or actual knowledge of the hazard.

Citation 1, Item 1b: 29 C.F.R. § 1910.133(a)(1) (Eye and Face Protection)

Under Citation 1, Item 1b, the Secretary alleges Respondent violated 29 C.F.R. § 1910.133(a)(1) because "[i]n the warehouse, personal protective equipment for the eyes and/or face was not required for employees who were exposed to the hazards of eye injuries from dust, wood chips and spilled solids while pulling boxed merchandise from pallets stacked overhead and from debris such as wood chips and nails from damaged pallets falling through floor openings . . . ." The cited provision states that "[t]he 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." The Secretary argues that she established the violation of this standard in view of photographs, testimony and OSHA recordkeeping records indicating employee exposure to eye and face hazards with no corresponding PPE use requirement by management. (Sec'y Post-Hr'g Br. at 13-15).

Respondent argues that it did not violate the standard because eye injuries were "infrequent and incidental" and do not "rise to the level of a *substantial* probability of serious harm." (Resp't Post-Hr'g Br. at 17-18).

Applicability and Exposure

The Respondent does not dispute that the standard applies. (Resp't Post-Hr'g Br. at 17). Moreover, by its terms, § 1910.133(a)(1) applies when an employee is "exposed to eye or face hazards from flying particles." Here, the CSHO testified that, during her inspection, she determined that wood chips from damaged pallets were falling through the upper level metal floor grating onto the underlying walkways where order fillers work. (Vol. I, Tr. 94; Ex. C-8). She also observed wood pieces fall off the pallets themselves as they slid forward in the module towards the face and head of the order fillers. (Vol. I, Tr. 93-94; Ex. C-3). Finally, the CSHO testified that she interviewed employees who indicated that dust and other debris, including poison ant granules in one instance, were falling from the top of pallets stacked above eye level. (Vol. I., Tr. 76, 98, 138). Indeed, Trusty and order filler DeLeon, in their testimony, confirmed that order fillers encounter these conditions daily. (Vol. I, Tr. 52-53; 57-59; Vol. II, Tr. 71-73, 98-99). Moreover, OSHA's Form 300s as well as Respondent's own Exhibit R-7, confirm

exposures beginning in 2006.[42] (Vol. I, Tr. 80-82; Exs. C-11, C-13, R-7). It is undisputed that protective eye wear was not required. (Vol. I, Tr. 98).

Knowledge and Noncompliance

Citing its low eye injury rate and a non-binding administrative law judge decision, the Respondent argues that the Secretary did not establish its noncompliance because it lacked both actual and constructive knowledge of a hazard necessitating the use of eye or face PPE. *See Koch Eng'r Co., Inc.*, 12 BNA OSHC 1081 (No. 83-0611, 1984) (ALJ); (Resp't Post-Hr'g Br. at 17-18). Specifically, it relies upon its analysis of OSHA's Form 300 records for the NB DC between 2006 through 2008 to establish what it terms its "insubstantial" eye injury rate of .32 percent. (Resp't Post-Hr'g Br. at 17; Ex. R-7). Moreover, it argues that only one of those injuries involved order-filling. (Resp't Post-Hr'g Br. at 18). Finally, it also argues that, in any event, PPE would not have prevented these injuries. The Secretary maintains that because objective facts show the presence of a hazard, the "[i]nfrequency of injury may, at best, be considered in conjunction with the probability of a hazard causing an accident in penalty calculations." [43] (Sec'y Br. at 24-26). Regardless of which test is more appropriate, (i.e. specific v. broadly worded) the Secretary has established the knowledge necessary for a violation of the eye and face PPE standard.

Turning first to industry custom, the CSHO, who had twenty years of experience, testified that she has conducted approximately 400 OSHA inspections involving PPE. Based on her experience, she testified that "employers h[ad] a blanket policy of [requiring] safety-glasses when you enter" warehouses and other facilities with conditions similar to the NB DC. (Vol. I,

[42] Exhibits C-11, C-13, and C-19 reference several relevant eye injuries (C-6219386, C7227084, C7242546 and C8219705).

[43] The Secretary presented this as a general argument that has equal application to Items 1c and 1d. As such, it will not be repeated in those discussions.

Tr. 147). *See generally ConAgra Flour Milling Co.*, 16 BNA 1137, 1142 (No. 88-1250, 1993) (noting the need to show the equipment is in use throughout the relevant industry in similar circumstances to establish a violation).

As to the number of eye injuries, the Fifth Circuit has stated that while "the Act does not establish as a *sine qua non* any specific injury rate, a very low injury rate has a definite bearing on the question whether an employer has notice that personal protective equipment is necessary under a general regulation . . . ." *Owen-Corning Fiberglass Corp.*, 659 F.2d 1285, 1290 10 BNA OSHC 1070, 1074 (5th Cir. 1981); *See generally General Motors Corp.*, 11 OSHC 2062, 2065-2066 (Nos. 78-1443, 1984) (consolidated) (finding no actual knowledge warranting protective shoes in light of low injury rate), *aff'd*, 764 F.2d. 32 (1st Cir., 1985) (finding Secretary failed to establish that employer had actual knowledge of hazards which required the use of safety shoes in the absence of a "significant level of risk"). However, in evaluating PPE standards, the Commission has also noted that "[a]s the severity of the potential harm increases in a particular situation, its apparent likelihood of occurrence need not be as great." *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (No. 98-0701, 2003) (finding the severity of potential hazard weighed in favor of finding a hazard requiring the use of respirators under 29 C.F.R. § 1910.134(a)); *Anoplate Corp.*, 12 BNA OSHC 1678, 1682 (No. 80-4109, 1986) (finding that splashing of chemical was a hazard that required protective eyewear, notwithstanding records indicating low number of relevant injuries). *Compare Owens-Corning Fiberglass Corp.*, 659 F.2d at 1290 (noting that a "substantial risk of a less serious harm" supports a finding of noncompliance under the Act).

The record establishes actual eye injuries, albeit low in number. The CSHO described conditions which were likely to cause injuries that could result in lost time from work, restricted

work activity, medical treatment, hospital care and possible permanent eye injury. (Vol. I, Tr. 97, 98 and 99). Moreover, Damorados agreed that if splintered wood chips from pallets or similar objects fell to the eye that it could result in a serious injury. (Vol. I, Tr. 199). In addition, the daily practice of hooking stacks of pallets filled with the broad variety of household products sold by Wal Mart, and pulling them toward the employee's face and head area on the higher shelves, presents a repeated risk of any number of spilled or partially open product contacting the employee's eyes and face. Indeed, the Commission has noted "the considerable vulnerability of the eye." *See Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1060 (No. 7-4945, 1982). Given these facts, the Secretary has established a violation of section 1910.133(a)(1) based on Respondent's failure to ensure that employees in the order-filling areas of the warehouse used eye protection while exposed to flying particles, spills and debris.

Citation 1, Item 1c: 29 C.F.R. § 1910.136(a) (Foot Protection)

Under Citation 1, Item 1c, the Secretary alleges Respondent violated 29 C.F.R. § 1910.136(a) because "[i]n the warehouse . . . employees were wearing tennis shoes in lieu of protective footwear . . . while manually handling heavy items such as boxed merchandise, furniture and wood pallets, including stacking and kicking up damaged pallets with exposed nails, exposing employees to the hazards of contusions and fractures from dropped items on feet, and lacerations and puncture wounds from nails and splintered wood." The cited provision states, as relevant, that "[t]he employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole . . . ." The Secretary argues that she established this violation in view of testimony and other evidence (such as OSHA logs and incident report forms)

indicating actual foot injuries and employee exposure to foot hazards from damaged and heavy pallets and merchandise – with no corresponding PPE use requirement. (Sec'y Post-Hr'g Br. at 17-18; Exs. C-11, C-15, C-16).

Respondent argues that the record fails to demonstrate a substantial probability of injury to order fillers at the NB DC. (Resp't Post-Hr'g Br. at 19).

Applicability and Exposure

The Respondent does not dispute that the standard applies. (Resp't Post Hr'g Br. at 19). Moreover, the CSHO testified that OSHA Forms 300 and 301 reflect order filler foot injuries between 2006 and 2008. (Vol. I, Tr. 102-103; Exs. C-11, C-13, C-16). Trusty's testimony, as well as Respondent's own exhibit, confirmed at least two injuries.[44] (Vol. II, Tr. 70, 73, Ex. R-7) In addition, Damarodas testified that he was personally aware of a foot injury sustained by an order filler kicking up a pallet. (Vol. I, Tr. 195-196). Finally, Trusty also acknowledged a possibility of foot injuries from nails and falling objects. (Vol. II., Tr. 99). Both Damarodas and Trusty, as well as an NB DC order filler, acknowledged that protective footwear was not required for order fillers. (Vol. I, Tr. 49, 186; Vol. II, Tr. 99).

Knowledge and Noncompliance

Citing its low foot injury rate of .43 percent between 2006 through 2008 and a Fifth Circuit decision, the Respondent raises its prior PPE argument - that the Secretary failed to establish its noncompliance because it lacked both actual and constructive knowledge of any hazard necessitating the use of protective footwear. *See Cotter & Co., v. OSHRC,* 598 F2d 911

[44] *See* Exs. C-11 (case number C6206827), C-13 (case number C7244204). In addition, the OSHA logs reference at least four additional foot/lower leg injuries that appear to relate to individuals performing order filling (case numbers C6219338, C7224578, C7235096, C8204825).

(5th Cir. 1979). (Resp't Post-Hr'g Br. at 19). The Secretary argues that the Respondent had actual knowledge of the exposed employees through its supervisory employee Damarodas, as well as Trusty. In particular, she notes that Damarodas reviewed and signed OSHA's annual Summaries of Work Related Injuries and Illnesses. (Sec'y Post-Hr'g Br. at 19; Exs. C-12, C-14).

As to industry custom regarding the use of protective footwear in warehouse facilities that use wood pallets, the evidence was, at best, inconclusive. The CSHO testified that she "normally" saw foot protection during inspections of similar facilities and could not recall whether she also observed employees without it. (Vol. I. Tr. 146-147). Trusty only had limited knowledge regarding industry custom on this issue. (Tr. Vol. II 127-128).

But more persuasive here – in view of the low rate of foot injuries - is the lack of evidence indicating severe harm from NB DC working conditions. Likewise, the evidence indicated that the most likely possible injury of the laceration of the foot would likely require limited, if any, medical treatment and would not result in a function of the body being substantially impaired. The evidence indicates that any foot injury did not have a substantial and significant effect on the employee's ability to perform normal activities or return to work. (Vol. I, Tr. 102-104, 195-196; Vol. II, Tr. 73; Exs. C-11, C-15, C-16). For example, according to Damarodas and Trusty, the employee in case number C-8204825 - that the CSHO specifically discussed during the trial and involved a splinter in the right foot – only required a tetanus shot with no time off. (Vol. I, Tr. 103-104, 196 ; Vol. II, Tr. 73; Exs. C-15, C-16).

Under these facts the Secretary has failed to meet her burden of proof with respect to knowledge of the foot hazard. Thus, Item 1c of Citation 1 is VACATED.

Citation 1, Item 1d: 29 C.F.R. § 1910.138(a) (Hand Protection)

Under Citation 1, Item 1d, the Secretary alleges Respondent violated 29 C.F.R. § 1910.138(a) because "[i]n the warehouse, personal protective equipment for the hands was not provided for, and used by, employees who were manually handling pallets, including stacking damaged pallets with exposed nails and splintered wood, and manually pushing pallets back against inclined rollers in modules, exposing employees to the hazards of lacerations and puncture wounds to the hands." The cited provision states, as relevant, that "[e]mployers shall select and require employees to use appropriate hand protection when employees are exposed to hazards such as those from . . . severe cuts or lacerations; severe abrasions; punctures . . . ." The Secretary argues that testimony and other evidence indicating actual and potential order filler hand injuries from wooden pallets that were splintered and had exposed nails, with no corresponding glove requirement and limited glove availability, establish this violation. (Sec'y Br. at 20-21). Moreover, the Secretary notes that Damarodas' testimony minimized the potential effect of the use of gloves on production. (Sec'y Post-Hr'g Br. at 21).

Respondent reiterates its argument that the record fails to demonstrate a substantial probability of hand injuries to order fillers at the NB DC. (Resp't Post-Hr'g Br. at 20). Respondent also argues that the use of gloves would "substantially limit associates' productivity and ability to perform job tasks." (Resp't Post-Hr'g Br. at 21).

Applicability and Exposure

The Respondent does not dispute that the standard applies. (Resp't Post-Hr'g Br. at 20). As to exposure, the CSHO testified that she observed numerous pallets with splintered wood and nails that order fillers had to handle in order to perform their jobs. (Vol. I, Tr. 92, 105; Ex. C-3). The CSHO testified that from talking with employees and reviewing the OSHA logs, she learned

of actual hand injuries, including one that required surgery. (Vol. I, Tr. 106)[45] Indeed, both Damarodas and Trusty, as well as an order filler, each acknowledged that splinters and nails posed risks to the hands of order fillers. (Vol. I, Tr. 47, 189; Vol. II, Tr. 99).

Knowledge and Noncompliance

Citing its low hand injury rate of .32 percent between 2006 through 2008 and, here, the aforementioned administrative law judge decision, the Respondent largely reiterates its prior PPE argument - that the Secretary failed to establish noncompliance because it lacked both actual and constructive knowledge of any hazard necessitating the use of hand protection. *See Koch Eng'r Co., Inc.*, 12 BNA OSHC 1081 (No. 83-0611, 1984) (ALJ); (Resp't Br. at 21). Moreover, it argues that only one out of the six hand injuries reflected in that roll-up related to the order-filling function at issue here. (Resp't Post-Hr'g Br. 20; Vol. II, Tr. 71, 77; Ex. C-20).

The court concludes that the Secretary failed to establish industry custom requiring the use of hand protection in warehouse facilities that use wood pallets. The CSHO specifically testified that she "remember[s] inspecting facilities where there [were] wooden pallets where there was no hand protection." (Vol. I, Tr. 146). Moreover, the record indicates that relevant order filler hand injuries were not only few in number, but also of lesser severity. Indeed, the Secretary's own witness, order filler DeLeon, testified that during his nine years at NB DC he'd "gotten a few stickers, but not very many." (Vol. I, Tr. 47). Mr. DeLeon continued that he had "never heard of anything major happening."

Under these facts the Secretary has failed to meet her burden of proof with respect to knowledge of a hand hazard requiring personal protective equipment. Thus, Item 1d of Citation 1 is VACATED.

[45] Trusty testified, however, that the one clearly relevant injury noted on OSHA records – case number C-8220322 – was removed from the 2008 OSHA log. (Vol. II, Tr. 77; Exs. R-6, C-20).

Penalty

The record establishes the seriousness of Citation 1, Item 1(a) and Citation 1, Item 1 (b) Respondent's failure to conduct a hazard assessment exposed order fillers to the daily possibility of serious eye injuries in the order filler function of NB DC.

In calculating the appropriate penalty for a violation, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. OSH Act § 17(j), 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by "the number of employees exposed, the duration of the exposure, the precautions taken against the injury, and the likelihood that any injury would result." *See J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary proposed a total penalty of $1,700.00 for the four grouped items. In calculating the proposed penalty, the CSHO testified that the initial gravity-based penalty was $2,000.00 – an amount that reflected a lesser probability of an accident and the fact that any injuries would be of medium severity. (Vol. I, Tr. 107-108). The CSHO then testified that she reduced the original penalty by fifteen percent based upon the Respondent's safety and health program. No evidence was introduced regarding Respondent's history of prior violations. The court notes Respondent did not address or otherwise object to the penalty either during the hearing or in its post-hearing brief.

The record indicates that the Respondent's failure to conduct a hazard assessment exposed order fillers to serious eye injuries. Yet, while the evidence indicates that the duration of exposure extended at least from 2006 and the number of employees exposed was high (twenty order-fillers per shift), the low injury rate suggests a low probability of injury. (Vol. I, Tr. 96,

171). Given the totality of these circumstances the court assesses a penalty of $1,700.00 for the violations of 29 C.F.R. § 1910.132(d)(1) and 29 C.F.R. § 1910.133(a)(1).

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1(a) is AFFIRMED as a serious violation.
2. Citation 1, Item 1(b) is AFFIRMED as a serious violation.
3. Citation 1, Item 1(c) is VACATED.
4. Citation 1, Item 1(d) is VACATED.
5. For the Serious Violations of Citation 1, Item 1(a) and Citation 1, Item 1(b) the court assesses a penalty of $1,700.00.

/s/

Patrick B. Augustine
Judge, OSHRC

Dated: December 4, 2009