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.

MID SOUTH WAFFLES, INC., d/b/a WAFFLE HOUSE #1283

Respondent.

OSHRC Docket No. 13-1022

ON BRIEFS:

Ronald J. Gottlieb, Appellate Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Mark A. Waschak, Esq.; J. Larry Stine, Esq.; Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, GA
For the Respondent

DECISION

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

BY THE COMMISSION:

Mid South Waffles, Inc. (MSW) operates a Waffle House restaurant located in Florence, Alabama. After a fire occurred in the restaurant's kitchen, the Occupational Safety and Health Administration conducted an inspection and issued MSW a six-item, serious citation alleging, as relevant here, a violation of the general duty clause of the Occupational Safety and Health Act, 29

U.S.C. § 654(a)(1),[1] and several violations of the general industry personal protective equipment (PPE) standards.

Following a hearing, Administrative Law Judge Sharon D. Calhoun affirmed the general duty clause violation (Item 1) based on MSW's failure to protect employees from burn hazards and two of the PPE items (Items 2a and 3) based on MSW's failure to provide employees using cleaning solutions with eye protection and gloves. She assessed a total penalty of $20,000. MSW petitioned for review of the affirmed violations. For the following reasons, the general duty clause violation is vacated, both PPE violations are affirmed on narrower grounds than those found by the judge, and a total penalty of $3,000 is assessed.

BACKGROUND

The Waffle House kitchen has two gas-fired griddles (or grills), each equipped with a removable "grease drawer" that collects grease, oil, and food waste. At the time of the alleged violations, MSW had a work rule requiring the grill operator, who also acts as the manager when one is not present, to clean each grease drawer once per shift. Cleaning involves draining the grease and oil from the drawer into a bucket, dumping solid waste from the drawer into a trash can, and emptying the contents of the bucket into a larger container.

Employees of the restaurant, which is open twenty-four hours a day, work in three shifts. The third shift begins at 9:00 p.m. and ends at 7:00 a.m. On February 16, 2013, about an hour and a half into the third shift, a fire started under the surface of the larger of the two griddles near the controls. The local fire department was called and extinguished the fire. The fire department conducted an investigation, taking photographs and interviewing the grill operator, Cameron Cunningham, who was also the acting manager the night of the fire. The department's investigation noted that when it "arrived on scene both of the cooking oil/waste containers for each grill were overflowing with waste," and it concluded that the fire "was accidental in nature and [likely] caused by not properly disposing of cooking oil/waste."

Two managers and several employees initiated a cleanup of the kitchen later that night. The following morning managers and employees engaged in further cleanup. During the cleanup,

[1] The general duty clause provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).

which continued for the next few days, the employees used several cleaning solutions, including various degreasers.

DISCUSSION

I. General Duty Clause Violation (Item 1)

To prove a violation of the general duty clause, the Secretary must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004); *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). The Secretary must also prove that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Burford's Trees Inc.,* 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010), *aff'd,* 413 F. App'x 222 (11th Cir. 2011) (unpublished).

Here, the judge found that the Secretary established that a full grease drawer constitutes a hazard and that recognition of that hazard was established by MSW's work rule to clean the drawers once per shift. As to knowledge, the judge found that Cunningham's knowledge of his failure to clean the grease drawer for the griddle that caught fire could be imputed to MSW; she also found that MSW had an ineffective safety program and "failed to exercise reasonable diligence in inspecting the worksite and taking measures to prevent hazards to its employees." Finally, the judge found that a feasible and effective means of abatement is to inspect the grease drawer and clean it when accumulation is present.[2] Commissioners Attwood and Sullivan agree with the judge that the Secretary met his burden of proving hazard, recognition, and knowledge.[3] Chairman MacDougall and Commissioner Sullivan find that the Secretary has failed to prove abatement and therefore vacate the violation.[4]

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[2] Although MSW claims that the Secretary failed to prove employees were exposed to a significant risk of harm, it does not contend that the Secretary failed to meet his burden of proving that the hazard was likely to result in death or serious physical harm. In any event, the judge correctly found that although no serious harm came to the employees, a fire of this nature could cause death or serious physical harm; as such, the Secretary has established this element of the general duty clause violation.

[3] Chairman MacDougall disagrees with the majority on these three elements as reflected in her separate opinion.

[4] Commissioner Attwood disagrees with the majority on this element as reflected in her dissenting opinion and would therefore affirm the violation.

Hazard and Recognition

In a general duty clause case, "[the] hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions and practices over which the employer can reasonably be expected to exercise control." *Arcadian Corp.,* 20 BNA OSHC at 2007; *Pelron Corp.,* 12 BNA OSHC at 1835. The Secretary must show, among other things, that the hazard was present. *Wheeling-Pittsburgh Steel Corp.,* 16 BNA OSHC 1218, 1221 (No. 89-3389, 1993). Hazard recognition may be shown by proof that "a hazard . . . is recognized as such by the employer" or by the "general understanding in the [employer's] industry." *See Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) (quoting *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996)).

In the citation, the Secretary alleges that MSW exposed its employees to "burn hazards" because "the grease drawer was not properly maintained to prevent a grease fire." On review, the Secretary alleges that a "fire hazard . . . existed from a full grease drawer that had not been cleaned to remove accumulated grease." The judge defined the hazard as "a grease drawer filled with grease and waste." It is axiomatic that citations are to be construed liberally, and there is no dispute that the parties litigated the hazard as being that of a "full grease drawer." *See Erickson Air-Crane, Inc.*, 2012 WL 762001 at *2 (Mar. 2, 2012, No. 07-0645) ("It is well-settled that pleadings are to be liberally construed and easily amended."); *General Dynamics Land Sys. Div.*, 15 BNA OSHC 1275, 1279-80 (No. 83-1293, 1991), *aff'd*, 985 F.2d 560 (6th Cir. 1993) (same). Commissioners Attwood and Sullivan therefore agree with the judge that the hazard at issue here is a full grease drawer.[5]

Defining the hazard as a full grease drawer informs MSW of a preventable condition over which it can exercise control, which is the basis for the company's duty under section 5(a)(1). *See Pelron Corp.*, 12 BNA OSHC at 1835; *see also Nat'l Realty & Constr. Co. v. OSHRC,* 489 F.2d 1257, 1265-68 (D.C. Cir. 1973). Although our colleague would find otherwise, it makes no

[5] In her separate opinion, our colleague takes exception to the judge's (and our) description of the hazard at issue, ignoring that the parties themselves have agreed the hazard was a full grease drawer. The judge clearly understood this, finding that "[MSW] does not dispute that a full grease drawer constitutes a hazard." Notably, our colleague further states that the "issue of common sense presented in this case" is whether "a reasonable employer [would] have known it was required to do more to 'properly maintain' the grease drawer before it caught fire[.]" It therefore appears that she too has defined the hazard as a full grease drawer.

practical difference whether the hazard is defined "as a grease drawer full of grease and waste" or, as the citation alleged, "a grease drawer [that] was not properly maintained to prevent a grease fire"—both definitions plainly inform MSW what it needed to do to exercise control of the hazard, i.e., "properly maintain" the grease drawer to prevent it from becoming full.

In her separate opinion, our colleague, citing *National Realty* and *Pelron*, and apparently relying on only the citation's definition of hazard, argues that the citation fails to define the hazard "in a way that gives an employer fair notice of its obligations under the Act by identifying the conditions or practices over which the employer can reasonably be expected to exercise control . . . ." She then concludes that "as part of [the Secretary's] burden of proof, the hazard must be defined here in a manner that gives MSW notice of the practices, procedures, or conditions that increase the likelihood of a grease fire—so that it can reasonably be expected to exercise control over them . . . . " We find the hazard definition does just that. Thus, because the record shows that a *full* (or improperly maintained) grease drawer defines the condition (or practice) that increases the likelihood of a grease fire and the condition of that grease drawer is within the control of MSW, the requirement that a hazard be preventable, first articulated in *National Realty* and applied in *Pelron*, has been met here. In fact, MSW does not dispute that a full grease drawer constitutes a hazard. As the judge found, citing the unequivocal and unrebutted testimony of Elizabeth Bailey, Vice President for Worker's Compensation and Safety for MSW,[6] as well as the unrebutted testimony of the fire department inspector,[7] "[t]he Secretary has established that a grease drawer *filled with grease and waste* constitutes a hazard." (Emphasis added).

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[6] The following exchange occurred during the Secretary's cross-examination of Elizabeth Bailey:

> Q. Would you agree with me that this was hazardous to have a grease drawer fill up with grease on a natural gas griddle?
>
> A. Yes.

[7] The fire inspector testified without contradiction when he was asked about the hazard:

> [T]he grease trap was full of food/oil materials . . . . I did ask how often the grease traps were changed out and it was at every shift.
>
> However, that doesn't take into account how busy the restaurant is. Obviously they were pretty busy because the thing was full, you know, whenever I got there.

Our colleague also asserts that the citation's definition of the hazard fails to "adequately inform MSW of what more it could do to 'free' its workplace of the potential hazard of fire and burns,"—in other words the hazard identified in the citation does not "provide notice of what more [MSW] should have done," and therefore, the Secretary has failed to prove this element of the general duty clause violation. But this analysis erroneously conflates hazard and abatement—under well-established Commission and court of appeals precedent, the question of whether the Secretary identified the additional steps MSW needed to take to "free" the workplace of the hazard (a term the Commission and courts of appeals have interpreted to mean eliminate or materially reduce) addresses the abatement element of the alleged violation. *See, e.g., Nat'l Realty*, 489 F.2d at 1265-68; *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840, 844 (8th Cir. 1981). Indeed, the citation expressly provides:

> Among other methods, one feasible and acceptable method to correct this hazard would be to ensure that the grease drawer is inspected, emptied, and cleaned on a regular and timely basis in accordance with the Operat[ion] Manual for the griddle as well as NFPA 96, "Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations," 2011 Edition.

> So to the best of my ability, it's possibly [sic] the oil and grease come [sic] over the side of the grease trap. Of course, you have a gas stove, so you have an open flame. So over time that grease or oil get heated up and it ignites?
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> ***
>
> Q. And in conclusion, . . . did you make a determination as to why this fire occurred?
>
> A. In my opinion, I believe the fire was accidental in nature. I mean, it was—you know, the waste container probably should have been emptied again.
>
> And, you know, it doesn't take into effect how busy the restaurant is. I mean, if you've got people coming in and that's all they're ordering is hash browns, it's hard to say how often, you know, it needs to be dumped.
>
> I'd say the beginning of the shift is a safe number to go with but it really doesn't take into consideration how busy the restaurant is. It was busy that night. It was full.
>
> Q. Do you believe that the fact that the grease drawer, the grease trap, was not emptied caused or contributed to the fire?
>
> A. Yes, sir, I do.

Thus, the Secretary properly addresses how the hazard could have been prevented (corrected) under the rubric of abatement. This is nothing new, as numerous Commission and court of appeals decisions have made plain in setting forth the elements for proving a general duty clause violation. *See, e.g., SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1207, *quoting Fabi Constr, Co. v. Sec'y of Labor,* 508 F.3d 1077, 1081 (D.C. Cir., 2007) (elements required for proving general duty clause violation); *Arcadian Corp*., 20 BNA OSHC 2001 (No. 93-0628 2004), (same); *Kastalon, Inc.*, 12 BNA OSHC 1928, 1931 (No. 79-3561, 1986) (consolidated) (same); *S.J. Louis Constr.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016) (same); *Peacock Eng., Inc.*, 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017) (same).[8]

MSW argues that there is nothing in the record to prove the existence of the hazard of a full grease drawer on the night of the fire.[9] We disagree. The fire inspector testified that he discovered "quite a bit" of grease and oil in the grease drawer on the night of the fire that could come up over the side of the drawer and ignite when exposed to the open flame. As noted above, he also explained that the grease drawer was overflowing with solid waste and concluded that the fire was caused by not properly disposing of oil and waste from the drawer. In addition, the

[8] Our colleague appears to question this precedent's articulation of the necessary elements for proving a general duty clause violation and suggests that our application of the Commission's longstanding and consistent analysis of the hazard and recognition elements "unnecessarily complicates" the matter. But it seems she is the one complicating matters by attempting to subsume the separate element of abatement within the hazard and recognition elements. All this despite the fact that recently in *Peacock Engineering*, the Commission—consisting at the time of Chairman MacDougall and Commissioner Attwood—emphasized the important distinction between abatement and the hazard and recognition elements, explaining that "[t]he efficacy of Peacock's work methods in avoiding injury . . . is a separate inquiry from whether an alleged hazard was present. In fact that bears on feasibility of abatement . . . ." *Peacock Eng.*, 26 BNA OSHC at 1590. *See Beaird-Poulan*, 7 BNA OSHC 1225, 1229 (No. 12600, 1979) (whether employer's efforts are "adequate to protect against the hazard is relevant to whether the Respondent has discharged its duty under § 5(a)(1) of the Act to render its workplace 'free' of the hazard by taking reasonable steps to protect its employees. It is not . . . determinative of whether a hazard exists in the first instance."); *Arcadian Corp.*, 20 BNA OSHC at 2007 (adequacy of employer's work practices to reduce risk of, or prevent occurrence of, hazard is separate issue from question of how recognized hazard is defined).

[9] The company claims that a video taken during the third shift on the night of the fire, which shows an unidentified employee presumably on his way to empty a bucket shortly before the fire started, proves the grease drawer was not full that night. It is not clear from the record, however, whether the bucket depicted in the video contained grease from the griddle that caught fire or from the second griddle in the restaurant's kitchen. It is not even clear that the bucket contained grease.

compliance officer testified that grill operator Cunningham told him that he had not cleaned the grease drawer before the fire occurred because he had been too busy. Finally, the Cooking Equipment Maintenance section of the guideline issued by the National Fire Protection Association and referenced in the citation—NFPA 96—states that cooking equipment that collects grease below the surface "shall be inspected and, if found with grease accumulation, cleaned[,]" which shows that the NFPA considers the accumulation of grease to be a fire hazard. NFPA 96, Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations, 2011 Edition, at 11.7.2.[10] Based on this evidence, we find that the Secretary has established the existence of the alleged hazard. [11]

As to hazard recognition, MSW argues that the judge relieved the Secretary of his burden of proof on this element by finding employer recognition based on the company's work rule requiring employees to empty the grease drawer. The Commission has been reluctant to rely solely on an employer's safety precautions to find hazard recognition absent other "independent evidence." *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2007 (No. 89-0265, 1997) (voluntary safety efforts may be considered in conjunction with other, "independent evidence" to establish the recognition element). As noted above, however, Vice-President Bailey's testimony

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[10] NFPA 96 provides in relevant part, that "[c]ooking equipment that collects grease below the surface, behind the equipment, or in cooking equipment flue gas exhaust, such as griddles or charbroilers, shall be inspected and, if found with grease accumulation, cleaned by a properly trained, qualified, and certified person acceptable to the authority having jurisdiction." While MSW points out that the grease drawer is designed to accumulate grease, it is the *excessive* accumulation of grease and waste that poses the fire hazard.

[11] Although it is not clear from her separate opinion, our colleague appears to base her conclusion that the Secretary failed to prove the existence of a hazard on her erroneous assumption that the Secretary defined the hazard as the mere presence of *any* grease in the grease drawer. According to our colleague, "the citation defines the hazard such that it can never be prevented since there is no way when frying foods to completely eliminate grease—as there is no dispute that the grease drawer was designed to collect grease and that grease can ignite." This fundamentally mischaracterizes the most basic factual underpinnings of this case, which have absolutely nothing to do with "completely eliminat[ing] grease." Indeed, in light of the very purpose of a grill's grease drawer (to hold accumulating grease and food waste) and the Secretary's focus on a full grease drawer (rather than the presence of "grease"), such an assertion is astonishing. Even if the Secretary had too broadly defined the hazard, however, the judge would have acted well within her authority in articulating a more narrowly tailored definition. *See FMC Corp.*, 12 BNA OSHC 2008, 2009 (Nos. 83-488, 1986) (consolidated) (redefining hazard).

definitively establishes recognition independent of MSW's work rule; she agreed that it was hazardous to have a grease drawer fill up with grease on a natural gas griddle.[12] As a company

[12] Our colleague views Vice-President Bailey's acknowledgement that a full grease drawer is hazardous as "insufficient evidence" of hazard recognition because another employee witness, Ana Risner, testified that she had never seen a full grease drawer in her 15 years of restaurant experience. But Bailey's testimony that a full grease drawer presents a fire hazard is not an unwitting statement by a witness, but rather, clear recognition by the employer's most senior safety and health official to testify at the hearing. MSW made no attempt to clarify her testimony or to have her retract it. Bailey speaks for the company as head safety officer, so her testimony alone establishes recognition. Accordingly, there is no need to "shoehorn" Bailey's testimony into the conclusion that hazard recognition has been established, as our colleague claims, because Bailey's testimony is the primary basis for finding recognition. It is mystifying that our colleague rejects her testimony in favor of that of Risner, a lower level management official who was one of Bailey's subordinates. *See Coleman Hammons Constr. Co., Inc.*, 27 BNA OSHC 1209, 1210 (No. 17-0992, 2018) *appeal docketed*, No. 18-60559 (5th Cir. Aug. 13, 2018) ("a corporate officer and agent of Respondent [has] the legal right and capacity to bind the company in its dealings"). Moreover, there is no "unresolved conflict," as our colleague claims, between Bailey and Risner's testimony—Risner did not testify that she disagreed with Bailey that a full grease drawer presents a hazard. Her testimony was directed at the question of *when* the drawer might fill up ("holidays . . . [m]aybe a Christmas day") and whether it was full on the day of fire, not whether a full drawer presents a hazard. Thus, Risner's testimony is irrelevant to the inquiry of whether a full grease drawer is a recognized hazard. Bailey's testimony, taken with MSW's work rule, is more than sufficient to support finding hazard recognition.

Even so, there is additional evidence to support this finding. Tina Miller, the Division Manager responsible for the Waffle House in question, was asked why she had not determined what caused the grill fire that occurred there:

> A. Well, I didn't have to. The maintenance men already told me what caused the fire.
>
> Q. And what was that?
>
> A. It was the hash browns residue in the grills.
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> Q. It wasn't cleaned out properly?
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> A. Well, you know, when you pull that drawer out and it's full, some of it will fall back behind there and get trapped into a trap in the back of the grill. And if that trap in the back of the grill is not cleaned real well and regularly then, *yes, it can catch on fire.*

(Emphasis added). This unrebutted testimony from a company manager with responsibility for this Waffle House establishes a specific reason why a full grease drawer is a hazard and lends additional support—not that any is needed given Bailey's unequivocal testimony—for finding that MSW recognized the hazard of a full grease drawer. Finally, contrary to our colleague's assertion, Miller's testimony establishes that MSW *had* experienced an overflowing grease drawer.

executive, Bailey's recognition that a full grease drawer is a fire hazard is imputed to MSW. *See Mo. Basin Well Svc., Inc.*, 26 BNA OSHC 2314, 2318 (No. 13-1817, 2018) (imputing supervisor's recognition of fire hazard to employer to establish hazard recognition); *Peter Cooper Corps.*, 10 BNA OSHC 1203, 1210 (No. 76-596, 1981) (imputing general manager's knowledge of hazard to employer to establish hazard recognition); *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996) (applying agency law's long-standing principle that corporation is charged with knowledge of its agents), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

Given Bailey's acknowledgement, MSW's work rule is not the sole basis for establishing that the company recognized that a full grease drawer posed a fire risk.[13] *See Mo. Basin Well Svc., Inc.*, 26 BNA OSHC at 2318 (in addition to voluntary safety measures, recognition established by supervisor's admission that conditions at worksite posed hazard); *see also Pepperidge Farm, Inc.*, 17 BNA OSHC at 2007 (finding no need to rely solely on the existence of an employer safety practice to establish recognition when there was evidence the employer was actually aware of the hazard).[14] Accordingly, the Secretary has established that MSW recognized the condition posed a fire hazard.[15]

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[13] Chairman MacDougall notes that, since she joins Commissioner Sullivan in finding that the Secretary failed to meet his burden to prove MSW should have implemented the proposed abatement measures, the citation is vacated regardless of how the hazard at issue is defined or whether the hazard was recognized by MSW. *See, e.g., Inland Steel Corp.*, 12 BNA OSHC 1968, 1971 (No. 79-3286, 1986) ("Since the Secretary has not established that [the respondent] should have implemented the abatement measure he advocates—the use of handbrakes—the citation allegation must be vacated regardless of how the recognized hazard in issue is defined.") (citing *Pelron*, 12 BNA OSHC at 1835).

[14] Out of concern that confusion may arise from Chairman MacDougall's description of his position in her personal footnote on each of the general duty clause elements at issue in this case, Commissioner Sullivan reiterates what is clearly stated at the outset of this decision: he finds that hazard, recognition, and knowledge have all been established, but that abatement has not. Accordingly, it is solely on the basis of his conclusion that the Secretary has failed to establish a feasible means of abatement that he agrees to vacate this citation item.

[15] Because the Secretary established that MSW recognized the hazard, there is no need to address whether MSW's industry also recognized it. However, the NFPA 96's guideline on inspecting equipment that collects grease below the surface is evidence of industry recognition of the hazard.

Knowledge

On review, MSW disputes the judge's finding of actual knowledge, focusing primarily on grill operator Cunningham's alleged misconduct in failing to empty the grease drawer before the fire occurred. However, irrespective of Cunningham's actions (or inactions), Commissioners Attwood and Sullivan find that because MSW lacked a sufficient work rule to prevent the hazard of a full grease drawer, the Secretary has established constructive knowledge. The Commission has long held that an employer's duty to exercise reasonable diligence includes the obligation to anticipate hazards and develop work rules that are sufficient to prevent the occurrence of those hazards in the work place. *See Pride Oil Well Serv.,* 15 BNA OSHC 1809, 1814-15 (No. 87-692, 1992). While MSW's work rule required the grease drawer to be cleaned once per shift, it did not specify *when* during the shift the drawer should be cleaned. This means that the drawer could be left to accumulate grease and oil for almost two full shifts if it is emptied at the start of one shift and not again until the end of the next.[16]

Furthermore, grill operator Jacson White testified without rebuttal that when the restaurant is busy, the grease drawer needs to be emptied *more* than once per shift. As such, MSW had every reason to expect that the grease drawer would fill up in less than one shift during busy periods. Under these circumstances, requiring that the grease drawer be emptied only once per shift is insufficient. Thus, MSW's safety program was inadequate and constructive knowledge has therefore been established.[17]

Abatement

Finally, the Secretary must establish "the existence of a feasible means of materially reducing or eliminating the likelihood of death or serious physical harm to employees." *Cerro*

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[16] Thus, Cunningham's failure to inspect and clean the grease drawer within the first hour and a half of his shift does not appear to violate MSW's work rule.

[17] Although the Eleventh Circuit is one of the circuits to which this case could be appealed, the court's holding in *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304 (11th Cir. 2013), is not relevant here given that the Secretary has established knowledge based on MSW's insufficient work rule, not on supervisory misconduct. *See* 29 U.S.C. § 660(a) (parties may appeal to circuit where worksite is located and/or employer is headquartered; employer may also appeal to D.C. Circuit.). However, the same evidence that establishes constructive knowledge would also prove the foreseeability of any such misconduct. *See S.J. Louis Constr. of Tex.,* 25 BNA OSHC 1892, 1898 n.17, 1900 (No. 12-1045, 2016) (because affirmative defense of unpreventable employee misconduct relies on same factors to evaluate constructive knowledge, foreseeability is established by showing the employer's safety program is inadequate); *see ComTran*, 722 F.3d at 1317.

Metal Prods. Div., Marmon Grp., Inc., 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986). In setting forth the method of abatement, it is the Secretary's burden to identify the specific steps that an employer needed to implement. *Nat'l Realty,* 489 F.2d at 1268. ("[T]he Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and demonstrate the feasibility and likely utility of those measures."). Moreover, when an employer already has a safety program designed to eliminate the recognized hazard, the Secretary must "show [the] *specific additional measures*" required to abate the hazard. *Pelron Corp.,* 12 BNA OSHC at 1836 (emphasis added); *see Cerro*, 12 BNA OSHC at 1822 (citing *Nat'l Realty*, 489 F.2d at 1267-68 & n.40). Here, the citation specifies "one feasible and acceptable method to correct this hazard" and that is to "ensure that the grease drawer is inspected, emptied, and cleaned on a regular and timely basis in accordance with the Operat[ion] Manual for the griddle as well as [NFPA 96]."[18]

Chairman MacDougall and Commissioner Sullivan agree with MSW that the Secretary has failed to identify the specific additional steps the company should have taken to abate the hazard. The Secretary has simply stated that MSW needed to maintain the grease drawer so that it did not become full. However, the Secretary's burden on this element requires asserting—and proving—what a sufficient work rule or practice would be. Such proof would presumably address what "inspect[ing] . . . and clean[ing] on a regular and timely basis" means in practice—indeed, as MSW points out, its work rule met the Operation Manual's instruction to clean the griddle "at least" daily. Neither the Operation Manual, which does not even mention inspecting, nor NFPA 96, which simply calls for grease-collecting cooking equipment to be inspected and cleaned, specify a frequency for inspecting or cleaning the grease drawer. Absent such specificity, MSW lacked adequate notice as to what the Secretary was claiming was the extent of MSW's obligation under the general duty clause. In short, the Secretary has merely identified the result it asserts

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[18] The cleaning instructions in the griddle's Operation Manual provide, in relevant part, that:

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

MSW must achieve, but not the additional steps—beyond those the company already had in place—it should have taken to achieve this result and consequently, abate the hazard.[19] *Compare Pelron Corp.*, 12 BNA OSHC at 1836; *Chevron Oil Co.*, 11 BNA OSHC 1329, 1333-34 (No. 10799, 1983) (Secretary proposed additional steps that were feasible and useful); *Cormier Well Serv*., 4 BNA OSHC 1085, 1086 (No. 8123, 1976) (Secretary proved it was feasible to install additional safety belts for trainees). Because such proof is lacking here, the Secretary has failed to establish the abatement element of the alleged general duty clause violation. Accordingly, Item 1 is vacated.

II. PPE Standards Violations (Items 2a and 3)[20]

Items 2a and 3 allege that employees were required to use PPE while using various commercial cleaners. Item 2a alleges a violation of 29 C.F.R. § 1910.133(a)(1) (eye protection) in two instances: while using "Spartan Waffle Iron Cleaner" in routine cleanup procedures (Instance (a)) and while using several cleaners and degreasers in the cleanup after the fire (Instance (b)).[21] Item 3 alleges a violation of 29 C.F.R. § 1910.138(a) (hand protection) while using the Spartan cleaner (Instance (a)) and several other cleaners and degreasers (Instance (b)).[22]

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[19] Our dissenting colleague places a great deal of emphasis on the Secretary's inclusion of "inspecting" in his proposed method of abatement as the "additional step" that cures this citation's deficiency. Yet she ignores that the notice required must be *specific*—it is not enough to direct MSW to inspect (something the grill operator did every time the drawer was cleaned in accordance with the company's work rule) without addressing what "regular and timely" means.

Furthermore, unrebutted testimony from Bailey confirms that MSW's work rule was to "check and empty out the grease [drawers] three times a day." The company's work rule, therefore, already requires what the Secretary proposes. In short, we fail to see the distinction between the requirement to "check" and the citation's reference to "inspect[]" as relied upon by our colleague in her dissent. *See* MERRIAM-WEBSTER'S DICTIONARY ONLINE, https:// www.merriam-webster. com/ dictionary/check (defining "check" as "to inspect, examine, or look at appraisingly–usually used with *out* or *over*").

[20] All three Commission members are in agreement with this part of the decision.

[21] The cited provision states that "[t]he employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemicals gases or vapors, or potentially injurious light radiation." 29 C.F.R. § 1910.133(a)(1).

[22] The cited provision states that "[e]mployers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from skin absorption

The judge affirmed both PPE violations as serious and assessed the penalties proposed by the Secretary. Specifically, as to Item 2a, the judge affirmed Instance (a) regarding the use of the Spartan cleaner and Instance (b) but only regarding the use of certain cleaners made by "ZEP."[23] She assessed the proposed penalty of $7,000. As to Item 3, the judge affirmed only Instance (a) regarding the use of the Spartan cleaner and assessed the proposed penalty of $6,000.

We affirm both PPE violations as serious based on the lack of hand protection (Item 3, Instance (a)) and eye protection (Item 2a, Instance (a)) when employees use the Spartan cleaner and assess a total penalty of $3,000. As to the use of the ZEP cleaners, we vacate with regard to the lack of eye protection (Item 2a, Instance (b)).

Spartan Cleaner

The Spartan cleaner is used by employees a few times per week to clean the three sets of waffle irons at the restaurant. Employees clean the waffle irons by applying the cleaner, leaving it on the hot waffle iron for a period of time, and then rinsing it off. It is undisputed that employees do not wear gloves or eye protection when using the cleaner. The judge found that the Secretary established applicability, exposure, and knowledge as to both affirmed PPE violations involving the Spartan cleaner. On review, MSW disputes only the applicability of the cited PPE standards, arguing that there is no history of eye or hand injuries and that the Secretary failed to show employees were exposed to hazards recognized by MSW or its industry. MSW accordingly argues that both items should be vacated, and if not, recharacterized as other-than-serious. We reject both arguments and agree with the judge as to the applicability of the PPE standard and serious characterization of these violations.

Item 3 (Instance (a)) — Hand Protection

The text of the cited provision conditions the requirement for hand protection on the presence of "hazards such as those from skin absorption of harmful substances; . . . chemical burns; [and] thermal burns . . . ." 29 C.F.R. § 1910.138(a). In the Eleventh Circuit, to establish the applicability of a PPE standard such as this one that, by its terms, applies only where a hazard

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of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes." 29 C.F.R. § 1910.138(a).

[23] While other cleaners were used in the post-fire cleanup, our discussion is limited to the use of the ZEP cleaners, as that was the judge's sole basis for affirming this instance of the violation.

is present, the Secretary must demonstrate that the employer had actual notice of a need for PPE, or that "the protective equipment sought by the Secretary is what the employer's industry would deem appropriate under the circumstances."[24] *Farrens Tree Surgeons Inc.*, 15 BNA OSHC 1793, 1794-1795 (No. 90-998, 1992), citing *Florida Machine & Foundry, Inc. v. OSHRC*, 693 F.2d 119, 120 (11th Cir. 1982).

Here, the Material Safety Data Sheet (MSDS) for the Spartan cleaner shows that it has a pH level of 14 and contains sodium hydroxide, which is a caustic chemical. The MSDS further states that the cleaner causes skin burns and skin damage or irritation, with symptoms including pain, redness, and chemical burns. The CO testified that the cleaner could cause injuries ranging from severe skin irritation to first, second, or even third-degree burns, as well as chemical burns and possible irreversible damage to the skin causing scars or disfiguring burns. The MSDS recommends wearing rubber gloves to prevent skin contact.

Although there is no evidence of hand or skin injuries related to MSW's use of the Spartan cleaner, we find that based on the list of potential injuries in the MSDS, as well as its recommendation to wear gloves, the restaurant industry would recognize that it posed a hazard warranting the use of hand protection. C*f. Young Sales Corp*., 7 BNA OSHC 1297, 1298 (No. 8184, 1979) (manufacturer's warning probative evidence of existence of recognized hazard under general duty clause). As such, the Secretary has established applicability of the PPE standard.

To determine "the seriousness of a violation, the correct inquiry is not the likelihood of accident but whether, in the event of an accident, there is a substantial probability that it would result in death or serious physical harm." *Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1061 (No. 79-4945, 1982), *aff'd*, 723 F.2d 410 (5th Cir. 1984). In this regard, the Secretary need only prove that an accident is possible and that death or serious physical harm could result. *Trinity Indus., Inc.*, 504 F.3d 397, 401 (3d Cir. 2007); *see also Beverly Enters., Inc.* 19 BNA OSHC 1161, 1188-90 (No. 91-3144, 2000) (consolidated) (Secretary must prove that employee is likely to suffer

[24] Pursuant to the Act, either the Secretary or an employer may appeal a Commission decision to "any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office ...." *See* 29 U.S.C. § 660(a), (b). Here, MSW has its principal place of business in Georgia and the inspection took place in Alabama, both of which are located in the Eleventh Circuit. Where it is probable that a decision will be appealed to a certain circuit, the Commission generally applies the law of that circuit. *Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

serious physical harm as result of an accident). Considering the nature of the potential skin injuries listed in the MSDS, its recommendation to wear gloves, and the CO's testimony, we find that there is a substantial probability that exposure to the Spartan cleaner would result in serious physical harm. Accordingly, this violation is affirmed as serious.

Item 2a (Instance (a)) — Eye Protection

Similar to the hand protection provision discussed above, the cited eye protection provision conditions its requirement on the presence of a hazard, which is when employees are "exposed to eye or face hazards from . . . liquid chemicals, acids or caustic liquids . . . ." 29 C.F.R. § 1910.133(a)(1). The MSDS for the Spartan cleaner states that it "[c]auses eye burns" and "severe eye damage or irritation with symptoms of pain, redness, and chemical burns," and that "[e]ye contact may cause blindness." While the CO similarly testified that if the cleaner contacted an employee's eyes, it could cause severe burns of the cornea, severe irritation, or blindness, he also agreed, without elaboration, that these are worst-case scenarios. The MSDS recommends using splash goggles.

Although there is no evidence of eye injuries related to MSW's use of the Spartan cleaner, we find that based on the list of potential injuries in the MSDS, as well as its recommendation to use splash goggles, the restaurant industry would recognize that it posed a hazard warranting the use of eye protection. *Cf. Young Sales Corp.*, 7 BNA OSHC at 1298. Therefore, the cited standard applies. As to characterization, considering the nature of the potential eye injuries listed in the MSDS, its recommendation to use splash googles, the CO's testimony, and viewing the evidence in light of the "considerable vulnerability of the eye," we find that there is a substantial probability that exposure to the Spartan cleaner would result in serious physical harm. *See Vanco*, 11 BNA OSHC at 1059-61. Accordingly, this violation is affirmed as serious.

ZEP Cleaners

Also at issue under Item 2a are the ZEP cleaners (Instance (b)) that the Secretary claims MSW's employees used in the post-fire cleanup. After the fire was extinguished, two managers came to the restaurant, and they, along with all but one of the employees that had been working during the third shift that evening, initiated a cleanup late that night. The following morning, the employees continued the cleanup, with Division Manager Tina Miller present, along with the other two managers. The Secretary alleges that several cleaners were used, including "ZEP FAST 505 Industrial Cleaner and Degreaser" and "ZEP All-purpose Cleaner and Degreaser."

The judge found that "a preponderance of the evidence shows ZEP . . . w[as] used during the cleanup" and the Secretary established a serious violation of the eye protection standard as to the use of these cleaners. While we agree with the judge's finding that the ZEP cleaners were used by MSW's employees, we vacate this instance as the Secretary has failed to prove applicability of the cited standard.

As a threshold matter, MSW argues that employees did not use ZEP cleaners during the cleanup. There is conflicting testimony on this question—Division Manager Miller testified that the cleaners were not used, but grill operator White testified that he did use them during the cleanup. The judge credited White over Miller, finding that the grill operator testified confidently and believably in this regard. In addition, the CO testified that he observed the ZEP cleaners at the restaurant during his investigation and employees told him that they were used during the cleanup. Given this evidence, we defer to the judge's credibility finding and conclude that the cleaners were used by MSW's employees during the cleanup. *See L&L Painting Co.*, 23 BNA OSHC 1986, 1990 (No. 05-0055, 2012) (the Commission generally defers to judge's credibility findings if they are based on demeanor of a witness during the hearing).

MSW also argues that even if the ZEP cleaners were used, there is no evidence establishing that they were used at full strength. According to the MSDSs for the two cleaners at issue, they have pH levels ranging between 8.5 to 13.25 and could "[c]ause eye irritation," with possible damage if not rinsed immediately, inflammation of the eye characterized by redness, watering, and itching; the MSDSs also recommend wearing safety glasses. However, an employee testified, without rebuttal, that the cleaners were diluted before use. Although the label for the ZEP All-Purpose cleaner explains that the product can be diluted, neither the label, the MSDSs, nor any other evidence provide information regarding the effect of dilution on the pH levels or warnings and recommendations in the MSDSs. In addition, there is no evidence showing the extent to which the cleaners were diluted before use. Therefore, we find that the Secretary has failed to prove that MSW's industry would recognize that using these diluted cleaners posed a hazard warranting the use of eye protection. Accordingly, Instance (b) of Item 2a is vacated.

Penalty

The Commission considers four factors when assessing a penalty: (1) the employer's size; (2) good faith; (3) history of violations; and (4) the gravity of the violation. 29 U.S.C. § 666(j). Of these factors, gravity is typically the most significant. *Orion Constr. Inc.*, 18 BNA OSHC

1867, 1868 (No. 98-2014, 1999). The judge determined that the gravity of the PPE violations was high and assessed the proposed penalty for both the hand protection ($6,000) and eye protection ($7,000) items. MSW argues that no penalties should be assessed because none of its employees have ever been injured despite repeated exposure to the Spartan cleaner.

MSW operates over 120 restaurants and has approximately 2,600 employees company-wide, so no penalty reduction for size is appropriate. MSW did take some steps to address safety at the restaurant (such as by having fire suppression equipment installed over the griddle), and the CO testified that the company cooperated during the investigation. As such, good faith supports a reduction in penalty. The CO testified that MSW had been inspected in the previous five years and serious violations were found, but he provided no details regarding this history and no documentary evidence of prior inspections was submitted. We therefore consider prior history as a neutral factor in our penalty determination.

The gravity of a violation is determined "based on the number of employees exposed, duration of exposure, likelihood of injur[ies], and precautions against injur[ies]." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005) (citation omitted). The waffle irons were cleaned between three to five times per week, and at least two employees were exposed to the hazard presented by using the Spartan cleaner without PPE. The cleaner was left on the waffle iron from twenty minutes to one hour during each cleaning, though the employee applying the cleaner was not necessarily in close proximity to the iron that entire time. While there is no evidence that an employee has been injured while using the cleaner, serious injuries could occur if it comes in contact with an employee's eyes or hands.

The CO testified that the probability of hand injuries from using the Spartan cleaner was "greater than for the [ZEP] cleaners" in light of the frequency and duration of its use. At the same time, however, there is evidence that when employees got the cleaner on their hands, they rinsed it off with no injury. With regard to eye injuries, while the CO testified that there was a high probability of corneal burns if the Spartan cleaner splashed directly onto the eye, the evidence suggests that the cleaner was sprayed, not poured, onto the waffle irons, which the CO testified would decrease the possibility of splashing. Finally, regarding precautions, there were sinks approximately 2-3 feet away from where the employees cleaned the waffle irons. While employees could, and did, use the sinks to wash the cleaner off when it got on their hands, the CO testified that it would be difficult for them to effectively flush out their eyes in the sinks.

Given this evidence, we assess the gravity of the hand protection violation as moderate based on the relatively small number of exposed employees, fairly short but repeated duration of exposure, lower likelihood of injury based on a history of exposure without injury, and the close proximity of sinks for washing the cleaner off. Based on these considerations, the other penalty factors, and the Secretary's failure to establish the other instance alleged under this item, we conclude that a penalty of $1,000 is appropriate for Item 3.

As to the eye protection violation, we assess the gravity as high based on the higher likelihood of injury in light of the "considerable vulnerability of the eye" and lack of effective precautionary measures. *See Vanco*, 11 BNA OSHC at 1059-61. In combination with the other penalty factors and the Secretary's failure to establish the other instance of this item, we conclude that a penalty of $2,000 is appropriate for Item 2a.

ORDER

For the reasons set forth above, the general duty clause violation (Item 1) is vacated. In addition, Instance (b) of Item 2a is vacated, but Instances (a) of Items 2a and 3 are affirmed. Both violations are characterized as serious and a total penalty of $3,000 is assessed.

SO ORDERED.

/s/_____
Heather L. MacDougall
Chairman

/s/_____
Cynthia L. Attwood
Commissioner

/s/_____
James J. Sullivan, Jr.
Commissioner

Dated: February 15, 2019

MACDOUGALL, Chairman, dissenting in part and concurring in part:

I write separately regarding the alleged general duty clause violation because, unfortunately, my colleagues both sow new confusion into section 5(a)(1) doctrine and draw inferences not supported by the record. For these reasons, while joining with Commissioner Sullivan in the decision to vacate this violation, I write separately to express my concerns with their analysis.

Specifically, I am troubled by my colleagues' conclusions regarding the Secretary's proof on the first two elements of the general duty clause citation: (1) that MSW "failed to render its workplace *free*" of a condition or activity in the workplace that presented a hazard; and (2) that MSW "or its industry recognized the hazard." *Maskell-Robbins, Inc.*, 16 BNA OSHC 1457, 1457 (No. 91-2189, 1993) (emphasis added). Their analysis of these two elements unnecessarily complicates the rather simple issue of common sense presented in this case: would a reasonable employer have known it was required to do more to "properly maintain" the grease drawer before it caught fire? Where MSW was emptying the grease drawer three times more frequently than the minimum recommended by the Operation Manual for the grill and had never experienced an overflowing grease drawer, the answer is no. By accepting the judge's redefinition of the hazard and finding recognition of that hazard, my colleagues have chosen to engage in Monday morning quarterbacking.

Section 658(a) of the Act requires that an employer charged with a violation be given notice in the form of a citation, which "shall be in writing and shall describe with particularity the nature of the violation . . . [and] shall fix a reasonable time for the abatement of the violation." 29 U.S.C. § 658(a). In addition, for a violation alleged under the general duty clause, which requires that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are *free* from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654 (a)(1) (emphasis added), "Congress intended to require elimination only of *preventable* hazards." *Nat'l Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) (emphasis added). Therefore, to respect Congress' intent and be consistent with Commission precedent, hazards must be defined in a way that gives an employer fair notice of its obligations under the Act by identifying the conditions or practices over which the employer can reasonably be expected to exercise control—in other words, the employer has the ability to "free" the workplace of the alleged hazard. *See Pelron Corp.*, 12 BNA

OSHC 1833, 1835 (No. 82-388, 1986) (Secretary's hazard definition did not specify condition or practice over which the company could exercise control). While my colleagues, as the judge did, redefine the hazard as a grease drawer full of grease, that is not how the Secretary defined it in the citation.[1] Instead, the hazard was broadly defined by the Secretary as "the employees were exposed to burn hazards . . . [because] the grease drawer was not properly maintained to prevent a grease fire."[2]

While the difference may at first appear as one without a distinction, there is an important distinction in how the hazard is defined[3]—just as it is in many general duty clause cases. *See Brennan v. OSHRC (Hanovia Lamp Division)*, 502 F.2d 946, 952-53 (3d Cir. 1974) ("Since the general duty clause is so broad, the evidence to support a charge of violation should be specific and detailed."). My colleagues presumably endorse the judge's redefinition of the hazard because they recognize that the way the Secretary defines it in the citation does not adequately inform

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[1] I disagree with my colleagues' summary conclusion that "[t]here is no dispute that the parties litigated the hazard as being that of a 'full grease drawer.' " Indeed, on review, MSW maintains that the Secretary too broadly defined the hazard by relying on a potential hazard that is inherent in its workplace, citing *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986), in support. My colleagues claim that MSW defines the hazard this way as well, citing only to the judge's finding that "[MSW] does not dispute that a full grease drawer constitutes a hazard." However, as stated below, I reject the judge's redefinition of the hazard and any finding that the employer accepted it. *See* Respondent's Post-Hearing Brief at 13 ("Complainant alleges a general duty clause violation because the grease drawer was not properly maintained, and asserts that Respondent failed to follow instructions in the Operat[ion] Manual for the grill. This item should be vacated because there is no hazard recognized by the industry or the Respondent that cleaning the grill three times in a day—three times as often as the manufacturer recommends—would result in serious injury or death.").

[2] While, as repeatedly noted by my colleagues and in *National Realty*, administrative pleadings may be liberally construed, this is only "so long as fair notice is afforded." 489 F.2d at 1264. Here, the hazard was not redefined until *after* the hearing. Post-hearing alterations of the citation can signal deficiencies in the notice afforded respondents. *See, e.g.*, *Whirlpool Corp. v. OSHRC*, 645 F.2d 1096, 1101 n.33, 1101 (D.C. Cir. 1981) (citing *General Elec. Co. v. OSHRC*, 540 F.2d 67, 69 (2d Cir. 1976)) (noting that "alteration of the citation resolved an ambiguity in the precise hazard charged . . . [and] this ambiguity should have been resolved before or at least during the hearing to provide petitioner with a full and fair opportunity to meet the Secretary's charge"; finding that "the Commission ignore[d] the importance of detailed notice to the fair administration of the general duty clause"). Further, testimony on an unpleaded issue does not constitute evidence of fair notice unless the parties understood the evidence was aimed at the unpleaded issue. *Id* at 1101, n.34. I find no such understanding in the hearing record before us.

[3] One that is lost on my colleagues when they claim that I too define the hazard as a full grease drawer, which I have not.

MSW of what more it could do to "free" its workplace of the potential hazards of fire and burns—in other words, the citation defines the hazard such that it can never be prevented since there is no way when frying foods to completely eliminate grease—as there is no dispute that the grease drawer was designed to collect grease and that grease can ignite. The duty set forth under § 5(a)(1) must be an "achievable one." *Nat'l Realty*, 489 F.2d at 1266 (finding that "Congress intended to require elimination only of preventable hazards"). Thus, under the general duty clause, " '[a] safety hazard at a worksite is a condition that creates or contributes to an increased risk that an event causing death or serious bodily harm to employees will occur.' " *F&H Coatings, LLC v. Acosta*, 900 F.3d 1214, 1224-25 (10th Cir. 2018) (citation omitted). In attempting to recast the alleged hazard, my colleagues inappropriately make the Secretary's burden easier—a full grease drawer is arguably preventable; proving the potential for burn hazards from frying foods due to failing to properly maintain the grease drawer, when the employer is cleaning it three times a day and three times as often as the manufacturer recommends, is a heavier burden.

The Secretary's overbroad allegation of a "burn hazard" because MSW failed to properly maintain the grease drawer does not adequately identify the hazard in terms of preventable practices or conditions over which MSW can reasonably be expected to exercise control because it does not provide notice of what more it should have done. *See Peacock Engineering, Inc.*, 26 BNA OSHC 1588, 1590 (No. 11-2780, 2017) ("In a general duty clause citation, '[the] hazard must be defined in a way that apprises the employer of its obligation, and identifies conditions and practices over which the employer can reasonably be expected to exercise control.'" (quoting *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004))); *Pelron*, 12 BNA OSHC at 1835 ("[d]efining the hazard as a 'possibility' that a condition will occur defines not a hazard but a potential hazard"). *See also The Ruhlin Co.*, 21 BNA OSHC 1779, 1784-85 (No. 04-2049, 2006) (employer did not have fair notice that it had an obligation under section 5(a)(1) to require employees to wear high-visibility vests); *FMC Corp.*, 12 BNA OSHC 2008, 2009-10 (No. 83-488, 1986) (consolidated) (defining the hazard "as those practices, procedures or conditions that increase the likelihood of an explosion"). Thus, as part of the Secretary's burden of proof, the hazard must be defined in a manner that gives MSW notice of the practices, procedures, or conditions that increase the likelihood of a grease fire so that it can reasonably be expected to

exercise control over them.[4] *See Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984) (to establish "recognition" element of a general duty clause violation, Secretary must establish that either the employer or its industry recognized a hazard from the process by which its employees performed the work). This was not done here in much the same way it was not done in *Pelron*.

In *Pelron*, the Commission found that the judge's definition of the hazard—the *possibility* of accumulations of ethylene oxide (EtO) that increased the likelihood and seriousness of an

[4] My colleagues contend that I have conflated the elements of hazard and abatement and that the Secretary's failure to identify what steps MSW needed to take to "free" the workplace of the hazard is relevant only to the abatement element of the violation. To support its contention, the majority cites the D.C. Circuit's decision in *National Realty*, but it ignores that this seminal case is instructive on the Secretary's failure to carry its burden in the present matter on more than just the element of abatement. In *National Realty*, the court made clear that an employer's duty under the general duty clause to prevent a hazard must be "an achievable one," so "Congress' language [that a workplace must be 'free' of a recognized hazard] is consonant with its intent only where the *'recognized' hazard* in question can be totally eliminated from a workplace." 489 F.2d at 1266 (emphasis added). The court went on to state that "[t]hough a *generic form* of hazardous conduct . . . *may be 'recognized*,' *unpreventable instances of it are not*, and thus the possibility of their occurrence at a workplace is not *inconsistent with the workplace being 'free' of recognized hazards*." *Id*. (emphasis added). The court noted that "Congress intended to require elimination only of preventable hazards. It follows, we think, that *Congress did not intend unpreventable hazards to be considered 'recognized' under the clause*." *Id.* (emphasis added). *See, e.g., Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1121-22 (No. 88-572, 1993) (hazard alleged under general duty clause violation must be defined in terms of a preventable consequence of the work). The court thus noted the distinction between preventability (i.e., the hazard element) and feasibility (i.e., the abatement element). *Id.* at 1267.

Further, the legislative history indicates that because the Act, including its general duty clause, was intended to encourage prevention of injuries and death, an employer cannot be held responsible for the presence of hazards that it is unable to prevent. The "free from recognized hazards" qualification was offered as an amendment by Senator Javits. S. Rep. 91-1282 at 58 (1970). However, the majority seeks to expand the scope of the statute's language beyond Congress' intent by diluting the restrictions governing the Secretary's use of the general duty clause.

Lastly, when the majority concludes that it makes no difference how the hazard is defined, because either way MSW was informed that it needed to "properly maintain the grease drawer," it is they who conflate the elements of hazard and abatement. Such reasoning is inconsistent and particularly curious given the conclusion shared with me by Commissioner Sullivan that the Secretary has failed to prove the element of abatement. *See Otis Elevator*, 21 BNA OSHC 2204, 2206 (No. 03-1344, 2007) (citing *Morrison-Knudsen*, 16 BNA OSHC at 1121-22) ("A workplace hazard cannot be defined in terms of a particular abatement method").

explosion—was too broad because such accumulations are always a possibility in the employer's industry. *Pelron*, 12 BNA OSHC at 1835. The Commission found that the proper definition of the hazard there was "practices, procedures or conditions which *increase* the likelihood of an explosion of EtO." *Id*. (Emphasis in original.) Here, the Secretary's hazard definition—a "grease drawer [that] was not properly maintained to prevent a grease fire"—does little more than allege that MSW failed to prevent the grease drawer from causing a fire, which is a potential hazard that simply cannot be eliminated in a restaurant that uses a grill.[5] An employer cannot reasonably be expected to free its workplace of inherent risks that are incident to its normal operation, as I separately noted in *Mo. Basin*, 26 BNA OSHC 2314, 2317 n. 5, 2318 n. 7 (No. 13-1817, 2018).

In addition, I am concerned that my colleagues have found recognition of the cited hazard based on insufficient evidence—the testimony from Elizabeth Bailey, MSW's Vice President for Worker's Compensation and Safety, coupled with MSW's voluntary work rule to empty the grease drawer each shift (thus, three times per day and three times as frequently as the minimum recommended by the manufacturer). While Bailey acknowledged the broadly defined hazard of an overflowing grease drawer,[6] the majority ignores that another witness for MSW—District Manager Ana Risner—stated that, in her 15 years of working in the restaurant industry, she had

[5] My colleagues further conflate the hazard with abatement by attempting to resuscitate the citation's overly-broad definition of the hazard by (in part) referencing the citation's abatement language. This is inappropriate because, as they themselves acknowledge, hazard and abatement must be treated as separate elements. *Peacock Eng., Inc.*, 26 BNA OSHC 1588, 1590 (No. 11-2780, 2017). When they are not, and (as here) an overly-broad definition of the hazard is permitted to stand, the Secretary's burden of proof for establishing hazard recognition is artificially lowered; the broader the definition of the hazard, the easier it is for the Secretary to prove that the hazard is recognized. This was not the case in *Peacock*, where the Secretary described the alleged hazard as "amputation, struck by and crushed by hazards"—preventable hazards recognized by the employer; even though, in that case, the Commission concluded that the Secretary's proposed abatement measures would not be effective in materially reducing the incidence of the hazard. *Id.* at 1590, 1593.

[6] My colleagues' reliance on Division Manager Tina Miller's testimony as proof of hazard recognition is even more perplexing. Miller stated that, as told to her by maintenance workers, "hash browns residue," which fell behind the grill and was not properly cleaned out, was the cause of the fire. Given their reliance on Miller's testimony, which is, at best, an indirect account of the fire's cause, the alleged hazard appears to be either a *full drawer* of grease, *hash browns* behind the grill, or *improper maintenance* of the grease drawer before it caught fire. Yet, despite the ever-changing hazard, my colleagues find that MSW had adequate notice of precisely what it did wrong.

never seen that happen and could only imagine the potential for needing to clean out the grease drawer more than once a shift on "maybe a Christmas Day"—apparently the restaurant's busiest day of the year. Risner testified that although it was conceivably possible for a grease drawer to fill up during the span of one shift on Christmas, in fifteen years she had never seen it happen.[7] On a nuts-and-bolts issue like this one, it is Risner—a front-line manager with a regular presence in the very restaurant where cooking on this grill took place—who seems better informed. Thus, Bailey's testimony can only be shoe-horned into the majority's conclusion that MSW recognized the (redefined) hazard by reading it in isolation. In any event, it is the Secretary who carries the burden of proof on this issue, so even under my colleagues' reading of Bailey's testimony, there is at most an unresolved conflict in the evidence on this point. *See, e.g., K.E.R. Enters., Inc.,* 23 BNA OSHC 2241 (No. 08-1225, 2013) (vacating general duty clause violation where proof of recognized hazard lacking); *Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321 (No. 97-0469, 2003) (consolidated) (vacating general duty clause violation where evidence, including conflicting testimony from supervisory personnel, failed to establish recognized hazard).[8] Moreover, as I have

[7] Grill operator Jacson White testified that he could recall cleaning the grease drawer more than once per shift on an "extremely busy day," but it is not clear from the record whether he took that action pursuant to MSW's work rule or that the work rule was insufficient due to the condition of the grease trap when the action was undertaken. In any event, there was no attempt by the Secretary to establish that White was a supervisor and that his recognition should be imputed to MSW.

[8] I also do not join my colleagues in their conclusion that the Secretary has proven constructive knowledge because I would find that MSW exercised reasonable diligence here. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (to establish constructive knowledge, Secretary must show that employer, with the exercise of reasonable diligence, could have known of a hazardous condition). The record does not establish that persons familiar with MSW's industry would regard additional measures as necessary; particularly where MSW's work rule required cleaning the grease drawer three times as much the Operation Manual recommends and there is no evidence that this work rule was not followed. *See Inland Steel Co.*, 12 BNA OSHC 1968, 1970-71 (No. 79-3286, 1986) (citing *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822-24 (No. 78-5159, 1986)) (under general duty clause, Secretary's burden of proving employer's safety program was inadequate includes presenting evidence that "knowledgeable persons familiar with the industry would regard the steps as necessary and valuable for a sound safety program in the particular circumstances existing at the employer's worksite"); *Ocean Electric Corp.*, 3 BNA OSHC 1705, 1707 (No. 5811, 1975), *rev'd on other grounds*, 594 F.2d 396 (4th Cir. 1979). ("If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such efforts.").

already indicated, speculative testimony, particularly where both Bailey and Risner stated that they could only imagine the potential hazard, is not evidence of fair notice, *see Whirlpool*, 645 F.2d at 1101, n.34, and it also does not show that MSW recognized any hazard at the time of the alleged violation. *See, e.g., Marshall v. L.E. Myers*, 589 F.2d 270 (7th Cir. 1978) (noting general duty clause's focus on preventable hazards and thus its limit of liability upon dangers actually or constructively recognized at the time of the violation). In sum, I find that the evidence fails to show that MSW management understood that the conditions presented an increased fire risk.[9] Consequently, given the Commission's longstanding precedent to not solely use an employer's voluntary work rule to establish hazard recognition so as to not dissuade employers from undertaking voluntary measures, *see Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2006 (No. 89-265, 1997) (and cases cited therein); *Gen. Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 2065-66 (Nos. 78-1443, 1984) (consolidated), *aff'd*, 764 F.2d 32 (1st Cir. 1985), I cannot find that the totality of the evidence supports a finding of MSW's hazard recognition. *See Mo. Basin*, 26 BNA OSHC at 2318 n.7 (MacDougall, Chairman, concurring) (noting that a supervisor's voluntary safety measure should not be imputed to his employer to prove hazard recognition).

Accordingly, while I do not join my colleagues' conclusion that the Secretary established his burden of proving the alleged hazard, recognition, and knowledge, I join Commissioner Sullivan in finding that the citation must be vacated because the Secretary failed to prove the feasibility of the proposed abatement measure.

/s/
Heather L. MacDougall
Chairman

Dated: February 15, 2019

[9] For similar reasons, unlike my colleagues, I do not find the NFPA 96's guideline on inspecting equipment that collects grease is "evidence of industry recognition" in this case. NFPA 96 does not address what my colleagues claim is the hazard at issue here; the guideline calls for nothing more than inspecting and cleaning, with no frequency noted. Contrary to Commissioner Attwood's contention, the evidence establishes that MSW was both inspecting and cleaning its grease drawers—three times as frequently as the minimum recommended by the equipment manual—and there is no evidence that MSW was on notice that it needed to do more than it was doing to prevent a grease fire. *See Oberdorfer Indus.*, 20 BNA OSHC 1321, 1326-27 (No. 97-0469, 2003) (consolidated) (vacating general duty clause citation where the relevant industry standard did not indicate noncompliance with its instructions created a hazard).

ATTWOOD, Commissioner, dissenting:

Because I find the Secretary established both the feasibility and effectiveness of the proposed abatement method, I dissent from my colleagues' decision to vacate the general duty clause citation.

The Secretary's proposed abatement to reduce or eliminate the hazard of a full grease drawer is to "to ensure that the grease drawer is inspected, emptied, and cleaned on a regular and timely basis . . . ." My colleagues conclude this proposed abatement method is deficient because, in their view, it fails to "identify" any "additional steps" MSW must take beyond its own existing work rule. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986) (when an employer already has a safety program designed to eliminate the recognized hazard, the Secretary must "show [the] specific additional measures" required to abate the hazard); *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986) (same). I disagree.

At the time of OSHA's inspection, MSW's work rule contained only one requirement: that employees empty and clean each grill's grease drawer once per shift.[1] As a means of abatement, the Secretary proposed that MSW "ensure that the grease drawer is inspected, emptied, and cleaned" and done so "on a regular and *timely* basis." (Emphasis added.) Thus, the Secretary's proposed abatement method does in fact identify at least one specific "additional step" to be taken that goes beyond MSW's work rule in two ways—it proposes that MSW expand its work rule to also require employees to "inspect," not just empty and clean, the grease drawer and to do so on a "timely," not just "regular" basis.[2]

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[1] I note that a critical inaccuracy pervades MSW's briefs on review. Numerous times MSW erroneously claims that the griddle's Operation Manual recommends that the grease drawer be emptied and cleaned "once per day," and therefore that the company's work rule requires the drawer to be emptied three times as often as the manufacturer recommended. The Manual, however, does not specify a frequency with which the grease drawer must be cleaned but instead states that it must be cleaned "*at least*" once per day.

[2] My colleagues claim that because MSW "checked" the drawer during the process of cleaning and emptying it, the company's work rule already contained an "inspection" requirement. This is nonsense. Although it is true that MSW employees are required to "check" the grease drawer during the process of cleaning and emptying it, these "checks" serve absolutely no purpose because, irrespective of its condition, the drawer was already going to be emptied and cleaned. The inspection requirement contained in the citation plainly requires a purposeful inspection—one

Because the citation contains this "additional step," the only remaining question is whether it is feasible and effective. I find that it is. The record establishes that inspecting the grease drawer merely requires that an employee either periodically look through the "reminder" hole on the front of the drawer,[3] look down through the chute through which food waste and grease is pushed into the drawer, or open the drawer to see if it is close to becoming full. Performing this step would take MSW employees a matter of seconds, so its feasibility cannot seriously be questioned. Indeed, one of MSW's grill operators, Jacson White, testified about the ease with which this "additional step" could be accomplished:

> Q. Can you tell me how you know whether the grease [drawer] is getting full?
>
> A. Actually, you can—there's a little hole that we slide the grease in and you can see it as it rises up or if you don't catch it like that, it will overflow. It will easily overflow.[4]

The efficacy of this proposed "additional step" was also established. Unlike *Pelron* and *Cerro*—the two cases from which the "additional steps" requirement originated—this case does not involve a complex hazard such as accumulations of EtO inside chemical reactor vessels or the unexpected energization of a large mechanical loader on a 300-350 foot, 5500-ton brass extrusion press. Here, we are dealing with a grease drawer. Thus, expert testimony is hardly necessary for the Commission to make an efficacy determination. It is obvious that expanding MSW's work rule to require that employees "timely" inspect the grease drawer (as opposed to requiring that they only empty it a maximum of once a shift)—in order to determine whether the grease and waste are approaching the hazardous level and the drawer needs to be emptied and cleaned—would materially reduce the hazard of the drawer becoming full. Indeed, the efficacy of this basic inspection requirement is supported by the fact that the NFPA guideline referred to in the citation,

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that is undertaken on a "timely" basis in order to determine *whether* the drawer needs to be emptied or cleaned.

[3] The judge noted that the grease drawer "includes a *reminder* hole in the center of the drawer to indicate when the drawer is full." The griddle's Operation Manual describes the grease drawer as a "[l]arge-capacity drawer . . . removable from the front for easy cleaning. Special 'reminder' hole in center of drawer indicates when drawer is full." The Manual distinguishes the reminder hole from the "large waste hole . . . which empties into the removable grease drawer."

[4] White confirmed that by standing at the grill and looking down in the hole he could see grease in the drawer. When asked whether "that hole" is "the same hole that you scrape waste from the griddle," he responded, "Yes, sir."

requires exactly the same measures: "[c]ooking equipment that collects grease below the surface . . . , such as griddles . . . , shall be *inspected* . . . and . . . cleaned . . . ." NFPA 96, Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations, 2011 Edition, at 11.7.2. (Emphasis added). For these reasons, I find the citation plainly specifies an "additional step" to abate the hazard and that step is both feasible and effective.[5]

Because I find the Secretary established all the requisite elements of the alleged general duty clause violation, I dissent.

/s/
Cynthia L. Attwood
Commissioner

Dated: February 15, 2019

[5] Remarkably, my colleagues do not acknowledge that the citation contains this "additional step" and instead vaguely claim that the citation must be vacated because the Secretary failed to address what " 'regular and timely basis' means in practice." Putting aside that their analysis completely ignores the citation's *new* inspection requirement, the phrase "regular and timely" is self-explanatory—it simply means MSW would need to require that employees inspect each grease drawer as often as is necessary to prevent it from becoming full. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1996) ("Timely: 1. Early, soon. 2. In time."). The need to empty and clean the drawer would then depend upon the findings of the inspection. *See D. Fortunato, Inc.*, 7 BNA OSHC 1643, 1648 (No. 76-3103, 1979) (holding that standard requiring that garbage be removed at "frequent and regular intervals" requires "removal as often as is necessary to prevent garbage from overflowing").

My colleagues make this same erroneous assertion in the context of notice, claiming that because the Secretary did not provide a *specific* greater frequency with which the grease drawer should be emptied or inspected, the citation failed to provide sufficient notice to MSW of what it was being charged with failing to do. But as discussed above, the citation plainly charged MSW with failing to require its employees to inspect and clean the grease drawer on a "timely" basis—there can be no dispute that this is something MSW's once-per-shift work rule failed to do. Thus, I am puzzled by my colleagues' almost exclusive focus on the frequency with which the drawer must be emptied to prevent it from becoming full. The Secretary's proposed abatement method in this case has absolutely nothing to do with the specific frequency (number of times per day or shift) with which the grease drawer is ultimately cleaned but instead addresses *when* that cleaning must occur (i.e., when regular and timely inspections show that it is necessary). The proposal that MSW require its employees to inspect and empty the drawer on a *timely* basis (as opposed to only emptying it on a regular basis—once per shift), obviously would materially reduce the hazard of it becoming full.

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Mid South Waffles, Inc., d/b/a Waffle House #1283, Respondent.	OSHRC Docket No. **13-1022**

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

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

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

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

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

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

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

Jurisdiction

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

Background

Waffle House Structure

Waffle House, a limited service restaurant, is a subsidiary of Mid South Waffles, Inc. (Tr. 126, 128). Mid South Waffles, Inc., was incorporated in 2009 (Tr. 129). It purchased Southeast Waffles which had several restaurant locations in Mississippi, Alabama, Tennessee, and Georgia (Tr. 129). In February 2013, Mid South Waffles, Inc., consisted of 124 to 126 restaurants and employed approximately 25 employees per restaurant, 2600 employees company-wide (Tr. 25, 129, 334). Twenty-five employees worked for Waffle House during the period covered by the inspection (Tr. 129). Anna Risner was District Manager, and supervised three stores. Shequetta Johnson was Restaurant Manager, and only supervised this Waffle House restaurant (Tr. 262, 352, 353, 354). When Johnson was not at the restaurant, the grill[1] operator for the shift managed the restaurant (Tr. 352, 353, 354).

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

[1] The terms "grill" and "griddle" were used interchangeably at the hearing to refer to Waffle House's cooking appliance.

Fire

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

Fire Investigation

Lt. Ryan Orrick, Fire Investigator for the Florence Fire Department, was dispatched to the fire at 10:52 p.m. that night to conduct an investigation of the fire (Tr. 27, 30). The fire had been extinguished by the fire department before he arrived at the site (Tr. 31). As a part of his investigation Lt. Orrick talked to the fire department officer in charge and then entered the restaurant to inspect and take pictures (Tr. 31). Once inside, he observed two griddles: on the left, a gas operated griddle with a slide-out drawer; and on the right, a smaller griddle. According to Lt. Orrick, the larger griddle had four gas burners which burned "pretty hot." He also observed a waste collection tray, known as the grease trap or grease pit[2], which slides inside the griddle and fits underneath, next to the controls (Tr. 43). The grease trap was not inside the griddle when he arrived, but instead had been removed and was placed on the top of the griddle (Tr. 34).

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

[2] The terms "grease trap" and "grease pit" were used interchangeably with the term "grease drawer" at the hearing.

was not as much damage to the top of the wood, however, the edge of the corner above the grease trap had the most damage. Lt. Orrick testified this means the fire likely started in the grease trap area (Tr. 35-36, 40).

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

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

Griddle

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

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

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

(Exh. C-11, p. 11)

Waffle House Cleanup

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

During the initial phase of the cleanup District Manager Risner assessed the site, after which she went to Walmart and purchased dust masks and Krud Kutter[3] for the cleanup (Tr. 364). Management and employees immediately began cleanup by clearing tables, discarding food, stacking dishes in the sink area and taking out garbage. Dishes were washed in the dish washer until there was no more hot water. At that point, the employees and managers stopped cleaning. Employees went home, but Risner and Johnson remained at the restaurant for a locksmith to arrive to make a key so the doors of the restaurant could be locked. Since Waffle House never closes, there was no key to lock the door. After the key was made, Johnson and Risner locked the door and left at approximately 4:00 a.m. (Tr. 363, 365).

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

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

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

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

OSHA Inspection

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

DISCUSSION

Credibility

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

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

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

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

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

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

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

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

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

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

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

In addition to the above-quoted elements of a § 5(a)(1) violation, the Secretary also must establish the employer had either actual or constructive knowledge of the hazardous condition. *Deep South Crane & Rigging Co.*, 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff'd Deep South Crane & Rigging Co. v. Seth D. Harris*, 24 BNA OSHC 1089 (5th Cir. 2013).

Citation 1, Item 1

> Citation 1, Item 1 alleges a violation of section 5(a)(1) as follows:
>
> On or about 02/16/13- In the kitchen area, the grease drawer of a 3-foot Wells natural gas griddle, Model #WG-3036G, SN #JJ09810101, the grease drawer was not properly maintained to prevent a grease fire.

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

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

Whether an Activity or Condition at the site Constituted a Hazard

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

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

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

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

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

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

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

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

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

Waffle House was so cognizant of the hazard of a full grease drawer, it implemented a policy requiring the grease drawer to be cleaned during every shift. The undersigned finds Bailey's testimony establishes the policy was implemented to prevent hazardous conditions created by a full grease drawer on a natural gas griddle. Employer recognition of the hazard is established.

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

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

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

Whether Feasible Means Existed to Eliminate or Materially Reduce the Hazard

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

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

The Operation Manual provides instructions for cleaning the grease drawer; however, as the Secretary concedes it does not indicate how often the grease drawer should be cleaned (Secretary's brief, p. 8, n. 8). NFPA (National Fire Protection Association) 96, which is the Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations also

relied upon by the Secretary to establish abatement feasibility, also provides guidance on cleaning the grease drawer. NFPA 96 provides:

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

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

Whether Waffle House had Knowledge of the Violative Condition

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

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

> As for the knowledge element [ ], the Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer (citations omitted). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See e.g., Secretary of Labor v. Kansas Power & Light Co*., 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). An example of constructive

> knowledge is where the supervisor may not have directly seen the subordinate's misconduct but he was in close enough proximity that he should have. *See, e.g., Secretary of Labor v. Hamilton Fixture*, 16 O.S.H. Cas. (BNA) 1073 *17-19 (1993) (holding that constructive knowledge was shown where the supervisor, who had just walked into the work area, was 10 feet away from the violative conduct). In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, see *New York State Elec. & Gas Corp.*, 88 F.3d 103, 105-06 (2d Cir. 1996) (citations omitted), with the rationale being that ---in the absence of such a program ---the misconduct was reasonably foreseeable.

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

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

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

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

empty it (Tr. 138). Although surveillance video shows the grease drawer purportedly being emptied on the night of the fire, the evidence after the fire shows the grease drawer contained a significant amount of grease and waste (Tr. 43-44, 45). Therefore, even if it had been emptied, it needed to be emptied again prior to the fire. If Cunningham, shift manager, had checked the grease drawer he could have known it was full. The undersigned credits Lt. Orrick's testimony regarding his findings after the fire, over the speculative testimony that the surveillance video showed the grease drawer being emptied. The evidence fails to show Cunningham inspected the grease drawer or emptied it prior to the fire.

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

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

Although Waffle House abandoned its employee misconduct defense, the undersigned feels it is important to note that despite implementing a work rule addressing the hazard, Waffle House failed to effectively establish and communicate its work rule. Employees were aware of the requirement to clean and empty the grease drawer once every shift, however, testimony at the hearing demonstrated confusion as to whether it was to be done at the beginning or end of the shift,

and even whether it should be emptied more than once during a shift. Such confusion indicates an ineffective safety program from which it would be foreseeable that violations could occur.

With reasonable diligence, Waffle House could have known of the condition of the grease drawer. "Reasonable diligence" includes the employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981). The Commission has held that "[r]easonable steps to monitor compliance with safety requirements are part of an effective safety program." *Southwestern Bell Tel. Co.*, 19 BNA OSHC 1097, 1099 (No. 98-1748, 2000 (citations omitted), *aff'd without published opinion*, 277 F.3d 1374 (5th Cir. 2001). Waffle House failed to exercise reasonable diligence in inspecting the worksite and taking measures to prevent hazards to its employees. Constructive knowledge is established.

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

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

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

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group, Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Citation 1, Item 2(a)

The Secretary cited Waffle House for a serious violation of 29 C.F.R. §1910.133(a)(1), alleging violations on February 17, 2013, during the cleanup the day after the fire, and on February 21, 2013, the day of the OSHA inspection. Citation 1, Item 2(a) alleges "protective eye equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment" in that:

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

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

(Citation).

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

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

Instance (a)

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

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

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

(Tr. 357). Risner testified she has used the waffle iron cleaner for 15 years, and has never heard of an employee taking the spray top off and pouring the cleaner on the hot waffle iron (Tr. 359, 360). She stated step-by-step instructions on cleaning the waffle iron are on the bulletin board in the back of the restaurant. This was not disputed. According to Risner, these instructions were on the bulletin board on February 16, 2013, and have been up for a while (Tr. 359-360).

With the exception of Batts and White, witnesses described the waffle iron cleaning procedure similarly and denied pouring the cleaner onto the waffle iron (Tr. 390, 421). Batts testified she poured the cleaner onto the waffle iron (Tr. 83-84). She and White testified the cleaner

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

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

Instance (b)

Waffle House admits its employees did not wear goggles during the cleanup from the fire (Waffle House's brief, p. 17). Managers supervised employees during the cleanup (Tr. 193). Division Manager Miller testified Waffle House employees used Dawn dishwashing liquid, Windex, and Krud Kutter when cleaning the restaurant during the second phase of the cleanup on February 17, 2013 (Tr. 419). She further testified she diluted the Krud Kutter in spray bottles.

According to Miller, ZEP was not used during the cleanup. She testified the only degreaser used was Tuf-Enuf[5] and Krud Kutter (Tr. 428). Jacson White testified on cross examination that ZEP was used during the cleanup (Tr. 396). When shown Exhibit C-14, he identified it as the products he used during the cleanup. He testified confidently and believably regarding having used ZEP. CSHO Tomas testified other employees told him they used ZEP during the cleanup, and while he was at the site, they retrieved the ZEP containers and brought them to him (Tr. 191). Two ZEP products were presented to CSHO Thomas: one was ZEP 505 Industrial Cleaner & Degreaser; the other was ZEP All-Purpose Cleaner & Degreaser (Tr. 191; Exhs. C-14, C-15 and C-16). The labeling on both products cautions to "avoid contact with the eyes" (Exhs. C-16 and C-17).

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

A preponderance of the evidence shows ZEP, a caustic or corrosive chemical, and Krud Kutter were used during the cleanup. Although Waffle House disputes using ZEP, it does not dispute employees used diluted Krud Kutter, during the cleanup, suggesting that dilution reduces the hazards. The record is void of evidence regarding whether dilution reduces the hazard. Regardless, the standard is violated where the evidence demonstrates employees without wearing required eye protection during the cleanup used ZEP which posed eye hazards. The undersigned finds the terms of the standard were violated. The Secretary has established a violation of the standard alleged in instance (b).

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

Citation 1, Item 2(b)

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

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

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

(Citation).

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

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

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

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

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

The Spartan Waffle Iron Cleaner indisputably is caustic and can cause serious injuries such as burns and blindness. It is used undiluted and is sprayed directly onto the waffle iron, which is closed after spraying and turned on so the chemical can work. Employees then return to their

regular duties for the approximately twenty minutes it takes for the waffle iron to clean. The duration of exposure to the chemical is brief. Cleaning occurs in the back room of the restaurant in proximity to the food prep area and sink, and bathrooms with sinks (Tr. 173, 357). There is no evidence that the sinks in proximity to the area where the waffle irons were cleaned were inoperable. CSHO Tomas testified only that they were unsuitable because it would be difficult for an employee to position their head under one of the sinks (Tr. 202-203). He did not however testify it could not be done.

Waffle House is a small restaurant. CSHO Tomas agreed on cross examination, the dimensions of the restaurant are 25 by 75[6], and water sources were only two to three feet away from where the waffle iron is cleaned (Tr. 292, 293). The number of sinks in the restaurant and proximity to the waffle cleaning area, for the size of the restaurant must be taken into consideration. Further, the evidence fails to reveal any injuries sustained by employees during the cleaning of the waffle iron. The undersigned finds the totality of the circumstances demonstrates Waffle House provided suitable eye washing facilities for employees potentially exposed to hazards which could affect their eyes while cleaning the waffle iron with the Spartan Waffle Iron Cleaner. The terms of the standard were not violated. Item 2b is vacated.

Citation 1, Item 3

The Secretary cited Waffle House for a serious violation of 29 C.F.R. §1910.138(a), alleging violations on February 17, 2013, during the cleanup the day after the fire, and on February 21, 2013, the day of the OSHA inspection. Citation 1, Item 3 specifically alleges "[t]he employer did not select and require employee(s) to use appropriate hand protection when employees' hands were exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes" in that:

> (a) On or about 02/21/13- 2501 Florence Boulevard, Florence, AL, employees were exposed to skin injuries while using Spartan Waffle Iron Cleaner to clean waffle irons.
>
> (b) On or about 02/17/13 -2501 Florence Boulevard, Florence, AL, employees were exposed to skin injuries while using commercial cleaners and degreasers to clean fire and smoke damage following a grease fire.

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

(Citation).

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

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

Instance (a)

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

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

The Spartan Waffle Iron Cleaner undeniably is caustic and can cause serious injuries such as burns. It was used undiluted. Waffle House contends that Batts's testimony regarding irritation and injuries to her hands from the Waffle Iron Cleaner should not be credited. The undersigned agrees. Batts's testimony regarding her alleged injuries and those she alleges were sustained by other employees, appeared self-serving and is determined to be unreliable. Accordingly, no weight is put on her testimony on those matters. CSHO Tomas testified the Spartan Waffle Iron Cleaner could cause chemical burns (Tr. 222). The Material Safety Data Sheet for the Spartan Waffle Iron Cleaner provides rubber gloves or other impervious gloves are recommended to prevent skin contact (Tr. 213). None were used by Waffle House employees. The Secretary has established a serious violation of Item 3, instance (a).

Instance (b)

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

caustic and corrosive chemicals, were used during the cleanup on February 17, 2013, during phase two.

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

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

Citation 1, Item 4

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

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

(Citation).

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

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

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

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

According to server Batts, on the night of the fire she grabbed a fire extinguisher but nothing happened, so she asked customers for help (Tr. 64). Batts further testified she was not trained on how to use fire extinguishers when she first started working at the restaurant, and she was not aware of any coworkers receiving training on how to use portable fire extinguishers (Tr. 65). CSHO Tomas testified Cunningham told him he had not been trained regarding the use of fire extinguishers (Tr. 226-227). He also testified that Manager Johnson told him she had not done any fire extinguisher training, and she could not remember the last time they were trained (Tr. 227, 230). Johnson's testimony does not establish fire extinguisher training was not done. Batts's testimony is discredited; Cunningham and Johnson did not testify at the hearing, therefore they were not subject to cross examination. Further, CSHO Tomas's recollection of events relating to his inspection were not detailed, was conclusory and inconsistent and he did not appear certain when testifying. The undersigned finds his testimony regarding Johnson and Cunningham as it related to fire safety training unreliable and places no weight on it.

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

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

Citation 1, Item 5

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

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

(Citation).

> The standard found at 29 C.F.R. § 1910.1200(e)(1) provides:
>
> (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:
>
> (i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and,
>
> (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

Waffle House contends its hazard communication program and material safety data sheets were located in a wire basket hanging on the commissary door of the restaurant (Tr. 367). According to Bailey, the hazard communication program is maintained in most restaurants in a hanging basket/folder with the Safety and Security Manual (Tr. 338, 339). CSHO Tomas testified that during his inspection on February 21, 2013, he asked Hazelip, who was the lead supervisor at

the time, if they have any documentation such as any "Health and Safety Programs" (Tr. 130, 131). According to CSHO Tomas, she said "no idea" (Tr. 234). He testified he also asked manager Johnson "what Safety and Health program do you have onsite, and she said 'no programs'" (Tr. 233). He also testified he asked the same question of District Manager Risner and she also said "no" (Tr. 234). At the hearing, CSHO Tomas testified "safety and health programs would include the hazard communication program" (Tr. 233). However, he did not testify he provided this explanation to the Waffle House staff during his inspection on February 21, 2013.

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

Assuming arguendo the alleged violation description in Item 5 can be construed to include February 17, 2013, Risner testified the written hazard communication program was in the basket where she told CSHO Tomas it could be found, which according to her is where it was always located (Tr. 368). Moreover, the Waffle House Hazard Communication Program and the specific material safety data sheets sought by CSHO Tomas were subsequently provided to him by Bailey (Tr. 340; Exh. R-10). CSHO Tomas's recollection of events relating to his request for documentation regarding the hazard communication program was conclusory and inconsistent. The undersigned finds his testimony regarding the hazard communication program unreliable and places no weight on it.

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

the date of the inspection. Accordingly, the Secretary has not established a violation of Item 5. Item 5 is vacated.

Penalty Determination

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

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

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

Citation 1, Item 1 is directly related to the fire which occurred on February 16, 2013, and alleges a serious violation of section 5(a)(1) of the Act. In assessing the gravity of the violation, CSHO Tomas testified it was high severity because serious injuries could result including burns, smoke inhalation or death if there were an explosion (Tr. 156). He rated the probability as greater because of the number of employees present at the time of the fire and the circumstances which were present which would make it more likely that the fire was going to occur (Tr. 156). The undersigned concurs with this high gravity assessment for item 1.

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

Citation 1, Item 3 instance (a) alleges a serious violation for Waffle House's failure to provide hand protection for employees using the caustic waffle iron cleaner. Employees could

sustain chemical burns and other skin irritation when using the Spartan Waffle Iron Cleaner. Several employees used the cleaner. High gravity is appropriate.

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of Citation 1, alleging a serious violation of Section 5(a)(1) of the Act, is affirmed, and a penalty of $7,000.00 is assessed.
2. Item 2a, of Citation 1, alleging serious violations of 1910.133(a)(1) is affirmed, and a penalty of $7,000.00 is assessed.
3. Item 2b of Citation 1, alleging a serious violation of 1910.151(c) is vacated, and no penalty is assessed.
4. Item 3 of Citation 1, instance(a) alleging serious violations of 1910.138(a) is affirmed; instance (b) is vacated. A penalty of $6,000.00 is assessed for item 3 instance (a).
5. Item 4 of Citation 1, alleging a serious violation of 1910.157(g)(1) is vacated, and no penalty is assessed.
6. Item 5 of Citation 1, alleging a serious violation 1910.1200(e)(1) is vacated, and no penalty is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Judge

Date: November 24, 2014
Atlanta, Georgia