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. SAFEWAY #2555, AND ITS SUCCESSORS, Respondent.	OSHRC Docket No. 03-1072

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 Safeway # 2555 ("Safeway") in Sidney, Nebraska, 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 a citation item alleging a violation of another general industry standard. The Secretary did not petition for review of this item.

Background

The Occupational Safety and Health Administration (OSHA) cited Safeway for failing to guard the rotating blades and dough hooks on two mixers located in Safeway's bakery. The first mixer, a model M-802, is a large floor-model vertical mixer that stands 65-1/8 inches tall and here held an 80-quart bowl with a diameter of 21-1/2 inches. The other mixer was a model A-200, which is a much smaller tabletop vertical mixer that held a 20-quart bowl. Both mixers are manufactured by Hobart Corporation. They have one agitator shaft that may be fitted with various attachments, and the agitator shaft rotates on its axis in a "planetary" or orbiting motion in addition to spinning. The parties do not dispute that since 1995 Hobart has equipped its mixers with a cage-like bowl guard as standard equipment, and made bowl guard kits available to owners of pre-1995 machines.[3]

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[3] The Secretary submitted no documentation concerning the bowl guards into the record. She attempts to do so on review by attaching to her response brief documents from Hobart's website, and requesting in a footnote that the Commission take judicial notice of them. The Secretary had ample opportunity below to present any evidence she felt was relevant. *See Article II Gun Shop Inc*., 16 BNA OSHC 2035, 2036, 1993-95 CCH OSHD ¶ 30,563, pp. 42,298-99 (No. 91-2146, 1994) (consolidated) (denying motion to submit additional evidence because party had ample opportunity to present evidence to judge). She also failed to make a request to supplement the record in a separate motion as required by Commission Rule 40(a), 29 C.F.R. §2200.40(a). Therefore, we do not consider these documents in resolving this case. *McWilliams Forge Co*., 11 BNA OSHC 2128, 2131, 1984-85 CCH OSHD ¶ 26,979, p. 34,671 (No. 80-5868, 1984) (Commission will not accept as matter of course motions made in briefs, petitions for review, or footnotes).

Similarly, Safeway did not submit any Underwriters Laboratories (UL) standards into the record. It attempts to do so on review by attaching to its reply brief excerpts from a UL standard. Safeway does not even ask the Commission to take judicial notice of its attachment, all the while urging the Commission to strike and disregard the Secretary's attachments. Safeway had ample opportunity below to present any evidence it felt was relevant. *See Article II Gun Shop Inc*., 16 BNA OSHC at 2036, 1993-95 CCH OSHD ¶ at 42,298-99. Safeway also failed to make a request to supplement the record in a separate motion – or indeed, any motion – as required by Commission Rule 40(a). Therefore, we do not consider these excerpts in resolving this case.

On April 16, 2003, an OSHA compliance officer (CO) conducting an inspection of Safeway noticed the M-802 and A-200 mixers in Safeway's bakery, neither of which were equipped with bowl guards. The mixers were not running, and the bowl of the M-802 mixer was not in place. In response to questioning by the CO, an employee explained that she used the M-802 mixer three to seven times a day, and that no recipes required her to add ingredients while the mixer was running. The CO also asked whether employees operated the A-200 mixer. There is no evidence of any Safeway employee being injured by either mixer. However, testimony from the record in *South Dakota Beverly Enters. ("Beverly")*, No. 01-0202 (Mar. 15, 2005) (consolidated) that Hobart had records of approximately a dozen injuries related to unguarded A-200 mixers was admitted in evidence.

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."[4] *ConAgra Flour 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*, 25 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

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[4] Safeway 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 *Beverly*. Therefore, section 1910.212(a)(1) applies here. *See Beverly* at n.2 (noting 1978 Federal Register notice in which Secretary declared that hazards presented by moving parts of vertical mixers were covered by section 1910.212).

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 concluded 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 Safeway than not. The judge relied on his findings that (1) expert testimony as to the safety of the mixers was not credible in light of Hobart's decision to install guards on new machines and provide bowl guard kits; (2) his conclusion was "bolstered by" his decision in *Beverly*, which was recently reversed by the Commission; and (3) Hobart's findings that users of the machines had been injured indicated that Safeway's employees were exposed to serious injuries. The judge did not find that Safeway employees were exposed to hazards presented by the particular mixers present in the bakery.

As we held in *Beverly,* we find that the judge made an unwarranted inference when he found that Safeway's employees were exposed to a hazard based on the fact that Hobart began to manufacture mixers with bowl guards in 1995. The record here does not support the judge's conclusion that Hobart began to equip its mixers with bowl guards because it believed unguarded mixers posed a hazard. In addition, the record of injuries reported to Hobart lacks specific information about the circumstances under which the injuries occurred.

We further find that the Secretary failed to meet her burden of establishing employee exposure to unguarded rotating parts of the mixers at Safeway. As in *Beverly*, the CO took no measurements to determine the possibility or likelihood of exposure at Safeway. In fact, the bowl was not even in place on the M-802 mixer, and his inspection of the A-200 mixer was limited to the question regarding whether any employee operated it. The Secretary asserts on review that employees' loose clothing or aprons could get caught in the mixers' blades or dough hooks, and that employees could inadvertently place a hand or arm in the bowl after slipping or falling. These claims are speculative and do not find support in the record. While the CO noted that an employee's apron

appeared loose, other evidence in the record establishes that employees wore their aprons correctly and were not allowed to wear loose clothing. The CO did not observe any slip or trip hazards, and the record shows that Safeway's floors were kept clean and dry. Under these circumstances, we find that Safeway employees were not exposed to any hazard that required guarding under section 1910.212(a)(1).

Finally, we note that the absence of mixer-related injuries at Safeway, 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 (while occurrence of injury is 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 Safeway employees were exposed to a hazard while operating or walking past the unguarded M-802 or A-200 mixers. Accordingly, we reverse and vacate the citation.[5]

SO ORDERED.

_/s/_____
W. Scott Railton
Chairman

_/s/_____
James M. Stephens
Commissioner

_/s/_____
Thomasina V. Rogers
Commissioner

Dated: April 5, 2005

[5] 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.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. SAFEWAY #2555, and its successors, Respondent.	OSHRC DOCKET NO. 03-1072

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, Safeway #2555 (Safeway), at all times relevant to this action maintained a place of business at 1930 Illinois Street, Sidney, Nebraska, where it was engaged in retail grocery sales. Safeway admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On April 16, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection at Safeway's Sidney work site. As a result of that inspection, Safeway was issued a citation alleging violations of the Act. By filing a timely notice of contest Safeway brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On December 23, 2003 a hearing was held on this matter in Denver, Colorado. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violation of §1910.151(c)

Serious citation 1, item 1 alleges:

29 CFR 1910.151(c):

> Safeway #2555 - Sidney, NE - 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. Suitable eyewash facilities were not available in the baker and deli areas. Employees were exposed to corrosive chemicals, including, but not limited to oven cleaner and chlorine bleach.

Facts

OSHA Compliance Officer (CO) Phillip Pisasale testified that on April 16, 2003 he asked employees in Respondent's bakery and deli departments where their eyewash stations were (Tr. 48-49). The employees directed him to two sinks labeled "Emergency Drenching and Eyewash Facility" (Tr. 46-48, 51-52; Exh. C-1). Pisasale believed the two sinks were inadequate to serve as eyewash stations (Tr. 48). The sinks were small, low, and Pisasale understood that an employee would have to splash water from the faucet into her eyes, or bend over and put her head in the sink in order to use the faucet as an eyewash (Tr. 49, 51-52; Exh. C-1). According to the CO, an eyewash must provide a stream of tepid water sufficient to drench both eyes for 15 minutes (Tr. 48, 53, 79). In addition, Pisasale believed the employee should have both hands free to hold her eyes open (Tr. 48, 53, 79).

A large three compartment sink with a high crookneck faucet was located immediately adjacent to the small sink in the bakery (Tr. 74; Exh. R-2). The faucet had an adjustable elbow so that it could be folded out towards the lip of the sink, or away at the back of the sink (Tr. 168; Exh. R-2) A spray hose was attached to the larger sink (Tr. 74). CO Pisasale did not believe that a high pressure sprayer was suitable for drenching (Tr. 54), but stated that employees could possibly get their heads under the faucet in the larger sink (Tr. 78). A similar triple compartment sink was located next to the small sink in the deli (Tr. 81; Exh. R-3). Pisasale did not evaluate the suitability of the large sinks as eyewash facilities because the employees told him that they would use the smaller sinks (Tr. 73).

Pisasale testified that employees in the bakery and deli departments used corrosive chemicals, specifically, bleach, diverse delimer and oven cleaner, in the course of their work (Tr. 46, 50, 55, 95).[1] The bakery manager told Pisasale that she alternated the use of the bleach and a degreaser on a daily basis (Tr. 51). The delimer, which contains phosphoric acid, was used approximately once a week (Tr. 95).

[1] Safeway's contention that the corrosive chemicals used are exempt "consumer products" pursuant to §1910.1200(b)(6)(ix) is rejected. The cited exemption applies only to the applicability of the Hazard Communication Standard.

Pisasale did not know how the delimer was used (Tr. 95-97). The oven cleaner, which contains sodium hydroxide, was also used once a week (Tr. 96, 98). Pisasale stated that there was little probability of an accident occurring, as employees wore protective eye wear (Tr. 56-57, 94, 97, 180). However, the CO testified, if an accident were to occur and the employee was not treated, corrosive chemicals would eat away at the cornea and other soft tissues around the eye (Tr. 56).

Billy Alexander, a loss control safety coordinator for Safeway Stores, testified that he was responsible for designating the three compartment sinks in the bakery and deli as emergency eye wash stations (Tr. 165, 171-72). He stated that he actually put his head under each of the faucets to make sure it could be done easily (Tr. 165, 167, 171-72). Alexander testified that both eyes could be flushed at once under the faucets of the sinks (Tr. 217), and that the hose next to the bakery sink did not have enough pressure on it to damage the eyes (Tr. 169). Alexander testified that he labeled the three compartment sinks as emergency drenching facilities (Tr. 164-67, 174). According to Alexander, the signs he originally installed were moved without his knowledge (Tr. 165-66, 172).

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 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 Atlantic 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.[2]

In this case too, the Secretary failed to carry her burden. The nature of the operations in which bleach, oven cleaner and delimer were used by Safeway employees was not described. The record is silent on the amount and strength of the corrosive chemicals used. Moreover, the CO admitted that the potential for an employee to get such chemicals in their eyes was low, as the employees all wore eye protection when using the cited products. Given the totality of the circumstances it cannot be found that the three compartment sinks in the deli and bakery departments, which were equipped with faucets capable of delivering continuous streams of fresh water, were unsuitable. Item 1 is vacated.

Alleged Violation of §1910.212(a)(1)

Serious citation 1, item 2 alleges:

29 CFR 1910.212(a)(1):

Safeway #2555 - Sidney, NE - Machine guarding was not provided to protect operators and other employees from the rotating blades/dough hooks of the Hobart mixers located in the bakery.

Facts

A Safeway bakery employee, Linda Briscoe, told CO Pisasale that she used the floor model M802 Hobart mixer three to seven times a day (Tr. 57-58, 66, 141). When operating the mixer, Briscoe would stand by the control panel, which was at chest height, lower the dough hooks, set the timer, put the mixer in gear, and press the start button (Tr. 59, 128, 305). The operator did nothing more until the timer expired and the mixing was completed (Tr. 129, 306). Though Pisasale did not see this machine in operation, he testified that the operator's loose apron could inadvertently be caught in the revolving blades or dough hooks (Tr. 60-62, 127, 152-53). The M802 was located adjacent to an aisle that kitchen employees used while working (Tr. 153). Pisasale believed that an employee might slip in the aisle and inadvertently put her hands into the rotating parts of the mixer, dislocating or amputating a finger (Tr. 65-66, 153). He stated that there was a low probability of an accident occurring, however, as the operators did not put their hands

[2] Safeway points out that its store #576 was previously cited under §1910.150(c) for failure to provide an eyewash for employees using floor stripper. *Safeway Store #576*, 1991 OSAHRC Lexis 80 (No. 90-1322, 1991). That citation was vacated as a garden hose in the area could deliver a reasonable volume of water for an adequate period of time. The principles of estoppel and *res judicata* do not foreclose this action, as Respondent maintains, because the cited facilities and the chemicals to which Safeway employees at store #2555 are exposed are distinct from those involved in the earlier action. The disposition of the earlier case, however, reflects the Commission's position on this standard.

in the bowl while the mixer was operating (Tr. 65, 127, 186, 307). Employees stated that water occasionally gets on the floor, but is cleaned up immediately (Tr. 130). No slip or trip hazards were present at the time of the inspection (Tr. 130). Pisasale did not see the A200 table model in operation, or ask how it was operated (Tr. 150-154). He did not believe it posed as large a potential hazard as the floor model, but included it in the citation because the beaters were unguarded (Tr. 150-54). CO Pisasale testified that all Hobart's commercial mixers are now sold with guards (Tr. 143). Guards are available for retrofitting older units (Tr. 64).

Billy Alexander testified that the floor in the bakery is kept clean and dry, and that operator's aprons are tight fitting (Tr. 182-83). Employees are instructed not to scrape down the bowl of the mixer while it is moving (Tr. 183). There were no prior injuries involving the vertical mixer (Tr. 129, 186).

Robert Todd, a professor in the department of mechanical engineering at Brigham Young University, testified for Safeway, relying, in part, on testimony from John Kelly, a Hobart Corporation employee, given in an August 22-23, 2001 hearing before this judge (Tr. 250-51; Exh. R-23). In the August 2001 hearing, Kelly testified that, in 1995, a corporate decision was made to place a guard on their commercial mixers, specifically on the A200 model, to prevent access to the rotating parts. There had been reports of injuries, specifically, lacerations and fractured fingers and hands, resulting from the use of the mixer (Exh. R-23, p. 285). In addition, the company was aware that European countries and Canada required or soon would require that the moving parts of the mixer be guarded (Exh. R-23, p. 282, 283). Moreover, Hobart received requests from customers for additional guarding (Exh. R-23, p. 284). Thus, from 1995 to the present, Hobart mixers have been manufactured and sold with a guard as standard equipment to prevent access to the rotating parts (Exh. R-23, p. 268). Professor Todd nonetheless concluded that it was not reasonably predictable that a person operating the A200 and M802 vertical mixers would be exposed to a hazard, as operating procedures do not require employees to place their hands inside the mixing bowl, and it would be extremely improbable that an employee could slip and fall into the rotating parts of either machine (Tr. 239-45, 253, 298).

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).

Respondent argues that a specific bakery equipment standard for vertical mixers, 29 CFR 1910.263(e)(2) applies to the cited mixers, pre-empting 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.

Safeway 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 establishes that the manufacturer of the Hobart mixers recognizes the hazardous nature of the machines and has provided a guard to eliminate those hazards. Although the design engineer testifying for Safeway opined that the unguarded mixer presents no hazard to users of the machine, his testimony is not credited 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 presented by the Secretary with respect to the Hobart mixers is exceedingly sparse; however, it 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. This conclusion is bolstered by the holding in *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), which, on facts similar to the instant matter, found that the Hobart 200 mixer created a significant risk of injury to employees. Accordingly, it is concluded that the Secretary has sustained her burden of proof that Respondents' employees were exposed to injury while operating both the Hobart M802 and A200 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

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).

Between two and four employees worked in the bakery (Tr. 66). They were exposed to the admittedly remote possibility of injury three to seven times a day. Safeway took precautions against injury by instituting work procedures prohibiting employees from scraping the bowl while the mixer was on, and immediately eliminating any slip hazards in the area. 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 of $2,125.00 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. *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.

Conclusion of Law

1. Safeway #2555 is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Safeway #2555 , 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, Safeway #2555 was not in violation of 29 CFR §1910.151(c).
4. At the time and place alleged, Safeway #2555 violated the provisions of §1910.212(a)(1), and said violation was serious within the meaning of the Act.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1910.151(c) is VACATED.
2. Citation 1, item 2, alleging violation of 29 CFR §1910.212(a)(1) is AFFIRMED, and a penalty of $100.00 is ASSESSED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: March 31, 2004