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

Secretary of Labor, Complainant, v. HBD/Thermoid, Inc., Respondent, and The United Steelworkers, AFL-CIO and USW Local Union #898L Authorized Employee Representative.	OSHRC Docket No. **16-1070**

Appearances:

Wayne P. Marta, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

Corey Crognale, Esquire, Ice Miller, LLP, Columbus, Ohio
For the Respondent

John Tuskar, Staff Representative, United Steelworkers, AFL-CIO & Local Union #898L, Columbus, Ohio
For the Employees

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

HBD/Thermoid, Inc., (HBD) manufactures industrial, multipurpose, and automotive hoses at its plant in Bellefontaine, Ohio. On February 16, 2016, an HBD employee was seriously injured when his left arm was caught and crushed in a machine called a catapuller. The Occupational Safety and Health Administration inspected the plant and the Secretary issued a Citation and Notification of Penalty to HBD on June 3, 2016, alleging a willful violation of 29 C.F.R § 1910.212(a)(1), for failing to guard the catapuller's nip points. In the Complaint, the Secretary amended the Citation to allege in the alternative HBD willfully violated 29 C.F.R. § 1910.147(c)(4)(i) by failing to develop, document, and utilize lockout/tag-out (LOTO) procedures for servicing activities on the catapuller (Tr. 14). Subsequently, the Secretary moved to amend the

Citation and Complaint to allege in the alternative the characterization of the cited standards as serious or repeat. The Court granted this motion in an order dated November 3, 2016.

HBD timely contested the Citation. By letter dated January 30, 2017, the United Steelworkers (USW), AFL-CIO and USW Local #898L, authorized employee representatives for HBD's employees, elected party status in this proceeding in accordance with Commission Rule 20, 29 C.F.R. § 1910.2200.20.[1] The Court held a hearing in this matter on February 14, 15, and 16, 2017, in Columbus, Ohio. The Secretary and HBD filed briefs on May 1, 2017.

For the reasons that follow, the Court **AFFIRMS** Item 1 of the Citation for the violation of 29 C.F.R. § 1910.212(a)(1) as repeat and assesses a penalty of $70,000.00.

JURISDICTION AND COVERAGE

HBD timely contested the Citation and Notification of Penalty on June 24, 2016. The parties stipulate the Commission has jurisdiction over this action and HBD is a covered business under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) (Tr. 17). Based on the parties' stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and HBD is a covered employer under § 3(5) of the Act.

BACKGROUND

HBD's Bellefontaine, Ohio, Factory

HBD manufactures rubber hoses at its factory in Bellefontaine, Ohio. The factory has eight production lines serviced by the mixing department, the extrusion department, and the finishing department. Once the mixing department has mixed the rubber, the extrusion department shapes the rubber into the tubing that forms a hose's inner layer. Lappers (spinning spools of yarn) weave a layer of netting around the hose's inner tubing for reinforcement. The outside cover is formed by extruding more rubber around the netting. The hose is then loaded into curing tanks (CV tanks)

[1] Commission Rule 20 provides:

> Affected employees and authorized employee representatives may elect party status concerning any matter in which the Act confers a right to participate. The election shall be accomplished by filing a written notice of election at least 10 days before the hearing. A notice of election filed less than 10 days prior to the hearing is ineffective unless good cause is shown for not timely filing the notice. A notice of election shall be served on all other parties in accordance with §2200.7.

John Tuskar attended the hearing on behalf of the USW. He did not participate in examination of the witnesses and he did not file a post-hearing brief (Tr. 7-8).

to cure it in glass Ballotini[2] beads, a sand-like material. From the tank, the hose passes through brushes that clean it and a water-soaked drum that cools it.

Machines called catapullers convey the hose through these stages of production. There are two types of catapullers: those located on the floor, called floor catapullers, and those located on platforms, called overhead catapullers. The platforms are approximately 10 feet high. Employees access an overhead catapuller by climbing approximately eight stairs of an attached metal stairway to the platform. A hose passes from the line's cooling drum to the overhead catapuller and is then transferred to a finishing belt by a machine known as a wig-wag. Finishing department employees retrieve the hose from the finishing belt and cut it to custom specifications. They then attach nozzles and connectors (Exhs. C-5 & C-20; Tr. 136-137, 511-512, 563-564).

Employees known as reelers work in the extrusion department. Reelers are responsible for hoses passing into and out of the curing tanks, through the floor catapullers, around the cooling drums, up to the overhead catapullers, and down to the finishing belts. Reelers monitor the hoses at each stage of the process to assure the hoses meet HBD's quality standards and the customers' specifications. Catapullers pull hoses of varying diameters along the production lines using two rotating and vertically aligned belts. Using two jack-screws equipped with T-handles, reelers can increase or decrease the gap between the conveyor belts to adjust the pressure of the belts on a hose. This configuration of the conveyor belts creates ingoing nip points in front of the belts and on the side of them. Reelers continually inspect the hoses for imperfections, particularly drag marks resulting from objects rubbing against the hoses' outer covers (Tr. 143-145, 153).

On February 16, 2016, each catapuller was equipped with a hinged guard over the side opening (the guard was referred to as a door, safety door, hinged side door, and side guard, among other variations). The guard was hinged at the top and was made of Plexiglas. It measured approximately 8 inches by 8 inches and weighed 5 to 10 ounces (Tr. 545, 559).[3] The guard could be flipped up 180° (Tr. 279). Reelers could look through the guard to observe the hose being pulled through the drive belts[4] (Tr. 181). Over time, the Plexiglas became scratched, decreasing

[2] Transcribed as "Ballantini" in the transcript.

[3] These estimates are taken from the testimony of employee witnesses. CSHO Steffen testified that when he arrived at HBD's plant to inspect CAT #8, HBD had enclosed the side opening of the catapuller with a metal cage, so he was not able to examine the hinged side guard at issue (Tr. 113-114).

[4] Witnesses used the terms *drive belts* and *belt drives* interchangeably. The Court will use the term *drive belts* in this decision since that is the term used in the alleged violation description (AVD) of the Citation.

its transparency (Tr. 278, 558). It was easier to see the drive belts when the side guard was flipped up (Tr. 214). A T-bar handle located to the right of the guard was used to adjust the drive belts (Exh. C-6). Employees could lift the hinged side guard while the catapuller was in operation (Tr. 584).

The catapuller at issue is an overhead catapuller on line 8 (referred to as "CAT #8"). CAT #8 differed from the other overhead catapullers at the plant because it was, in the words of one reeler, a "left-load cat and everything else is pretty much right-load, so in this particular cat your view is obstructed because of the adjustment rods, so you actually have to lift the guard of this cat in order to be able to tell if you're pinching the hose too tight." (Tr. 559) On February 16, 2016, Reeler #1 was seriously injured when his left arm was pulled into the drive belts of CAT #8. How this accident occurred was the subject of some dispute at the hearing. No one witnessed Reeler #1's actions at the time of the accident (Tr. 226, 240-241). After the accident, HBD placed immoveable yellow metal cages around the side opening area of the overhead catapullers (Exh. C-7; Tr. 248).

OSHA Inspection in this Proceeding

Joseph Margetiak, assistant area director for OSHA's Toledo office, opened an inspection at HBD's factory on February 18, 2016, after the office received notification of Reeler #1's injury (Tr. 32). He held an opening conference at the worksite, interviewed employees, and took photographs of CAT #8 and the surrounding area (Tr. 33). Margetiak did not complete the inspection, turning it over to compliance safety and health officer (CSHO) Daniel Steffen the following day (Tr. 35, 80-81). CSHO Steffen also inspected HBD's worksite, interviewed employees and took photographs (Tr. 81). Based on his inspection CSHO Steffen recommended OSHA issue a citation to HBD charging the company with a willful violation of § 1910.212(a)(1) (Tr. 84). The Secretary did so on June 3, 2016.

Exhibit C-9: 2014 OSHA Video

In November of 2014, approximately fifteen months prior to the accident that gave rise to this proceeding, CSHO Brittany Miller and CSHO Corinne Majoros conducted an inspection at HBD's Bellefontaine factory, prompted by a referral arising from a fatality that occurred at an HBD factory in North Carolina (Tr. 40).

During the inspection, CSHO Miller videotaped HBD employees during the stringing process (Exh. C-9). This video, which the parties played multiple times during the hearing (Tr.

53, 70, 73, 141, 153, 409, 480, 570, 673, 709, 725) showed an HBD reeler at one point feeding a hose into an overhead catapuller (the line number of the overhead catapuller was not established at the hearing). CSHO Miller described the activity in the video:

> Well, this is towards the end of the process. . . . So the hose has come to the reeler and it goes up to the catapuller there, which helps spread it over the table underneath. So the operator is threading it—or feeding it through to the—through the catapuller. [The reeler is standing on] the platform.

(Tr. 73) The hinged side guard of the overhead catapuller is flipped up in the open position while the stringing operation is in process. After the reeler finishes stringing the hose, he stoops and peers into the opening as he adjusts the T-bar handle with his left hand while resting his right hand on the railing. He then flips the side guard down and starts down platform steps (Exh. C-9).

CITATION NO. 1

The Secretary's Burden of Proof

> An employer is liable for violating an OSHA safety standard if the Secretary of Labor can show the following by a preponderance of the evidence: (1) the standard applies to the cited conditions, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or should have known of the hazardous condition with the exercise of reasonable diligence.

R.P. Carbone Const. Co. v. Occupational Safety & Health Review Comm'n, 166 F.3d 815, 818 (6th Cir. 1998).

Item 1: Alleged Serious Violation of § 1910.212(a)(1)

Item 1 of Citation No. 1 alleges,

> HBD/Thermoid, Inc. on or about February 16, 2016, at the address of 1301 W. Sandusky St., Bellefontaine, OH: The employer did not ensure nip points between the drive belts on finish end catapuller (CAT) #8 [were] adequately guarded during production operations. Employees performing inspection and adjustment activities to CAT #8 in an unguarded condition were exposed to amputation hazards at the incoming nip-points.
> Section 1910.212(a)(1) provides:
>
> 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.

(1) Applicability of the Cited Standard

Section 1910.212(a)(1) is found in *Subpart O—Machinery and Machine Guarding* of the general industry standards. It is undisputed CAT #8 is a machine within the meaning of the cited standard. HBD concedes, "The cited standard 29 C.F.R. 1910.212(a)(1) is applicable. The record evidence establishes that HBD's elevated catapuller posed the nip hazard[.]" The Court finds § 1910.212(a)(1) applies to the cited condition.

(2) Terms of § 1910.212(a)(1) Were Violated

The Accident

Much of the testimony at the three-day hearing focused on the details of Reeler #1's accident on February 16, 2016. The account given of the accident by Reeler #1, who was the only witness to his injury, is disputed by HBD. Reeler #1 claims another employee earlier had propped open the hinged side guard on CAT #8 to eliminate a drag mark on the hose being run. As Reeler #1 climbed the stairs to the platform, he slipped or stumbled and somehow his left hand came close enough to the side opening in CAT #8 that the Plexiglas door slammed down on it, causing his hand to pass through the opening in the machine. The drive belts caught Reeler #1's hand and pulled his arm into the catapuller.

HBD contends this account is implausible and the reason given for propping open the side guard is nonsensical. HBD posits Reeler #1 lifted the side guard and reached into the catapuller for his own reasons, possibly to adjust the position of the hose, and was then too embarrassed afterward to admit he had been injured while performing an unsafe procedure (Exh. C-11; Tr. 735-736, 745-746).[5]

It is not necessary to determine exactly how Reeler #1 sustained the injury to his left arm. "[I]t need not be proved that the accident here was caused by the employer's failure to take these measures [required by the cited standard]. *See Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated) ("Determining whether the standard was violated is not

[5] Exhibit C-11 is a copy of an accident report written by David Hill, HBD's HR supervisor at the Bellefontaine plant (Tr. 487). The report provides this explanation for the accident: "Employee states he was checking for mark on hose and was looking at area where he states the side guard was propped open. Pushed on hose and was caught at side nip point." (Exh. C-11, p. 1). Hill concedes he did not interview Reeler #1 regarding the accident. He claims he received the information about the cause of the accident from Reeler #6, the father of the injured employee (Tr. 496-497). Reeler #6 emphatically denies he told Hill that Reeler #1 had reached into the opening of CAT #8 to move the hose (Tr. 730-731). The Court credits the testimony of Reeler #6 on this point. He was visibly perturbed when asked if he had made this statement to Hill and his forceful denial was direct. Hill, on the other hand, equivocated when asked where he got this information from ("I believe I--if I recall, it's been a while, but I believe I got that from his father." (Tr. 497)) and then stated, "[H]is father was pretty much saying that I was calling his son a liar and I didn't think it would be appropriate for me to approach that gentleman in those conditions, so I didn't" (Tr. 499)

dependent on the cause of an accident."), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003)." *Cent. Florida Equip. Rentals, Inc., Respondent,* 25 BNA OSHC 2147, 2153 (No. 08-1656, 2016). The real issue is whether the fact the side guard is hinged, and thus is easily bypassed by employees, renders it inadequate to protect employees from the hazard presented by CAT #8's nip points. A summary of the testimony relevant to the February 16, 2016, accident provides context for this issue:

Testimony of Reeler #1 (The Injured Employee)

Reeler #1 worked on production lines #7 and #8 (Tr. 137). His tasks included stringing the hose through the catapullers, inspecting the hoses for drag marks and other imperfections, and adjusting the belts on the catapuller (Tr. 137). Reeler #1 testified the side guard "should be down" when the catapuller is being operated (Tr. 139).[6]

Reeler #1 stated he observed the side guard of CAT #8 propped open twice (Tr. 142).[7] The first time he observed the guard propped open was "on a particular occasion" when he relieved Reeler #5 (Tr. 208). When he asked why the guard was propped open, Reeler #5 told him it was to relieve a drag mark. Reeler #1 explained,

> If this side hinge door here, which is connected to the same piece where this Plexiglas is, if it is moved—I'm not saying that when it's propped open it's going to rotate it completely, but with it being propped open it'll turn—it'll alleviate it'll move the top of that machine and this will rotate counterclockwise. . . . The cone itself will rotate. Counterclockwise.

(Tr. 210)

Reeler #1 testified he had only seen a side guard *propped* open twice, which he differentiated from seeing side guards *flipped* open, a much more common observation. He stated the Ballotini material used to cure the hoses was prevalent in the factory and caused the Plexiglas guards to scratch. Reeler #1 stated, "It gets everywhere. It's slippery and it—peoples' fingers and stuff and gloves and it gets everywhere." (Tr. 212) Consequently, "the visibility on [the side guards] are very minimal. . . . It's been scratched, quite a few. All over them, every one of them." (Tr. 213) "It's easier to see [the drive belts] with the door open." (Tr. 214). Reeler #1 had seen the

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[6] Exhibit C-6 is a copy of a photograph showing the hinged safety guard on the right side of the orange-topped catapuller component. Adjacent to it on the side of the catapuller facing the viewer is a Plexiglas cone guard, guarding the cone through which the hose passes.

[7] Apparently, he is counting as one occasion the times he claims he saw the guard propped open on the consecutive days of February 15 and 16, 2016, the day before and the day of his accident that triggered the OSHA inspection giving rise to this proceeding.

side guards flipped open during adjustments of the belt (during which the catapuller is off) and during stringing operations (when the catapuller is operating) (Tr. 214). He saw side guards flipped up "[a] lot of times during the stringing process. . . . That happened a lot." (Tr. 216)

February 15, 2016: The Day before the Accident

On February 15, 2016, the day before the accident, Reeler #1 began his regular shift, the B shift, starting at 4:00 p.m. and ending at 12 a.m. (Tr. 149). Shortly after his shift began, Ronald (R.J.) Horne, HBD's quality auditor, informed Reeler #1 a drag mark had appeared on the hose being processed on line #8 (Tr. 149-150). To find the source of the drag mark so he could fix the problem, Reeler #1 started at the first stage of the process for which a reeler has responsibility, the CV tank. Using this method, Reeler#1 determined the drag mark originated from steel wool used to clean the hose after it comes out of the CV tank. Reeler #1 eliminated the drag mark by replacing the steel wool (Tr. 144-145, 150). Later in the shift, Horne informed Reeler #1 that another drag mark had appeared on the hose being processed on CAT #8. This time, Reeler #1 and Horne, working together, traced the origin of the drag mark to the cone through which the hose feeds into the catapuller (Exh. 6a; Tr. 151-152). "It would be that [the hose] was rubbing on one side of the cone where the hose actually goes into the machine. There's a plastic cone that it goes through to—supposedly to eliminate those things. But it would be rubbing on one side of that cone." (Tr. 145)

Reeler #1 stated Horne asked him to stand on the production floor near the wig wag and flacking belt and watch to see if the drag mark disappeared as the hose passed through CAT #8, while Horne stood on the platform next to CAT #8. The drag mark disappeared "after some time." (Tr. 158) Horne asked Reeler #1 to come around to the desk to the right of the stairway leading up to CAT #8. Reeler #1 testified,

> And as I was on my way back to the desk, that's when I realized that the door [guard on the side of CAT #8] was propped open for the second time that I had seen it. . . And as he was coming down, I was on my way back around and he was coming down the steps. We had a conversation that went like this. He had told me and he had pointed up the catapuller to where I could see the door being propped open. And he asked me—or he told me that that would be between me and him. That would be between us. And he put his finger to his lips like, "shhhh," to reference a secret. And he went—I thanked him and he went away.

(Tr. 158-159)

Reeler #1 noted the side guard was propped open with "a scrap piece of hose… [a]pproximately 6 to 8 inches long." (Tr. 159) He stated he walked over to two of his coworkers, Reeler #2 and Reeler #3, "and my exact words were, 'I guess that's how we fix things around here,' and I had pointed to the door, the safety door on cat line #8, on the catapuller door being propped open with the piece of hose." (Tr. 161)

February 16, 2016: The Day of the Accident

Reeler #1 returned to work the next day for his 4:00 p.m. shift. He met with Reeler #4, a "utility relief" worker substituting for Reeler #5, who was on vacation (Tr. 163). Reeler #1 cut a sample of the hose being run on line #8 and observed a drag mark on it. Starting with the CV tank, he traced the line all the way to CAT #8, looking for the cause of the drag mark, when he saw the hinged side guard "was still propped open." (Tr. 165) Reeler #1 climbed the stairs to the platform.

> Reeler #1: Well, I was climbing the stairs. You know, my left hand first. To—I don't know why I always do that, but I grabbed it with the left hand first and then left, right, left as I was climbing up to the top of this—the platform here, as you can see in—
>
> The Court: I'm sorry sir, you're going to have to start over a little bit because you're going really fast.
>
> Reeler #1: I'm sorry.
>
> The Court: And I want to be sure that I understand, all right?
>
> Reeler #1: Okay. Where would you like me to begin?
>
> The Court: You said you were going up and you had your left hand—
>
> Reeler #1: Yes, I grabbed the bannister here on C-5 with my left hand first, I don't know why, I always grabbed it with my left hand. So left, right, left as I was climbing up to the top of the stairs. My hand was still on the bannister, my right hand was still on the bannister, as I was getting ready to climb to the top of the platform. My right foot was still on the stairs, my right hand was still on the stairs, but my left hand was just coming off of the top of the bannister there. And as I did, I don't know whether it was the vibration of me climbing the steps or stepping my foot down on top of the platform. That's when the door had fallen on the rubber—it came out of the rubber hose, it fell and the door fell and hit my arm, my left arm, and it pulled me into the machine at that time.

(Tr. 166-167)

Reeler #1 screamed and attempted to hit the emergency stop button. Reeler #3 came to his aid and hit the emergency stop button and assisted him down the platform stairs (Tr. 226-227). Reeler #1 was taken to the hospital (Exh. C-12). Reeler #1 testified that, as a result of the accident,

"The left part of my forearm was pulled in first and it crushed my ulnar which is the bone there. It shattered in three spots." (Tr. 171) At the time of the hearing, Reeler #1 had been on medical leave for one year (Tr. 134-135).

Testimony of Ronald Horne

Ronald Horne disputes Reeler #1's account of their interaction on February 15, 2016, the day before the accident. Horne is a quality auditor for HBD (Tr. 449-450). He stated he has no supervisory authority over the reelers (Tr. 474-475).

Horne agrees he and Reeler #1 traced the cause of the second drag mark on the hose run on the #8 line to the cone of CAT #8. "[T]he cone from what we could see, it looked like the hose was rubbing on the cone… If the hose is not properly aligned with adjustment rollers, then it could kind of rub on the side of that." (Tr. 459) Horne acknowledged he climbed the stairs to the CAT #8 platform, but denies asking Reeler #1 to watch the hose to see if the drag marks disappeared (Tr. 462-463). Horne contends he was able to get rid of the drag mark by "slacking the line," (adjusting the speed of the catapuller using a power box located to the left of the stairway to CAT #8 (Tr. 472)) "and then I looked on the belt and I didn't see any kind of scuff mark, drag mark or anything after that." (Tr. 463)

Horne emphatically denies Reeler #1's claim he propped open the side guard on CAT #8 with a scrap piece of hose and signaled to Reeler #1 he should keep it a secret between them.

> Q.: Now, at any time while you and [Reeler #1] were looking for the source of the drag mark, rough mark, whatever you call it, and trying to eliminate it, was the side guard on that #8 catapuller flipped open?
>
> Horne: No, sir.
>
> Q.: So it was closed that entire time?
>
> Horne: Yes.
>
> Q.: At any point in time while you were at that line #8 on the elevated platform …Did you ever prop open that side guard?
>
> Horne: No, sir. No, sir.
>
> Q.: So if anyone were to have testified that you did prop open that side guard, they would either be mistaken or perhaps even lying?
>
> Horne: They would have to be.

Q.: Because you never did that?

Horne: No, sir.

(Tr. 463-464)

> Q.: [Reeler #1testified] you propped open the side guard on the overhead catapuller on line #8 and . . . you came down and you put your finger up to your lips, like this, and basically indicated that the propping open of that side guard on the catapuller should be a secret between him and you. And my question to you is did that ever happen?
>
> Horne: No, sir.
>
> Q.: So you would deny that happening?
>
> Horne: Yes. Yes, I will.

(Tr. 467-468)

Horne also disagreed with Reeler #1's assertion that lifting the hinged side guard could eliminate a drag mark caused by the cone of CAT #8. "No, the side guard wouldn't have anything to do with any type of drag mark. . . . There's no benefit in any way [to propping open the side guard] that would get rid of a drag mark or anything." (Tr. 474) Contrary to Reeler #1's testimony that opening the side guard causes the cone to rotate counterclockwise, Horne stated the cone is mounted in a stationary position (Tr. 476). Horne testified he had never seen the overhead catapuller in operation with the side guard flipped up or propped open, but he acknowledged the side guard on the overhead catapuller shown in the 2014 video taken by OSHA was flipped up (Exh. C-9; Tr. 479, 481).

Testimony of Other Reelers

Reeler #2: Reeler #2 corroborated Reeler #1's testimony regarding their interaction on February 15, 2016. He stated Reeler #1 pointed to the propped-up guard on CAT #8 "and he said, 'I guess that's how we fix things.' And we just all laughed." (Tr. 225) Reeler #2 observed the side guard was propped open with a piece of red hose (Tr. 226). Reeler #2 did not believe, however, that Horne was responsible for propping open the side guard. He stated Horne and other quality auditors have no authority to tell reelers how to operate the catapullers and do not themselves adjust the drive belts (Tr. 240).

Reeler #3: Reeler #3 worked for HBD for approximately two years before leaving in April 2016 (Tr. 255). His recall of his observations the day before the accident was uncertain. He stated he saw the hinged side guard on CAT #8 propped open the day before the accident. "I witnessed another employee, R. J. [Horne] was up top—and that part is a little fuzzy. I'm not sure if he actually propped it up or not. But I do recall seeing it propped up." (Tr. 257) Later Reeler #3 clarified, "I do remember [Horne]—like he was sitting up there. Like he was standing up there. I do remember seeing him up there. . . . I don't remember seeing him actually prop up the guard. . . I assumed it was him." (Tr. 271)

Reeler #3 corroborated the testimony of Reelers #1 and #2 regarding the comment made by Reeler #1 the day before the accident. "[Reeler #1] came over and he said, 'I guess this is how we fix things," and he kind of pointed to it and it was propped open. And I just kind of shrugged it off. I mean, I didn't really think anything about it, you know." (Tr. 259)

Reeler #3 described the immediate aftermath of the accident that occurred the next day.

> Well, when it initially happened like I heard a scream once and I really didn't think anything of it. I mean it's a factory so we kind of -- try to make light of it, so we just hoot and holler a little bit. But the second time it was blood curdling, like it sent a shiver up my spine a little bit. That was a pain scream. And that's when I ran over and there's a computer -- like a box that has an emergency stop on it and I hit that and then I run up the steps and I loosened it up off his arm. . . .I ran up the steps and then I loosened the cat so he could pull his arm free. And then just after that happened, like I kind of stood on the -- this side over here where there's like a green bannister right there or whatever. And I had him by the shirt a little bit, so like as he was walking down the steps he wouldn't fall.

(Tr. 260-262)

Reeler #4: Reeler #4 was acting as utility relief for the 8:00 a.m. to 4:00 p.m. shift on February 16, 2016, substituting for Reeler #5, who usually worked that shift (Tr. 595, 599). At 4:00 p.m., Reeler #1 relieved Reeler #4. Reeler #4 testified the hinged side guard of CAT #8 was not propped open at any time during his shift (Tr. 596). He had a short conversation with Reeler #1 regarding a drag mark that had appeared on the hose near the end of his shift.

> It was when he approached me, I explained to him first thing that there was a slight drag mark on the hose, and nobody was complaining about it, and then I explained to him that I went to the proper steps from one end of his line to the other to evaluate on what was causing the drag mark, and then I explained to him what was causing the drag mark, you know, what possibly could be done to resolve the drag mark, and then I explained to him that it was at the end of the shift when I found the cause

> of the drag mark, that he would have to call maintenance and tell them that this is the issue, this is how, you know, that it needs resolved.

(Tr. 596-597) Reeler #4 concluded the drag mark was caused by a bearing block behind the guide rollers on CAT #8, not far from the guarded side opening (Exh. R-13; Tr. 600).

Reeler #6: Reeler #6 has worked for HBD since October of 1984. He is the father of the injured employee, Reeler #1 (Tr. 277). Reeler #6 agreed with Reelers #1, #2, and #3 that the hinged side guard to CAT #8 was propped up the day before his son's accident. "I seen that the guard was propped open with a piece of hose. . . It looked to me like a one inch red Valu-flex." (Tr. 281) He observed this "around 9:00, 9:30 that morning." (Tr. 282)[8]

Reeler #7: Reeler #7 worked the midnight to 8:00 a.m. shift on lines #7 and #8 (Tr. 606, 608). He relieved Reeler #1 on February 15, 2016, the day before the accident (Tr. 609). He testified the hinged side guard on CAT #8 was closed when he arrived for his shift. He had never seen the guard propped open (Tr. 609).

Credibility Determination

As noted, it is not necessary for the Secretary to prove how an accident occurred to establish an employer failed to comply with the terms of the standard. The testimony of the witnesses did, however, raise an issue of credibility, which the Court will address.

Reelers #1, #2, #3, and #6 testified they observed the hinged side guard of CAT #8 propped open with a scrap of hose the day before the accident. Reelers #2 and #3 corroborated Reeler #1's account that they observed the propped side guard when it was pointed out to them by Reeler #1 during the 4:00 p.m. to 12:00 a.m. shift on February 15, 2016. Reeler #6 also testified he observed the side guard propped open, but stated he noticed it on his own around 9:00 or 9:30 a.m. that day (Tr. 158-159, 225, 259, 282). Reeler #1 attributed the propping open of the guard to Horne, although he did not actually see Horne do so. Rather, he inferred Horne was responsible because he saw Horne climb the steps to CAT #8 and then saw the side guard was propped open afterwards. Horne conceded he climbed the stairs to the platform, but denies propping the guard open (Tr. 462-463). Reeler #3 remembered seeing Horne on the platform of CAT #8, but he did not see him prop open the side guard (Tr. 257, 271).

[8] Reeler #1 claims he surmised Horne had propped open the side guard on CAT #8 after the 4:00 p.m. shift started on February 15, 2016. His claim is at odds with his father's statement that he observed the side guard propped open between 9:00 and 9:30 that morning (approximately six and a half hours earlier).

The Court determines the record does not establish Horne propped the side guard open. There is no positive evidence tending to establish he did so, only Reeler #1's inference based on Horne's presence on the platform prior to Reeler #1's observation of the propped guard. The inference of Reeler #1 is undermined by the testimony of his father, Reeler #6, who stated he observed the side guard propped open at least six and a half hours before the 4:00 p.m. shift started.

After Reeler #1 finished working his shift (during which he claims the side guard was propped open) on February 15, 2016, Reeler #7 relieved him at midnight and worked until 8:00 a.m. the following day. Reeler #4 relieved Reeler #7 at 8:00 a.m. and worked on line #8 until 4:00 p.m. on February 16, 2017, when Reeler #1 relieved him (Tr. 595). Reelers #4 and # 7 testified the side guard on CAT #8 was not propped open during their shifts (Tr. 596, 609). Reeler #4 had been searching for the cause of a drag mark immediately before Reeler #1 relieved him and had traced it to a bearing block behind the guide rollers, a discovery which would have brought him next to the side guard on CAT #8 (Exh. R-13; Tr. 600).

The Court credits the testimony of Reelers #4 and #7 that the side guard on CAT #8 was not propped open during the shift immediately following Reeler #1's shift on February 15 and the shift immediately preceding his shift on February 16, when he was injured. The Court also credits the testimony of Reeler #4 that he informed Reeler #1 of the source of the drag mark on the hose being run at the shift change on February 16, 2016. Reelers #4 and #7 were both credible witnesses.[9] They were straightforward and unequivocal in their responses. Each reeler testified with a matter-of-fact demeanor and with no hesitations. They demonstrated no evasiveness or uneasiness during the questioning. Their responses were prompt and confidently delivered.

In contrast, Reeler #1's speech pattern and physical demeanor changed markedly when he answered questions about Horne's actions and about the accident itself. At times he sounded rehearsed and overly insistent on certain points. The Court is aware Reeler #1 was seriously injured in a traumatic accident that occurred exactly one year prior to the hearing and he was in obvious physical discomfort on the stand. Nevertheless, his defensiveness and evasiveness appeared related to his testimony regarding Horne's purported propping open the side guard as

[9] The testimony of Reelers #2, #3, and #6 that they observed the side guard on CAT #8 propped open during their shifts on February 15, 2016, does not directly contradict the testimony of Reelers #4 and #7 that the side guard was not propped open at the end of Reeler#1's shift on February 15 and the beginning of his shift on February 16. It is possible the side guard was propped open temporarily by an unknown employee one or more times on February 15 and 16. The Court finds specifically the side guard to CAT #8 was not propped open at the time of Reeler #1's accident on February 16, 2016.

well as Reeler #1's detailed account of how his arm ended up in the side opening on CAT #8. The Court has reviewed carefully Reeler #1's account of his accident (Tr. 166-167) while referring to Exhibits R-12a (photo of the stairway and platform of CAT #8, marked by Reeler #1) and C-6 (close-up photo of hinged side guard of CAT #8). It is difficult to reconcile Reeler #1's account with the physical layout of the stairway, platform, and catapuller shown in the photographs. Reeler #1 stated his right foot was on the top step of the stairway and his right hand was still on the right bannister. The Court finds implausible Reeler #1's testimony that, while his weight was on his right foot and his right hand was on the bannister, his left arm was forced into the opening of the catapuller by the small, lightweight, Plexiglas guard (which he refers to as the door): "[T]he door fell and hit my arm, my left arm, and it pulled me into the machine at that time." (Tr. 167) The Court does not credit his testimony that the side guard on CAT #8 was propped open at the time of the accident on February 16, 2017.

The Secretary's Burden for Proving Noncompliance with the Standard

To prove HBD failed to comply with the terms of § 1910.212(a)(1), the Secretary must establish HBD failed to provide a method of machine guarding for CAT #8 to protect reelers and other employees in the area from the hazard of ingoing nip points.

> 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." *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 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.

Safeway #2555, & Its Successors, 2005 WL 858056 at *1(No. 03-1072, 2005).

The Court of Appeals for the Sixth Circuit (the circuit in which this case arises) has held it is the Secretary's burden to show a feasible method of machine guarding exists to protect employees from hazards.

> [T]he standard applies only where there exists an identifiable and practical means for guarding the specific machine in the specific uses to which the cited employer puts it. *See, e. g., Production Control Units, Inc.* (OSHRC Docket No. 6976), 15

> OSAHRC 617, 2 BNA-OSHC 3294, 1975-76 CCH-OSHD P 20,238 (Ad.L.Judge, 1975). We believe that this approach places an eminently reasonable limitation on the breadth to which the standard's literal language might otherwise be extended. Further, it comports with the principle that where a standard imposes a duty without specifying the means of compliance, the Secretary has the burden of establishing the existence of a specific and technologically feasible means of compliance as an element of his showing that a violation has occurred. *See General Electric Co. v. OSHRC*, 540 F.2d 67, 70 (2d Cir. 1976); *Ace Sheeting & Repair Co. v. OSHRC*, 555 F.2d 439, 440-41 (5th Cir. 1977); *Irvington Moore, Division of U. S. Natural Resources, Inc. v. OSHRC*, 556 F.2d 431, 433 n. 3 (9th Cir. 1977).

Diebold, Inc. v. Marshall, 585 F.2d 1327, 1333 (6th Cir. 1978). The Secretary must also demonstrate the employer had sufficient notice of the standard's requirements. *Id.* 582 F. 2d at 1335-1336.[10]

The Court finds, for the reasons that follow, the Secretary has met the three requirements for establishing HBD failed to comply with the terms § 1910.212(a)(1) in that: (i) HBD did not provide adequate guarding on the CAT #8; (ii) a feasible method of adequate guarding existed; and (iii) HBD had sufficient notice of the cited standard's requirements.

(i) Adequacy of the Hinged Side Guard

It is undisputed HBD equipped the CAT #8 with a hinged side guard covering the opening to the drive belts. The Secretary contends the guard was inadequate because it was hinged, and so could be bypassed at the will of the reeler or any other employee. HBD argues the guard is adequate for essentially the same reason: "[T]he only means for access on the part of the reeler/operator is through a unilateral bypassing of the hinge guard." (HBD's brief, p. 17) Whether the ability of the operator to bypass the hinged side guard renders it inadequate under § 1910.212(a)(1) is the crux of the issue. To resolve this issue, the Court looks to the testimony of the expert witnesses called by the Secretary and HBD.

The Court qualified James Washam (called by the Secretary) and Brian Huber (called by HBD) as experts in machine guarding and LOTO (Tr. 313-314, 642).[11] Washam had visited

[10] HBD did not dispute at the hearing and does not argue in its brief that adequate guarding of CAT #8 was infeasible or that it lacked adequate notice of the requirements of § 1910.212(a)(1).

[11] Washam is a former CSHO and assistant area director in OSHA's Cincinnati Area Office. In 1997, he was named OSHA's Region V Machine Guarding and Lockout Coordinator, a position he served in for ten years. He subsequently worked as a private safety consultant conducting machine-guarding and LOTO audits in private industry. OSHA hired Washam to develop and redesign its courses relating to machine guarding and LOTO and to present the courses to OSHA personnel. He served on several ANSI committees, including those addressing mechanical press requirements, risk assessment, and robotics (Exh. C-20, p. 1; Tr. 307-311).

Huber is a partner in Machine Safety Specialists, LLC, a consulting company for machine safety. He was a safety

HBD's Bellefontaine plant in 2015 as part of another case, during which he observed machines and equipment, including the catapullers. He visited the plant again on January 27, 2017 (Exh. C-20, p. 3; Tr. 315-316).[12] Huber visited the plant and examined CAT#8 on January 10, 2017 (Tr. 665).

Washam concluded the hinged side guard did not meet the requirements of § 1910.212(a)(1):

> [I]t is my opinion that the side guard on the Catapuller prior to February 16, 2016, was inadequate protection for the hazardous condition created by the in-running belts of that machine. Operators of the Catapuller were thus exposed to serious hand and arm injuries. In order for barrier guards with movable sections to provide adequate protection, they must be fixed in position with fasteners not readily removable or must be equipped with safety interlock switches designed to stop all movement when opened. The side guard on the Catapuller had neither.

(Exh. C-20, p. 5)

On the other hand, Huber concluded the hinged side guard complied with § 1910.212(a)(1):

> Since the guard will not stay in the open position by itself due to the design of the guard, the operator must keep one hand on the open guard at all times. The other hand would then be used to make the adjustment to the pressure on the hose. As soon as the operator's hand releases the guard, the guard will close, due to the design of the guard.
>
> This design is well designed and effective in the respect that it forces the operator to fully engage both hands while making hose pressure adjustments. Many "catapullers," or belt pullers on the market are fully open on both sides allowing an operator to insert a hand or finger into the path of the hose or belt and experience

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products manager for twelve years for Northwest Controls/Crescent Electric Supply. He has presented machine guarding training to CSHOs in Ohio (Exh. C-23, pp. 3-4; Tr. 635-638).

[12]At the Secretary's request, and over the objection of HBD, Washam attended the depositions of the employee witnesses (Tr. 323-324). The burden is on the party seeking to exclude a person from the deposition to move for a protective order "designating the persons who may be present while the discovery is conducted." Fed. R. Civ. P. 26(c)(1)(E). To meet this burden, the moving party must show "good cause" that an order is necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* HBD failed to establish good cause for excluding Washam from the depositions. HBD also objected to Washam's testimony that was grounded on his observations of the deposition testimony of the employee witnesses, citing *Crowley v. Chait,* 322 F. Supp. 2d 530 (D.N.J. 2004) (Tr. 323-324). In *Crowley,* the district court judge barred the plaintiff's expert "from testifying as to any conclusions that are based on his review of depositions and the summaries of the depositions." *Id.* at 547. The district court judge found the expert's anticipated testimony was unreliable because he "relied on summaries prepared by counsel." *Id. Crowley* is inapposite to this proceeding, in which Washam attended the depositions in person and did not rely on summaries provided by the Secretary. Upon questioning by the Court, HBD's counsel acknowledged he and another counsel attended the employee depositions and had the opportunity to cross-examine the witnesses. "Myself and Mr. Clancy . . . were there. We were able to participate. It was under oath. They were sworn-in witnesses, everything you asked is yes." (Tr. 334) HBD did not address the issue of Washam's attendance at the employee witnesses' depositions in its brief.

> an in-running nip. The design of the catapuller used at HBD/Thermoid eliminates this possibility.
>
> The only way I can see that an operator would be injured on the catapuller used at HBD/Thermoid would be an intentional bypass by utilizing an unauthorized device to hold the guard open.

(Exh. C-23, p. 1)

Huber testified HBD implemented a secondary safeguarding measure using "safe distance safeguarding." (Tr. 652) HBD argues the "function of lifting the side guard to inspect the hose pressure occurred with the operators' hands being engaged at a location beyond exposure to any nip hazard. Likewise, the reeler/operator adjusted the depth of the drive belts by turning the T handle of the jack screw located above and on top of the catapuller. Again, the location of the T handle was clearly beyond the nip hazard. … Put simply, this secondary safeguarding method in conjunction with the machine guards provided acceptable safeguarding against amputation hazard." (HBD's brief, pp. 23-24)

Washam disagreed that this method protected a reeler lifting the side guard. "[H]e's not safeguarded by location. Location means I'm 10 feet away or 8 feet away, I can't reach this thing. In this case he can reach them inadvertently or intentionally, or if he makes a mistake he can reach those drive belts." (Tr. 362) Although reelers are trained to lift the side guard with one hand while adjusting the T-bar handle with the other, this does not protect a reeler from inadvertence or inattention. "He's got a free hand when he opens the gate or the movable section. …When he's up there, everything is going the way it should, he raised one hand up to the adjustment knob. That's the way he's supposed to do it, but you can't rely on he's going to do that every time, nothing is going to go wrong, something else happens. That's why most accidents occur." (Tr. 362)

Although both expert witnesses demonstrated they were knowledgeable and experienced in the history and application of machine guarding, it is Washam's view which reflects Commission precedent. "[A]ccidents generally do not always occur during normal operations. Indeed, the very term 'accident' implies that something abnormal has occurred. Standards are intended to protect against injury resulting from an instance of inattention or bad judgment as well as from risks arising from the operation of a machine. *Pass & Seymour, Inc.*, 7 BNA OSHC 1961,

1963, 1979 CCH OSHD ¶ 24,074, p. 29,238 (No. 76-4520, 1979)." *Trinity Indus., Inc.,* 1994 WL 71661, at *21 (No. 88-1547, 1994).

> The Commission has also long-recognized that OSHA's machine guarding standards were designed to protect employees from common human errors such as "neglect, distraction, inattention or inadvertence of an operator [.]" *Slyter Chair, Inc.,* 4 BNA OSHC 1110, 1112 (No. 1263, 1976). "The standard was designed to provide against such human weaknesses." *Id*. "This requirement implicitly recognizes that human characteristics such as skill, intelligence, carelessness, and fatigue, along with many other qualities play a part in an individual's job performance, and it avoids dependence on human conduct for safety." *B.C. Crocker,* 4 BNA OSHC 1775, 1777 (No. 4387, 1976). "The plain purposes of the standard are to avoid dependence upon human behavior and to provide a safe environment for employees in the machine area from the hazards created by the machine's operation." *Akron Brick & Block Co*., 23 BNA OSHC 1876, 1878 (No. 4859, 1976).

Matsu Alabama, Inc., 25 BNA 1952, 1970 (No. 13-1713, 2015) (ALJ), *aff'd* 670 Fed. Appx. 699 (11th Cir. 2016).

HBD argues it "instructed its employees on how to recognize the hazards associated with their work and the ways to avoid the amputation hazard. Of note, HBD's safety orientation, as well as its on the job training was tailored to advise its reeler/operators of the hazards associated with operating the elevated catapullers and included instructions relative to proper utilization of all safety devices and machine guards." (HBD's brief, p. 24) Again, Commission precedent, as well as that of the Sixth Circuit, does not support HBD's position. The Sixth Circuit affirmed the Commission's holding that § 1910.212 "concerns guarding of machinery rather than training or signage." *Selkirk, Inc. v. U.S. Occupational Safety & Health Review Comm'n*, 49 F. App'x 42, 44 (6th Cir. 2002).[13]

The Court agrees with the Secretary's position that a guard is not effective if it is easily bypassed by an employee. The Commission made this point long ago, when discussing an Employer's implementation of a two-hand tripping device as a "secondary safeguarding measure":

> Respondent asserts that an employee would only jog a machine with each of his hands on a separate button. Respondent thus appears to contend that its machines were equipped with an acceptable form of guarding: a two-hand tripping device. …

[13] Although HBD asserted the affirmative defense of employee misconduct in its Answer, it did not pursue this defense at the hearing and does not argue it in its brief. As such, the defense is deemed abandoned. *See Georgia-Pacific Corp.,* 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991) (Issues not briefed are deemed abandoned.). Even if argued, the employee misconduct defense would not succeed in this case. "There is no work rule that, if communicated to employees, would change the fact that [the employer] failed to properly guard the machines." *Matsu Alabama, Inc.,* 25 BNA OSHC at 1983.

> However, such a guarding method is only acceptable *if installed in such a way that it cannot be easily circumvented by employees.* … The record does not support the assertion in Respondent's brief that employees in fact used both hands to operate the controls, nor can we conclude that the controls were arranged so as to require two-hand operation. Thus, the existence of the dual buttons does not alter our conclusion that Respondent violated the standard.

Pass & Seymour, Inc., 7 BNA OSHC 1961, n. 5 (No. 76-4520, 1979) (citations omitted, emphasis added).

HBD's own theory of Reeler #1's injury illustrates the inadequacy of the hinged side guard. The Secretary recalled Reeler #1 as a rebuttal witness. The cross-examination by HBD's counsel was designed to establish a plausible cause of Reeler#1's injury.

> Q.: [I]f you [reached in through the side opening of CAT #8 to adjust the hose], you would feel, one, it's unsafe; true?
>
> Reeler #1: Yes, it's unsafe, yes.
>
> Q. And you pride yourself in being a safe worker?
>
> Reeler #1: I do.
>
> Q.: And you also want to be respected by your co-workers, your fellow reelers?
>
> Reeler #1: I guess, yeah.
> . . .
> Q.: And so if you did an unsafe act or stupid act, you would feel embarrassed in the eyes of your co-worker; true?
>
> Reeler #1: Yes. Yes.

(Tr. 745-745)

HBD posits that Reeler #1, while trying to eliminate the drag mark on the hose being processed when he started his shift on February 16, 2016, lifted the side guard with his right hand and reached into the opening with his left. This presumed action represents the sort of "neglect, distraction, inattention or inadvertence of an operator" an immovable guard is designed to prevent. HBD's theory demonstrates why employees should not be afforded the option of bypassing a machine guard. It was one of the reelers' duties to find the cause of drag marks on the hose and to eliminate the drag marks. If HBD's theory is correct that Reeler #1 reached through the opening to adjust the hose, he did so in the interest of accomplishing one of his assigned duties. Such an

action would show bad judgment and carelessness, but it results from the manner in which the machine functions and is operated.

The Court finds Washam's expert opinion regarding the efficacy of the hinged side guard to be persuasive. The Court determines the Secretary has established HBD did not provide an adequate side guard for CAT #8.

(ii) Feasible Method of Adequate Guarding Existed

After Reeler #1's accident involving CAT #8, HBD modified the guarding method to protect against the hazard posed by the in-running nip points. HBD fully enclosed CAT #8 in a wire-mesh cage that is not moveable during the machine's operating cycle (Exhs. C-7 & C-9; Tr. 319-320). This eliminated the hazard created by the in-running nip points. HDB adduced no evidence showing the use of the wire-mesh cage had adverse technological or economic consequences for its employees or its product. The Court finds the Secretary has established the feasibility of HBD's compliance with the requirements of the machine-guarding standard as applied to CAT #8.

(iii) HBD Had Sufficient Notice of the Requirements of § 1910.212

In the Sixth Circuit, the Secretary must demonstrate the employer had sufficient notice of the requirements of § 1910.212. *Diebold Inc.,* 582 F. 2d at 1335-1336. Among the recognized criteria for assessing the sufficiency of notice are (1) the need for the standard's generality, (2) industry practice relating to compliance with the standard, and (3) governmental enforcement of the standard's requirements. *Id.*

HBD had sufficient notice of what the machine-guarding standard required with respect to the Overhead CAT #8. The standard's generality results from its nature as a regulatory "catch-all" provision intended to impose guarding requirements on a wide variety of machinery where hazards exist and guarding is feasible but no other safety standard applies. HBD had installed the movable side guards on the machines to protect workers from hazards created by ingoing nip points. This demonstrates HBD was sufficiently notified of the machine-guarding standard's requirement that CAT #8's conveyor belts be guarded.

Regarding industry practice, the Secretary correctly notes ANSI Standard B11.19-2010

> offers a representative perspective of what employers deem as adequate guarding of machines equipped with moveable barriers that are intended to protect workers from ingoing nip points. The thrust of that publication is that guards meant to protect against those hazards should not be capable of being bypassed while a

> machine is operating. At the hearing, both parties' experts acknowledged that principle as accepted industry practice. Consequently, industry practice clearly afforded HDB with sufficient notice that the side guard on the Overhead CAT #8 was inadequate due to the capability of its being bypassed during the machine's operating cycle.

(Secretary's brief, pp. 15-16)

> It is well established that voluntary industry standards are admissible and probative evidence of industry recognition of hazards. *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 871 (3d Cir. 1979); *H–30, Inc. v. Marshall,* 597 F.2d 234 (10th Cir. 1979); *Titanium Metals Corp. of America v. Usury, supra* note 3; *Beaird-Poulan, A Division of Emerson Electric Co., supra; The Boeing Co., Wichita Division,* 77 osahrc 188/D13, 5 BNA OSHC 2014, 1977–78 CCH OSHD ¶22, 266 (No. 12879, 1977); *cf. Betten Processing Corp*., 75 OSAHRC 43/E2, 2 BNA OSHC 1724, 1974–75 CCH OSHD ¶19,481 (No. 2648, 1975) (ANSI standard used to show industry recognition of the hazard had been incorporated by reference.).

Cargill, Inc., 10 BNA OSHC 1398, 1402 (No. 78-5707, 1982).

Huber, HBD's expert, conceded ANSI Standard B11.19-2010 prohibits bypassing of a guard during the operating cycle of a machine. He acknowledged video Exhibit C-9 shows a catapuller operating while the side guard is in the open position (Tr. 702-703). The Secretary has established industry practice provided notice to HBD of the inadequacy of its guard.

As for jurisprudence, the cases cited in the section of this decision addressing compliance with the terms of § 1910.212 establish Commission precedent for enforcing the requirements of the machine-guarding standard with respect to machines equipped with rotating conveyor belts that pose a hazard of ingoing nip points.

The Secretary has established HBD had sufficient notice of the requirements of § 1910.212(a)(1).

(3) Employees Had Access to the Violative Condition

> To establish access under Commission precedent, the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is "reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods*., 18 BNA OSHC 1072, 1074, 1998 CCH OSHD ¶ 31,463, pp. 44,506-07 (No. 93-1853, 1997) (citing *Gilles & Cotting, Inc*., 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶20,448, p, 24,425 (No. 504, 1976)).

S & G Packaging Co., LLC, 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001).

HBD does not dispute its employees were exposed to the hazard created by the in-running nip points of CAT #8. Reeler #5 testified regarding employees' exposure to nip points on the CAT #8.

> Cats have jaws that are adjustable. In our process we make different sizes of hose and they have a crank on top that you have to adjust the size for or the opening for the hose. If you don't adjust them, like if you're running bigger hose after a smaller hose, it will mash the hose flat, which will give it an oval effect and it's not a good product. So we have to adjust those out and that's one of the things you do is one of the first things you tell them to do is don't get your hands there, keep your hands back because of the belts that pull the hose through will pull you on in.

(Tr. 554-555)

The Secretary has established it was reasonably predictable by operational necessity that HBD's reelers were in the zone of danger of CAT #8.

(4) Employer Knowledge

> The fourth and final condition for a prima facie violation of the Act requires that the employer knew of the hazardous condition, or could have known through the exercise of reasonable diligence. … The knowledge of a supervisor or foreman, depending on the structure of the company, can be imputed to the employer. *See Danis–Shook Joint Venture XXV*, 319 F.3d at 812 (observing that "the knowledge of a supervisor may be imputed to the employer" and ascribing the foreman's knowledge of his own failure to wear protective gear to the defendant company).

Mountain States Contractors, LLC v. Perez, 825 F.3d 274, 283–84 (6th Cir. 2016).

HBD argues it had neither actual nor constructive knowledge of the inadequacy of the hinged side guards. HBD's argument focuses on its lack of awareness that reelers sometimes flipped the hinged side guards on catapullers to the open position while the catapullers were in operation. The employee witnesses called by HBD, including Reelers #4, #5, and #7, followed the company line and testified they had never seen catapullers operated with the side guard flipped open.[14] The employee witnesses called by the Secretary reported instances when they had seen the catapullers running with the side guards flipped open (Tr. 224-225, 279-289).

[14] Despite stating categorically the side guards were never opened during the operation of the catapullers, two witnesses modified their testimony. Reeler #5 stated the side guards were always down during production, with one exception: "The only reason being to raise that hinge guard would be to actually grab the bottom, lift it out, look and see if the jaws are too tight, set the guard back down and crank it, loosen it up to keep it from pinching the hose." (Tr. 557) Gary Proffitt, HBD's extrusion supervisor, also acknowledged reelers lift the hinged side guards to make adjustments while the catapullers are in operation (Tr. 395).

HBD's focus on the instances when the side guards were flipped to the open position on the catapullers is misplaced. The hinged side guards were inadequate at all times because they could be lifted, not just when they actually were flipped into the open position. Whether the side guard was flipped open, propped open, or lifted with one hand, it was capable of being bypassed, which is what renders it inadequate. As James Washam noted,

> [T]hat's the whole intent of the machine guarding requirement, is that you can't rely on somebody that was trained to recognize a hazard or work rule for protection. It's got to be by a device that prevents entry when that machine is running. So there's been many cases that an employee might open a guard and see a piece of hose inside that shouldn't be there or see a tool in there that the maintenance guy left in there or a piece of debris, and without thinking reach in and get it.

(Tr. 327)

It is undisputed management personnel at the Bellefontaine plant knew the side guards on the catapullers could be lifted. Reeler #5 testified the hinged side guards had been in place for "a few years" at the time of the accident and it was common knowledge among HBD's employees that the hinged side guard could be lifted while the catapuller was running (Tr. 585). HR supervisor Hill testified he had been aware "forever" that employees could open the side guards while the catapuller was operating (Tr. 506). As Reeler #5 and extrusion supervisor Proffitt conceded, there were times when it was necessary for reelers to lift the hinged side guard during the operating cycle. HBD had actual knowledge of the violative condition of the guards.

2014 OSHA Inspection and Video

HBD argued at the hearing that it lacked knowledge of the violative condition of the side guards because OSHA had inspected its plant in 2014 and had not cited the catapuller side guards. In the 2014 video taken by CSHO Miller during her inspection of HBD's factory, the hinged side guard of the overhead catapuller is flipped up during the demonstration of the stringing operation. Reeler #5 volunteered his explanation for the guard's open position.

> Q.: Who is taking this video?
>
> Reeler #5: We had two ladies in from OSHA that were taking this video at the time. . . . This gentleman on the steps is . . . another reeler.
>
> Q.: And is that hinge guard open there?
>
> Reeler #5: Yes, it is.

Q. What's he doing?

Reeler #5: The reason for the hinge guard being open is –

Q.: Well, first of all, what's he doing when –

Reeler #5: He fed the hose through the cat.
. . .
Q.: Is that appropriate to string the hose through the cat with the hinge guard open?

Reeler #5: No. This particular day here, like I said, there were two ladies from OSHA in, and when they were talking about the cats, we were trying to explain the pinch on the hose, if it's too tight or not tight enough, and they didn't know exactly what we were talking about and asked if there was any way possible to see what was going on. And I told them, I said well, we can show you by leaving the guard up, and that was the only reason that guard was out of the way during that process, because you don't need to have it up for any reason once you launch the hose into the end of that cat.

Q.: And that wasn't even the cat #8?

Reeler #5: Yeah, that was Line 2.

Q.: And . . . when you referred to the hinge guard, that's the hinge guard where as you indicated are you able to prop it open or leave it open as it's depicted in that picture or that video?
. . .
Reeler # 5: No. No way possible.

(Tr. 571-572)

CSHO Miller stated she did not request that the hinge guard be raised while she videotaped the stringing procedure. She and CSHO Majoros were focused on a rotating shaft on the catapuller near the reelers' feet, not the overhead catapuller (Tr. 65). She stated, "That's the way that we—we watched them reel up the hose. The focus was on the first part of the video for the reeler, not the catapuller. … If you see in the video, there is a flashlight focused on their feet and that's what the video was focused on." (Tr. 66) CSHO Miller testified she did not cite HBD for the inadequate hinged side guards because "it wasn't the focus of my citation. ... I can't catch everything." (Tr. 70)

Her testimony is corroborated by CSHO Majoros, who testified she was shining the flashlight towards the feet of the reelers as she stood next to CSHO Miller. The beam of the flashlight is visible in the video as it moves across the legs of the employees. She stated she did

not ask HBD to open the side guard. "Compliance officers are taught very early on that you don't expose yourself to a hazard and you don't expose employees to a hazard for the sake of a violation. It just doesn't happen." (Tr. 711)

The Court credits the testimony of CSHO Miller and CSHO Majoros over that of Reeler #5. Reeler #5's mannerisms and demeanor during his testimony detracted from his credibility. He was eager to blame the opened side guard on the CSHOs, ignoring counsel's question about what the reeler was doing and stating, unprompted, the CSHOs asked HBD to open the guard. No one else from HBD who attended the demonstration shown in Exhibit C-9, including HR supervisor David Hill, corroborated the testimony of Reeler #5 that the side guard was opened at OSHA's request. Hill accompanied the CSHOs during their inspection and he stated they did not show any interest in the hinged side guard (Tr. 514, 517). CSHO Miller and CSHO Majoros were unwavering in their testimony they did not ask HBD to open the side guard (Tr. 59-72). CSHO Majoros maintained her composure and was unshaken in the face of aggressively sarcastic cross-examination by HBD's counsel (Tr. 712-723).

OSHA's failure to cite HBD for the inadequate side guards on the catapullers during the 2014 inspection does not prevent a finding of a violation of § 1910.212(a)(1) in this proceeding.

> It is well-established that "an employer cannot rely on the failure of the Secretary to issue a citation for a particular condition during an earlier inspection as the basis for later arguing lack of knowledge of the same hazardous condition." *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1780, 1782 (No. 91-2524, 1994). "In essence, the mere fact of prior inspections does not give rise to an inference that OSHA made an earlier decision that there was no hazard, and does not preclude the Secretary from pursuing a later citation." *Seibel Modern Mfg. & Welding Corp.*, 15 BNA 1218, 1224 (No. 88-821, 1991). In *Seibel*, the Commission noted it had previously "cautioned employers against freely drawing such inferences from uneventful inspections" since "an employer is required to comply with a standard regardless of whether it has previously been informed that a violation exists." *Id.* at 1223-1224 (citing *Simplex Time Recorder Co.*, 12 BNA OSHC 1591, 1596 (No. 82-12, 1985); *Columbian Art Works, Inc.*, 10 BNA OSHC 1132, 1133 (No. 78-29, 1981); *GAF Corp.*, 9 BNA OSHC 1451, 1457 (No. 77-1811, 1981). "These cases implicitly rule against deducing from uneventful prior inspections that particular operations are nonhazardous." *Id. See also International Harvester Co. v. OSHRC*, 628 F.2d 982, 985 n. 3 (7th Cir.1980) (earlier failure to cite for violation of a particular standard is not a decision that the employer was complying). *Cf. Cedar Construction Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C.Cir.1978) ("[w]e believe that recognizing such a right [to rely on uneventful prior inspections] would discourage self-enforcement of the Act by businessmen who have far greater knowledge about conditions at their workplaces than do OSHA inspectors").

Matsu Alabama, Inc., 25 BNA OSHC at 1962-1963.

The Secretary has established HBD had actual knowledge the hinged side guard on CAT #8 could be bypassed by the reelers, and thus was inadequate to guard the ingoing nip points. HBD also had actual knowledge of the violative condition, as established by video Exhibit C-9; the testimony of extrusion supervisor Gary Proffitt that reelers lift the hinged side guards to make adjustments while the catapullers are in operation (Tr. 395); and the testimony of HR supervisor David Hill that he had been aware "forever" that employees could lift the hinged side guard while the catapuller was operating (Tr. 506). The actual knowledge of supervisors Proffitt and Hill is imputed to HBD.

Based on the record, the Court finds the Secretary has established HBD violated § 1910.212(a)(1).[15]

CHARACTERIZATION OF THE VIOLATION

Willful Characterization

The Secretary characterized the violation of § 1910.212(a)(1) as willful.

> A willful violation is one involving voluntary action, done either with "an intentional disregard of or plain indifference to," employee safety and the requirements of the statute. *DCS Sanitation Mgmt., Inc. v. OSCHRC,* 82 F.3d 812, 816 (8th Cir. 1996). A willful violation occurs when an employer makes "a conscious, intentional, deliberate, [or] voluntary decision," to expose its employees to a known hazard. *Donovan v. Capital City Excavating Co.,* 712 F.2d 1008, 1010 (6th Cir.1983). It does not matter that the employer lacked malicious intent or "venial motive." *Id.*

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[15] At the hearing, the Court stated to Secretary's counsel, "The citation alleges one violation of § 5(a)(2) of the Act and the standard thereunder found at 29 C.F.R. § 1910.212(a)(1), which has been amended in the alternative to a violation of 29 C.F.R. § 1910.147(c)(4)(i). Do I have that right, Mr. Marta?" The Secretary's counsel replied, "You do, Your Honor." (Tr. 14) Having found the Secretary established a violation of § 1910.212(a)(1), the Court determines it is unnecessary to address the standard cited in the alternative, § 1910.147(c)(4)(i).

> Where, as here, the Secretary makes an alternative allegation, only one of his allegations can prevail, i.e. the alternative allegation is moot if the first provision alleged is found to apply. *See, e.g., MasTec, N. Am., Inc.*, 20 BNA OSHC 1900, 1902 n.4 (No. 99-0252, 2004) ("Since we find compliance with the terms of [§] 1926.950(c)(1), we need not consider the alternative allegation under [§] 1926.950(c)(2)."); *Nat'l Industr. Constructors, Inc.*, 10 BNA OSHC 1081, 1086 n.8 (No. 76-4507, 1981) (where Secretary alleged alternative violations of two separate provisions of OSHA construction standards, Commission held that "resolution of the issues raised concerning the alternative allegation ... is unnecessary[[]" once one provision is found applicable); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1282 (3d ed. 2016) ("Alternative ... pleading usually is drafted in terms of 'either-or' propositions ....").

Tower Maint. Corp., Respondent., 25 BNA 2146, 2147 (No., 13-0777, 2016)

Selkirk, Inc., 49 F. App'x at 45.

The basis for the Secretary's characterization of the violation as willful is HBD's knowledge of two previous injuries to reelers. The first occurred in 2007, when Reeler #2's right hand was crushed in the front nip point of a catapuller (Exh. C-3; Tr. 54, 57-58). The second injury occurred when another reeler's hand was caught in the catapuller's front rollers (Tr. 490, 533-534, 541). After these injuries, HBD installed cone guards and roller guards on the catapullers (Tr. 534).

HBD asserts it made "a good faith effort to fulfill its obligation of protecting its employees against amputation hazards." (HBD's brief, p. 29)

> A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. ... Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one—whether the employer's belief concerning a factual matter, or concerning the interpretation of a standard, was reasonable under the circumstances.

Calang Corp., 14 BNA OSHC 1789, 1793 (No. 85-319, 1990).

Here HBD has established it had a good faith belief the hinged side guard conformed to the requirements of § 1910.212(a)(1). The Court determines the violation of § 1910.212(a)(1) was not willful.

Repeat Characterization

In the alternative, the Secretary characterizes HBD's violation of § 1910.212(a)(1) as repeat. Under § 17(a), 29 U.S.C. § 666(a), a violation may be characterized as repeat where there is a "Commission final order against the same employer for a substantially similar violation." *See Potlatch Corp*., 7 BNA OSHC 1061, 1063, (No. 16183, 1979).[16]

As a result of the OSHA's 2014 inspection, the Secretary issued a Citation and Notification of Penalty to HBD on April 20, 2015, alleging serious, willful, and other-than-serious violations of sixteen general industry standards, including one serious violation and one willful violation of § 1910.212(a)(1) (Exh. C-4, pp. 13, 20; Tr. 42-43).

[16] HBD appears to concede the repeat characterization. The Court granted the Secretary's motion to allege in the alternative that the violation of § 1910.212(a)(1) was repeat or serious on November 3, 2016. In its prehearing statement, filed February 8, 2017, HBD did not dispute the repeat or serious characterization, nor did it address the issue in its post-hearing brief.

The Secretary and HBD entered into a settlement agreement on February 24, 2016, agreeing to affirm the serious violation of §1910.212(a). The Secretary withdrew two of the three instances alleged under the willful violation of § 1910.212(a)(1) and recharacterized the violation as repeat (Exh. R-2; Tr. 45-47). The settlement agreement was approved by Judge Joys and became a final order on April 22, 2016.

"The Secretary establishes a prima facie case of substantial similarity by showing that the prior and present violations are for failure to comply with the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-1995 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994)." *Deep S. Crane & Rigging Co.,* 23 BNA OSHC 2099, 2105 (No. 09-0240, 2012). The Secretary has established there is a Commission final order against HBD for failure to comply with § 1910.212(a)(1), the same standard at issue in this proceeding. The Court affirms Item 1 as a repeat violation.

PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

HBD is a large employer with a history of OSHA violations. The record indicates HBD took steps to address safety concerns, including hiring a corporate safety director after the 2014 OSHA inspection (Tr. 530). Immediately after Reeler #1's injury, HBD installed wire-mesh cages around the side openings of the overhead catapullers. HBD's positive actions, however, must be balanced against its deficient safety measures. *Ed Taylor Construction Co.,* 15 BNA OSHC 1711 (No. 88-2463, 1982). (balancing "commendable measures" with "clearly inadequate" implementation in denying good faith credit). The Court gives HBD no credit for good faith.

The gravity of the violation is high. HBD operated three shifts over twenty-four hours each day, with a reeler working for eight hours per shift. A reeler's duties include constantly monitoring the hose being run for drag marks, which can bring the reeler in proximity to the inadequate side guard at any time during the shift. The likelihood of injury is moderate, but if an injury does occur,

it is likely to be severe. Reeler #1's arm was crushed and broken in three places. He had been on medical leave for one year at the time of the hearing. The precaution of installing an easily bypassed guard on CAT #8 was inadequate to protect against employee injuries.

The Court determines a penalty of $70,000.00 is appropriate for Item 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a violation of § 1910.212(a)(1), is **AFFIRMED** as repeat and a penalty of $70,000.00 is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia

Date: July 25, 2017