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. BUFFETS, INC., d/b/a OLD COUNTRY BUFFET, Respondent.	OSHRC Docket No. 03-2097

DECISION

Before**:** RAILTON, Chairman, ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

At issue before the Commission is whether Administrative Law Judge Robert A. Yetman properly affirmed a citation issued to Old Country Buffet ("Buffet") restaurant in Billings, Montana, alleging a violation of 29 C.F.R. § 1910.212(a)(1),[1] a standard promulgated under the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678.[2] For the following reasons, we reverse the judge and vacate the citation.

[1] The standard provides in pertinent part:

§ 1910.212 General requirements for all machines.

(a) *Machine guarding* – (1) *Types of guarding*. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks.

[2] The judge also vacated four citation items alleging violations of other general industry standards. The Secretary did not petition for review of these items.

Background

The Occupational Safety and Health Administration (OSHA) cited Buffet for failing to guard the rotating parts of three A-200 mixers located in the restaurant. The A-200 is a 20-quart capacity vertical food mixer manufactured by the Hobart Corporation. The mixer has one agitator shaft that may be fitted with various attachments. The agitator shaft rotates on its axis in a "planetary" or orbiting motion in addition to spinning. In 1995, Hobart began to equip its A-200 mixers with a cage-like bowl guard as standard equipment, and made bowl guard kits available to owners of pre-1995 machines. It is undisputed that Buffet's mixers were pre-1995 models and had not been fitted with bowl guards.

While inspecting Buffet on August 7, 2003, an OSHA compliance officer (CO) observed an employee pouring dehydrated potatoes from a pitcher into an unguarded model A-200 Hobart mixer while the mixer was running. The employee told the CO that she used the mixer three to five times a day to make mashed potatoes, and that she added ingredients while the mixer was running, according to Buffet's recipe. Buffet's bakers used the two other A-200 mixers for making desserts, and in two recipes poured ingredients from one or two-quart measuring cups into the bowls while the mixers were running. Employees turned off the mixers when they scraped the bowls. There is no evidence of any Buffet employee being injured by contacting the rotating parts of the unguarded mixers.

Discussion

Under section 1910.212(a)(1), the Secretary is required "to prove that a hazard within the meaning of the standard exists in the employer's workplace."[3] *ConAgra Flour*

[3] Buffet argues that the specific bakery standard in 29 C.F.R. § 1910.263(e)(2) preempts the general machine guarding standard in 29 C.F.R. § 1910.212(a)(1). This same argument was specifically rejected in *South Dakota Beverly Enters*., No. 01-0202 (Mar. 15, 2005). Therefore, section 1910.212(a)(1) applies here. *See Beverly* at n.2 (noting

Milling Co., 16 BNA OSHC 1137, 1147, 1993-95 CCH OSHD ¶ 30,045, p. 41,241-42 (No. 88-1250, 1993) (citing *Armour Food Co*., 14 BNA OSHC 1817, 1821, 1987-90 CCH OSHD ¶ 29,088, p. 38,883 (No. 86-247, 1990)), *rev'd on other grounds*, 2 F.3d 653 (8th Cir. 1994). Specifically, the Secretary "must show that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated." *Id*. (citing *Jefferson Smurfit Corp*., 15 BNA OSHC 1419, 1421, 1991-93 CCH OSHD ¶ 29,551, p. 39,953 (No. 89-553, 1991)). The mere fact that it is not impossible for an employee to come into contact with the moving parts of a particular machine does not, by itself, prove that the employee is exposed to a hazard. *Armour Food*, 14 BNA OSHC at 1821, 1987-90 CCH OSHD at p. 38,883.

In affirming the citation here, the judge noted that the evidence presented by the Secretary to establish a violation was "exceedingly sparse," but minimally sufficient to establish that a hazardous condition and exposure was more likely to exist at Buffet than not. The judge relied on his findings that (1) Buffet's employees put their hands within inches of the zone of danger posed by the agitators when adding ingredients; and (2) Hobart began manufacturing its mixers with guards and providing bowl guard kits for old mixers.

As in *South Dakota Beverly Enters*. ("*Beverly*"), No. 01-0202 (Mar. 15, 2005), we find that the judge made an unwarranted inference when he found that Buffet's employees were exposed to a hazard based on the fact that Hobart began to manufacture mixers with bowl guards in 1995. There is nothing in the record that explains why Hobart decided to equip new mixers with a guard. Thus, it was incorrect for the judge to presume, based on this record, that Hobart's decision was motivated by concerns that its unguarded mixers posed a hazard to employees.

We further find that the Secretary failed to meet her burden of establishing

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1978 Federal Register notice in which Secretary declared that hazards presented by moving parts of vertical mixers were covered by section 1910.212).

employee exposure to any hazard from the mixers at the cited Buffet restaurant. The CO testified that an employee operating the mixers or adding ingredients could get a hand, apron, or long hair caught in the unguarded rotating parts. Yet, as was the case in *Beverly*, there is no indication that the CO took any measurements of the mixers, bowls, and measuring cups, to determine the possibility or likelihood of exposure. Based on testimony from a Buffet employee, the Secretary asserts on review that employees' fingers came within 10 inches of the agitator when they added ingredients, while the unguarded mixer was running, and argues that even a slight deviation would allow an employee's fingers to come even closer to the moving shaft or agitator. This evidence does not support the Secretary's claim of exposure. She failed to explain how an employee would or could "deviate" in pouring to the point of contacting a rotating part. *Cf. Jefferson Smurfit*, 15 BNA OSHC at 1422, 1991-93 CCH OSHD at p. 39,954 (no exposure to gluing machine's inrunning nip point located 16 inches from power switch). The evidence does not show exposure when employees add ingredients while the mixer was running because employees pour ingredients from one- or two-quart containers into a bowl that is only 12 inches in diameter and sits inches below the machine's motor, which limits access to the bowl.

The Secretary also claims that an employee's clothing or hair could contact the rotating parts of the mixer while turning on the machine, changing the speed of the mixer, or adding ingredients. This claim is also unsupported. The Secretary presented no evidence that employees wore loose clothing, and did not explain how such clothing would become entangled in the rotating parts of the mixers. Although the evidence suggests that some employees wore their hair longer than was allowed by Buffet's policy, and their hair was not always in a net but pulled into a ponytail through a hat, the Secretary failed to show that an employee's long hair contacting the rotating parts was more than a theoretical possibility. In any event, we note the Hobart cage-type guard that the Secretary urges should be in place on the A-200 mixers would do little to prevent long hair from contacting rotating parts.

The Secretary also claims that employees who walked past the mixers were

exposed to the mixer's unguarded rotating parts as a result of potential slip hazards near the mixers. The CO never mentioned slip hazards as a basis for exposure, however, and the record shows that employees wore slip-resistant shoes and kept the floors swept and cleaned. Given the speculative nature of the Secretary's argument, and the evidence indicating that Buffet employees were not exposed to slip hazards, we find the Secretary failed to establish that employees simply walking past the unguarded mixers were exposed to the mixer's unguarded rotating parts as a result of slipping.

Finally, we note that the absence of mixer-related injuries at Buffet, while not dispositive, lends further support to our conclusion that employees were not exposed to any hazard presented by the unguarded mixers. *See Armour Food*, 14 BNA OSHC at 1822, 1987-90 CCH OSHD at p. 38,883 (occurrence of injury not necessary to prove violation; absence of injuries supports finding that there was no hazard).

Conclusion

We find that the Secretary has failed to establish that Buffet employees were exposed to a hazard while operating or walking past any of the unguarded A-200 mixers. Accordingly, we reverse and vacate the citation.[4]

SO ORDERED.

_/s/_____
W. Scott Railton
Chairman

_/s/_____
James M. Stephens
Commissioner

_/s/_____
Thomasina V. Rogers
Commissioner

Dated: April 5, 2005

[4] Commissioner Rogers notes that even under the Commission's more recent formulation of the exposure test in *Fabricated Metal Prods. Inc.*, 18 BNA OSHC 1072, 1998 CCH OSHD ¶ 31,463 (No. 93-1853, 1997), the Secretary has failed to show exposure. That is, the Secretary has failed to show that it is "reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Id.* at 1074, 1998 CCH OSHD at p. 44,506-7.

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SECRETARY OF LABOR, Complainant, v. BUFFETS, INC., d/b/a OLD COUNTRY BUFFET, Respondent.	OSHRC DOCKET NO. 03-2097

APPEARANCES:

For the Complainant:
Oscar L. Hampton, III, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
James J. Gonzales, Esq., Holland & Hart, LLP, Denver, Colorado

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Buffets, Inc., d/b/a Old Country Buffet (Buffets), at all times relevant to this action maintained a place of business at 2425 King Avenue West, Billings, Montana, where it operated a restaurant. Buffets admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 7-25, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Buffets' Billings work site. As a result of that inspection, Buffets was issued a citation alleging violations of the Act. By filing a timely notice of contest Buffets brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On May 26-27, 2003 a hearing was held on this matter in Billings, Montana. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1910.133(a)(1) & .138(a)

Serious citation 1, item 1 alleges:

29 CFR 1910.133(a)(1): The employer did not ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from liquid chemicals.

> (a) Old Country Buffet, kitchen area: Eye protection was not being used by employees replacing the empty cleaning chemicals containers with full containers that contain sodium hypochlorite, sodium hydroxide, and phosphoric acid.
>
> (b) Old Country Buffet, dish area: Eye protection was not being used by dishwashers using cleaning chemicals that contain ammonium chlorides, sodium linear alkylbenzenesulfonate, and ethanol.

Serious citation 1, item 2 alleges:

29 CFR 1910.138(a): The employer did not select and require employees to use appropriate hand protection when employees hands were exposed to hazardous conditions(s):

> (a) Old Country Buffet, kitchen area: Appropriate gloves were not being used by employees replacing the empty cleaning chemicals containers with full containers that contain sodium hypochlorite, sodium hydroxide, and phosphoric acid.
>
> (b) Old Country Buffet, dish area: Appropriate gloves were not being used by dishwashers using cleaning chemicals that contain ammonium chlorides, sodium linear alkylbenzene-sulfonate, and ethanol.

Facts

The chemical tower. OSHA Compliance Officer (CO) Julie Gentile testified that she visited Buffets' Billings restaurant on August 7, 2003 after OSHA received a complaint stating that employees were not provided with adequate protective equipment (Tr. 29-30). During the inspection Gentile learned that employees stock an ECOLAB chemical tower with concentrated cleaning products, which are used in the restaurant weekly to once every other week (Tr. 39, 62). The chemicals in the tower are diluted in hoses running from the containers of chemicals before they are dispensed for use (Tr. 39). Employees are not exposed to the diluted chemicals while cleaning floors or counter tops (Tr. 136-37, 156). However, CO Gentile testified that employees could be exposed to the concentrated chemicals when removing the flexible hose from a nearly empty container and placing it into a full one (Tr. 41, 44). No eye or face protection was used during this process, nor were rubber gloves used (Tr. 41, 45, 48, 172, 257).

The product ECO-SAN contains sodium hypochlorite (Tr. 53; Exh. C-2). The Material Safety Data Sheet (MSDS) for sodium hypochlorite states that overexposure to the concentrate causes chemical burns and can result in blindness if the eyes are affected (Tr. 57; Exh. C-2). Industrial rubber gloves and

chemical splash goggles are recommended to prevent exposure to the concentrated solution (Tr. 57; Exh. C-2). The MSDS also recommends eye protection during use of the diluted "use solution" (Exh. C-2).

Solid Power dishwashing fluid contains sodium hydroxide, a caustic soda (Tr. 55; Exh. C-3). Concentrated sodium hydroxide solution may cause chemical burns; however, because the product comes in a solid form, no protective equipment is recommended by the MSDS under conditions of normal use (Tr. 57; Exh. C-3).

Oasis 299 contains phosphoric acid (Tr. 40, 46-47, 55, 253; Exh. C-4). The MSDS states that overexposure to phosphoric acid causes irreversible eye damage and/or skin burns (Tr. 58, 257; Exh. C-4). Chemical splash goggles and rubber gloves with a protective cuff are recommended for use with the concentrated product (Tr. 58; Exh. C-4).

Oasis 115 contains potassium hydroxide (Tr. 91-92, 253; Exh. C-7). The MSDS states that overexposure to the concentrate can cause chemical burns and, if to the eyes, can result in blindness (Tr. 94; Exh. C-7).

During the initial training provided for employees, they were instructed to use rubber gloves and goggles when re-supplying the chemical tower if the use of such protective equipment was recommended in the MSDS (Tr. 139-40, 256). However, Paul Willett, the service manager for the Billings Old Country Buffet (Tr. 464), testified that neither goggles nor gloves were required for employees changing out the containers on the chemical tower (Tr. 492). According to Willett, the MSDS for the cited chemicals do not recommend either hand or eye protection for employees merely handling the containers in which the chemicals are stored (Tr. 492). The tower is designed to prevent any contact with the concentrated chemicals (Tr. 492, 494-95). Willett stated that he has changed out the containers, but was never exposed to the concentrated chemicals inside (Tr. 493).

Jake Hess, a cook who worked at the Billings restaurant during the relevant periods (Tr. 266-67), testified that changing the containers on the chemical tower was a simple procedure (Tr. 307). He did not believe that the task was hazardous, or that it was necessary to wear protective equipment to perform it (Tr. 307-08). The ECOLAB technician who services the chemical tower wears no protective equipment when calibrating the dilution of the chemicals used in the tower (Tr. 503-04).

The CO did not see any chemicals on the hoses when they were removed from the empty containers in the chemical tower (Tr. 152). There was no residue or spillage on any of the containers (Tr. 169, 172). There was no evidence that any of the concentrated chemical had ever spilled onto an employee or splashed into anyone's hands or eyes (Tr. 151, 153, 494).

Dishwashing. CO Gentile testified that employees could potentially sustain skin irritation from repeated immersion in dishwashing solutions, or eye injuries from splashing dishwashing solutions in their eyes while manually scrubbing pots and pans (Tr. 48-50, 61).

Solitaire, a dish washing solution, contains sodium linear alkylbenzenesulfonate, which can cause minor to moderate eye irritation in concentration, and minor skin irritation with prolonged or repeated exposure (Tr. 49, 51; Exh. C-5). The MSDS for this product states that no protection should be necessary during normal use, but recommends splash goggles and impervious gloves when exposed to concentrated solutions is anticipated (Exh. C-5).

Oasis 144 contains ammonium chlorides, which can cause severe irritation and chemical burns to the skin (Tr. 58, 60; C-6). The MSDS for Oasis 144 recommends the use of chemical splash goggles and rubber gloves with a protective cuff when handling the concentrated product (Tr. 253, 257; Exh. C-6).

CO Gentile did not determine what concentration of the cited chemicals was used for washing dishes (Tr. 140). During her inspection she determined that the dishwashers were handling pots and pans in the diluted dishwashing cleanser for up to 15 minutes, three to four times during each shift (Tr. 165-66). CO Gentile admitted that no employees were exposed to a concentrated solution for an extensive period (Tr. 167). Latex gloves were available in the dishwashing area (Tr. 168).

Discussion

§1910.133(a)(1) provides:

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

§1910.138(a) provides:

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

Under long-established Commission case law, the scope of section 1910.133(a)(1) is narrow. In *Atlantic Battery Co, Inc*., 16 BNA OSHC 2131, 1995 CCH OSHD 30,636 (No. 90-1746, 1994), the Commission, citing *Philadelphia, Bethlehem & New England R.R.*, 11 BNA OSHC 1345, 1983-84 CCH OSHD ¶26,512 (No. 77-2200, 1983), held that §1910.133(a)(1) is so broadly-worded that it is appropriate to apply the reasonable person test in assessing compliance with the standard. Under that test, personal protective equipment (PPE) is mandated only "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." *Id.*, at 1346, p. 33,736. The wording of §1910.138(a) tracks that of §1910.133(a)(1), and must be read in the same way.

The Secretary did not establish that Buffets' employees were exposed to a reasonable probability of injury that could have been prevented by the wearing of protective eye and face equipment or protective hand wear. The Secretary has therefore failed to prove a violation of either §1910.133(a)(1) or §1910.138(a) .

The chemical tower. The CO never observed employees changing out the chemicals in the tower. She speculated, however, that employees might flip droplets of concentrated chemicals into their eyes when removing the flexible hoses from the empty containers. Respondent's Exhibit 14 demonstrates the manner in which employees change out the containers (Tr. 240). The chemical containers are located at or below waist level; the employee changing out the containers is not required to actually touch anything but the screw top to which the hose is attached; the hose is stiff, and does not flip around; no residue from the chemicals was noted on the hose, nor was there any evidence of spillage from the hose or screw top on any of the containers. On this record it is extremely unlikely that the flexible hoses could splatter concentrated chemicals in such a manner that it would get on the employee's hands, much less reach his or her eyes or face.

The Secretary introduced no evidence whatsoever indicating that it is the practice in the restaurant industry, or any other industry where the ECOLAB chemical tower is used, to employ hand, eye or face protection when handling containers of cleaning chemicals. The Secretary relies on Buffets' own training, during which employees were instructed to use any PPE required by the MSDS. First, the Commission and the courts have been reluctant to rely solely on voluntary safety efforts by an employer to find that the employer recognized a hazardous condition. See, e.g., *General Motors Corp., GM Part Div.*, 11 BNA OSHC 2062, 2065-66, 1984-85 CCH OSHD P26,961, p.34,611-12 (No. 78-1443, 1984), aff'd, 764 F.2d 32 (1st Cir. 1985); *Cotter & Co. v. OSHRC*, 598 F.2d 911, 914-15 (5th Cir. 1979); *Diebold, Inc. v. Marshall and OSHRC*, 585 F.2d 1327, 1337-38 (6th Cir. 1978). The rationale is that such reliance would "dissuade employers from taking voluntary protective measures beyond those the law requires." Secondly, where, as here, there has been no showing that the employees handling the containers are actually exposed to the concentrated chemicals inside them, it cannot be found that the MSDS requires the use of PPE.

The Secretary failed to carry its burden of showing that a reasonable person familiar with the practice would have required the used of hand, eye, or face protection for employees changing out containers of chemicals in the ECOLAB tower.

Dishwashing. Insofar as the alleged dishwashing violation is concerned, the Secretary failed to show that employee exposure to the diluted products in use posed a hazard requiring the use of any protective equipment.

The Secretary failed to carry its burden of showing that a reasonable person familiar with the practice would have required the used of hand, eye, or face protection for employees washing dishes. Citation 1, items 1 and 2 are, therefore, dismissed.

Alleged Violation of §1910.151(c)

Serious citation 1, item 3 alleges:

29 CFR 1910.147(d)(3): All energy isolating devices that were needed to control the energy to the machine or equipment was not physically located and operated in such a manner as to isolate the machine or equipment from the energy source:

> (a) Old Country Buffet, bakery: Employees performing duties including, but not limited to installing and removing the mixer attachments, on the 20 quart Hobart mixer located on the east counter, without de-energizing the mixer by unplugging the power cord.
>
> (b) Old Country Buffet, bakery: Employees performing duties including, but not limited to installing and removing the mixer attachments, on the 20 quart Hobart mixer located on the south counter, without de-energizing the mixer by unplugging the power cord.
>
> (c) Old Country Buffet, cooking line area: Employees performing duties including, but not limited to installing and removing the mixer attachments, on the 20 quart Hobart mixer located on the south counter, without de-energizing the mixer by unplugging the power cord.
>
> §1910.147(d)(3) provides:
>
> *Machine or equipment isolation*. All energy isolating devices that are needed to control the energy to the machine or equipment shall be physically located and operated in such a manner as to isolate the machine or equipment from the energy source(s).

Facts

CO Gentile testified that employees unplugged the Hobart planetary mixers when cleaning the machines; however, they routinely change out the attachments on the mixers without unplugging them (Tr. 72, 76, 80-81, 273). Gentile testified that in the event the timer on the mixer was set on "hold," there was a chance the mixer could start up unexpectedly if the operator accidentally pressed the on/off toggle switch located on the motor housing of the mixer while he or she was inserting an attachment (Tr. 77-78, 84, 218-19, 271; Exh. R-10). The CO stated that the agitators were changed out in the bakery five to ten times a

day (Tr. 82, 85-88). An employee could suffer a broken finger or wrist if caught between a rotating attachment and the mixer's bowl (Tr. 89).

Tresa Stewart, a baker at the Billings Old Country buffet (Tr. 417), described the operation of the Hobart mixer. Stewart testified that attachments are seated while the bowl of the mixer is lowered (Tr. 421). The bowl is then raised, the timer is set, and the toggle is flipped to the on position (Tr. 422). Stewart had never heard of an unexpected startup of a Hobart mixer (Tr. 478). Paul Willett testified that a safety post is located underneath the toggle switch of the mixer (Tr. 502; Exh. R-3, R-9). The operator must reach between the safety post and switch, both of which are located behind the gear shift on the mixer housing, to move the toggle (Tr. 502; *see also* CO Gentile's testimony, Tr. 210-216). Unless the timer is set, and the toggle switch is deliberately flipped, the mixer will not start (Tr. 502). There has never been an incident at the Old Country Buffet where an employee has inadvertently turned on a mixer (Tr. 502). CO Gentile was unaware of any incidences of Hobart mixers becoming unexpectedly energized (Tr. 216).

According to Stewart, changing the agitators is part of the production process (Tr. 477). The manufacturer's instructions only direct the user to unplug the machine during "maintenance" (Tr. 227; Exh. R-3). The only maintenance listed in the instructions is lubrication of the slideways (Tr. 228; Exh. R-3).

Discussion

The lockout/tagout standard at §1910.147 ". . . covers the servicing and maintenance of machines and equipment in which the *unexpected* energization or startup of the machines or equipment, or release of stored energy could cause injury to employees." The Commission has specifically found that the lockout/tagout standard does not apply to all machinery regardless of how likely or remote the chances of unexpected energization are. *General Motors Corporation, Delco Chassis Division* (*General Motors),* 1995 CCH OSHD ¶30,793 (Nos. 91-2973, 91-3116 & 91-3117, 1995). In *General Motors,* the Commission cited the preamble to the lockout/tagout standard, which states that:

> The standard [does not apply] to servicing and maintenance that present minimal and readily controlled risk . . . *[E]ach covered employer's burden is determined by the frequency and complexity of servicing actually undertaken . . . Machines and equipment that present no hazard are excluded from coverage.*

Final rule: supplemental statement of reasons, 58 Fed. Reg. 16,612, 16,621 (1993) (emphasis added). The Commission went on to hold that where employees are performing servicing or maintenance tasks that do not expose them to a significant risk of harm from unexpected start up, the standard does not apply.

Nothing in this record establishes that the danger of an unexpected start up posed a significant risk of harm to employees using the Hobart mixer. Because the design of the mixer includes a guard post which prevents inadvertent contact with the on/off toggle, the mixer could only be turned on by an

employee deliberately flipping the switch. Because the toggle is located on the mixer housing and is under the immediate control of the operator, the mixer's start up could not be unexpected. This item is, therefore, vacated.

Alleged Violation of §1910.151(c)

Serious citation 1, item 4 alleges:

29 CFR 1910.151(c):Where employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes were not provided within the work area for immediate emergency use.

> (a) Employees replacing empty corrosive cleaning chemical containers that contain sodium hydroxide, potassium hydroxide, and phosphoric acid were not provided an emergency eye wash station within the work area.

Facts

CO Gentile testified that employees were exposed to the same chemicals listed in items 1 and 2, discussed above (Tr. 91). Immediate flushing is required to ameliorate any damage to the eyes which may be caused by those chemicals (Tr. 94; Exh. C-2, through C-7). The CO testified that the only ANSI approved eyewash available to employees was in the bakery, down a hall and around one corner, approximately 25 feet from the chemical tower (Tr. 94, 251, 471, 530). According to Gentile, an employee would have to navigate that distance with his or her eyes closed in the event he or she was exposed (Tr. 95).

Paul Willett testified that there were six different sinks in Buffets' kitchen area that were suitable for eye drenching (Tr. 466; Exh. R-1). Willett stated that he personally placed his head under the faucets and/or sprayers in all six locations and was able to flush his eyes (Tr. 469-70). Willett testified that it took 10 seconds to walk, blindfolded, from the chemical closet to the eyewash in the bakery (Tr. 506-07; Exh. R-1, D). He could reach the sink in the "back of house," 20 feet from the chemical closet, in three or four seconds (Tr. 508; Exh. R-1).

During the inspection, an employee told Gentile that he understood that if he had something in his eye, he could use a sink to flush his eyes (Tr. 190-91). Patsy Kline told the CO that she had actually used a sink as an eyewash (Tr. 205-06). At the hearing, Tresa Stewart testified that she was trained to use the eyewash in the bakery, but that she would have used a sprayer on any one of the sinks to flush her eyes if she got something in them (Tr. 426, 446-49). Jake Hess testified that no one ever told him he could use the sinks in the kitchen to flush his eyes, however, he considered it to be "basic knowledge" (Tr. 276-77, 302-06).

Discussion

The cited standard provides:

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

Under Commission precedent, whether an employer has provided suitable facilities depends on the totality of the relevant circumstances, including the nature, strength, and amounts of corrosive material to which employees are exposed, the configuration of the work area, and the distance between the area where any corrosive chemicals are used and the eyewash facilities. *Atlantic Battery Company, Inc. (Atlantic Battery),* 16 BNA OSHC 2131, 1994 CCH OSHD ¶30,636 (No. 90-1747, 1994). The Commission has held that the Secretary cannot bear her burden of proving that the facilities provided are unsuitable merely by showing that the drenching or flushing facilities are not an eyewash fountain. *Id.; see also, E.I. duPont de Nemours & Co.*, 10 BNA OSHC 1320, 1982 CCH OSHD ¶25,883 (No. 76-2400, 1982). In *Atlantic Battery*, the Commission found that the Secretary had not proved that an aerated hose was an unsuitable means of flushing the eyes where the record failed to describe the strength and amount of sulfuric acid used by affected employees, or the nature of the acid mixing operation to which employees were exposed. The Commission cited *Gibson Discount Center, Store #15*, 6 BNA OSHC 1526, 1978 CCH OSHD ¶22,669 (No. 14656, 1978), in which the availability of running water within a reasonable distance was found "suitable," and *Con Agra Flour Milling Co,* 16 BNA OSHC 1137, 1993 CCH OSHD ¶39,045 (No. 88-1250, 1993), where the §1910.151(c) citation was dismissed altogether as the Secretary failed to demonstrate that Con Agra's employees were more than "potentially" exposed to corrosive chemicals in the course of their duties.

In this case too, the Secretary failed to carry her burden. The record is silent on the amount and strength of the corrosive chemicals to which employees were actually exposed. Though corrosive chemicals were stored in, and dispensed from the chemical closet, as discussed in citation 1, item 1, the Secretary failed to establish the circumstances under which employees were more than potentially exposed to such chemicals. The suitability of the available flushing facilities cannot, therefore, be properly evaluated. However, an approved eyewash was located in the bakery of the Old Country Buffet. Six other sinks were located throughout the kitchen area. Given the totality of the circumstances, it cannot be found that these sinks, which were equipped with faucets capable of delivering continuous streams of fresh water, were unavailable for immediate use. Item 4 is vacated.

Alleged Violation of §1910.212(a)(1)

Repeat citation 2, item 1 alleges:

29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by the point of operation and rotating parts.

(a) Old Country Buffet, bakery: A Hobart 20 quart mixer located on the east counter, lacked a guard to prevent employees from being exposed to the rotating parts of the mixer.

(b) Old Country Buffet, bakery: A Hobart 20 quart mixer located on the south counter, lacked a guard to prevent employees from being exposed to the rotating parts of the mixer.

(c) Old Country Buffet, cooking line: A Hobart 20 quart mixer located on the south counter, lacked a guard to prevent employees from being exposed to the rotating parts of the mixer.

A SUBSTANTIALLY SIMILAR CITATION WAS ISSUED ON JANUARY 31, 2003, INSPECTION NUMBER 306047424, CITATION NUMBER 1, ITEM NUMBER 1.

Facts

CO Gentile testified that employees use the Hobart mixers throughout the day to prepare recipes that require employees to add ingredients while the mixer is running (Tr. 72-73, 222). Gentile stated that employees within the zone of danger posed by the mixer's rotating agitator could catch their fingers, hair or clothing in the rotating parts or the machine's point operation (Tr. 102, 109-10). The manufacturer warns users to keep hands clothing and utensils out of the bowl while the machine is operating (Tr. 226; Exh. R-3). The Secretary has previously established that the manufacturer of the Hobart mixer recognizes a hazard associated with the mixer's point of operation, as users of the machine have sustained lacerations and fractures of the hand and fingers. The manufacturer now equips the mixers with a cage guard that prevents operators from inserting their hands into the bowl (Tr. 120; Exh. C-10). *See, South Dakota Beverly Enterprises Inc. d /b/a Beverly Health Care Bella Vista Nursing Home and Commercial Management, Inc., d/b/a Beverly Health Care – Ipswich*, 2002 CCH OSHD ¶ 32,554 (Nos. 01-0202, 01--0427, 2002).

Janet Carson, a baker with 17 years of experience operating 20 quart Hobart mixers (Tr. 364, 370), testified that none of the machines she has worked with had a cage guard over the bowl (Tr. 370, 380). Though Carson believed that the Hobart mixer is safe (Tr. 375, 379), she testified that if an operator were to catch a hand in the bowl of the mixer, it would be crushed, as the rotating agitator goes all the way to the edge of the bowl (Tr. 381, 388).

Tresa Stewart testified that she does add ingredients to the bowl of the mixer while the mixer is running (Tr. 423, 445). Using a one or two-quart measuring cup, she pours liquid gelatin into the bowl

while the whip agitator continues to rotate (Tr. 438-39). While pouring, Stewart's hand is next to the housing above the bowl, which extends three or four inches beyond the mixer assembly (Tr. 440-41). Jake Hess testified that he poured potato pearls into the mixer's bowl while the mixer was in operation up to 20 times a day (Tr. 270-72, 308). Stewart testified that she had never heard of an injury associated with the use of any of Respondent's Hobart mixers (Tr. 474). Employees are required to restrain their hair, and wear hats; loose clothing is to be covered with an apron (Tr. 475-76). Employees are warned to keep their hands, clothing and utensils out of the bowl while the mixer is operating (Tr. 476). According to Stewart, Hobart's service representative never informed her that the 20 quart mixers should be modified to include a cage guard (Tr. 484).

Discussion

The standard set forth at 29 CFR 1910. 212(a)(1) reads as follows:

> (a) *Machine guarding*--(1) *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

To establish a violation of a specific standard, the Secretary must prove, by a preponderance of the evidence that 1) the standard applies; 2) the employer violated the terms of the standard; 3) its employees had access to the violative condition; and 4) the employer had actual or constructive knowledge of the violative condition. *E.g., Hamilton Fixture,* 16 BNA OSHC 1073, 1082, 1993-95 CCH OSHD ¶30,034, p. 41,178 (No. 88-1720, 1993), *aff'd without published opinion,* 28 F.3d 1213 (6th Cir. 1994).

Applicability. Respondent argues that a specific bakery equipment standard for vertical mixers, 29 CFR 1910.263(e)(2) applies to the cited mixers, preempting the more general standard at §1910.212(a)(1). The standard at §1910.263(e)(2) specifically relates to vertical mixers and is silent regarding any hazard created by the moving agitator parts. Because no guarding is required under the specific standard Respondent concludes that vertical mixers are exempt from guarding requirements. Respondent's argument is not supported by Commission precedent. It is well settled that where the abatement required by a specific standard does not eliminate the hazard addressed by a citation, and where meaningful abatement beyond that required by specific standards is proposed by the Secretary, general standards are not pre-empted. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶29,200 (No. 84-546, 1991). *See also; Quinlan t/a Quinlan Enterps.*, 15 BNA OSHC 1780, 1991-93 CCH OSHC ¶29,765 (No. 91-2131, 1992)[General standards remain applicable where they provide meaningful

protection to employees beyond the protection afforded by specific standards]. The cited standard is applicable.

The Hazard. Buffet further maintains that employees operating the cited Hobart mixers are not exposed to nip point or rotating parts hazards giving rise to coverage under §1910.212(a)(1). The Commission has held that in order for the Secretary to establish employee exposure to a hazard requiring guarding under §1910.212(a)(1), she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. The Commission emphasized that the inquiry is not simply whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable. *Fabricated Metals Products, Inc.*, 18 BNA OSHC 1072, 1997 CCH OSHD ¶31,463 (No. 93-1853, 1997); *see also, Pratt and Whitney Aircraft Div. v. Sec. of Labor* 649 F.2d 96 (2nd Cir. 1981).

The evidence presented by the Secretary with respect to the Hobart mixers is exceedingly sparse; however, it is clear that employees place their hands within inches of the zone of danger posed by the Hobart's agitators when adding ingredients to the mixing bowl. In light of the manufacturer's decision to install guards for the rotating parts on all new mixers purchased and to offer guards for older mixers, the evidence meets the minimal limits of sufficiency to establish that the alleged hazardous condition and employee exposure thereto is more likely to exist at Respondent's work site than not. Accordingly, it is concluded that the Secretary has sustained her burden of proof that Respondents' employees were exposed to injury while operating the Hobart mixers. In view of the manufacturers' finding that users of the machine had sustained lacerations and fractures of the hand and fingers, it is concluded that Respondents' employees were exposed to serious injuries.

Penalty

This violation is classified as repeated. A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (16183, 1979). On January 31, 2003, a citation was issued to Respondent alleging a violation of §1910.212(a)(3)(ii). The violation alleged that a Hobart 20 quart mixer was used without a guard, which would prevent employees from putting their hands into the mixing bowl while the machine was operating (Exh. C-9). Buffet entered into a settlement agreement with the Secretary on February 14, 2003 disposing of the citation (Tr. 114). The record is silent as to the contents of the settlement agreement, and Complainant declined to enter the agreement into evidence (Tr. 114-15, 258-59). There is, therefore, no evidence that Respondent admitted culpability in regard to the 2003 citation, or that the citation, in the

form it became a final order against Buffets, alleged a substantially similar violation. Because there is no evidence of a final order establishing a violation of the standard, this item is not properly classified as repeated. The violation is affirmed as a serious violation.

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). The factors to be considered in determining gravity include: 1) the number of employees exposed to the risk of injury; 2) the duration of exposure; 3) the precautions taken against injury, if any; and 4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

At least two employees testified to adding ingredients to the Hobart mixer during the course of their work. They were exposed to the admittedly remote possibility of injury up to 20 times a day. Buffet, Inc. took precautions against injury by instituting work procedures prohibiting employees from scraping the bowl while the mixer was on, and requiring them to wear caps and aprons while working. Employees have suffered no injuries from their use of the unguarded Hobart mixers. Given the remote likelihood of an accident occurring, OSHA's proposed penalty is considered excessive. The Commission has held that where the low gravity of the violation is the over riding factor, a low penalty may be appropriate, even for a serious violation. Citation 1, items 1, alleging violation of 29 CFR §1910.133(a)(1) is VACATED. *Flintco, Inc.*, 16 BNA OSHC 1404, 1993-95 CCH OSHD ¶30,227 (No. 92-1396, 1993); *Orion Construction, Inc.*, 18 BNA OSHC 1867; 1999 CCH OSHD ¶31,896 (No. 98-2014, 1999). Because the risk of injury resulting from this violation is so low, $100.00 will be assessed.

Findings of Fact

All findings of fact relevant an necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Buffet, Inc. is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Buffet, Inc. , at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, Buffet, Inc. was not in violation of 29 CFR §1910.133(a)(1).
4. At the time and place alleged, Buffet, Inc. was not in violation of 29 CFR §1910.138(a).

5. At the time and place alleged, Buffet, Inc. was not in violation of 29 CFR §1910.147(d)(3).

6. At the time and place alleged, Buffet, Inc. was not in violation of 29 CFR §1910.151(c).

7. At the time and place alleged, Buffet, Inc. violated the provisions of §1910.212(a)(1), and said violation was serious within the meaning of the Act.

ORDER

1. Citation 1, items 1, alleging violation of 29 CFR §1910.133(a)(1) is VACATED.

2. Citation 1, items 1, alleging violation of 29 CFR §1910.138(a) is VACATED.

3. Citation 1, items 1, alleging violation of 29 CFR §1910.147(d)(3) is VACATED.

4. Citation 1, items 1, alleging violation of 29 CFR §1910.151(c) is VACATED.

2. Citation 2, item 1, alleging violation of 29 CFR §1910.212(a)(1) is AFFIRMED as a serious violation, and a penalty of $100.00 is ASSESSED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: September 7, 2004