United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CWP ASSET CORP., D/B/A MISTER CAR WASH, Respondent.	OSHRC Docket No. 17-1483

Appearances:

Josh Bernstein, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas,
For Complainant

Travis Odom, Esq., Littler Mendelson, P.C., Houston, Texas
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

On June 8, 2017, one of Respondent's employees was hospitalized after he got his foot caught in the chain and sprocket of a car conveyor system at one of Respondent's car wash locations in El Paso, Texas. A couple of days later, Complainant sent Compliance Safety and Health Officer, Rafael Guerrero, to conduct an inspection of the worksite. CSHO Guerrero conducted an inspection that lasted three days, during which time he observed Respondent's work practices, conducted interviews, and did some independent research of the car wash industry. (Tr. 116, 127–28). At the conclusion of his inspection, CSHO Guerrero recommended, and Complainant approved, a single-item Citation and Notification of Penalty.

The Citation alleges Respondent violated 29 C.F.R. § 1910.212(a)(1) by failing to adequately guard the sprocket and chain for the car conveyor, which were located under a trap door in the car wash tunnel. (Ex. C-1). Respondent filed a Notice of Contest, arguing that the existing guard was adequate and that the injured employee's actions were the result of unpreventable employee misconduct. The Notice of Contest initiated the present matter, which was assigned to Simplified Proceedings by the Chief Administrative Law Judge on October 6, 2017.[1] This matter was initially assigned to Administrative Law Judge John H. Schumacher, who is no longer with the Commission. The case was re-assigned to the undersigned on December 14, 2017.

A one-day trial was held on June 7, 2018, in El Paso, Texas. The following people testified: (1) [Redacted], the injured employee; (2) Alfred Murillo, a supervisor at the worksite; (3) CSHO Rafael Guerrero; (4) Juan Espinosa, general manager of the worksite; and (5) Edgar Morales, Respondent's regional manager. At the conclusion of the trial, the parties opted to submit post-trial briefs in lieu of closing on the record as provided for in Commission Rule 200. *See* 29 C.F.R. § 2200.200(b)(6). The parties timely submitted their post-trial briefs, which the Court has reviewed, along with the record evidence and relevant case law.

Based on what follows, the Court finds Respondent placed its employees close to the hazard by shifting its drying operations inside the car wash bay. By so doing, the Court finds it was reasonably predictable Respondent's employees would be in the zone of danger created by the void over the conveyor's sprocket and chain. Because the change in work practice moved its employees closer to the hazard, Respondent had a commensurate responsibility to ensure any ingoing nip points or rotating parts were adequately protected. *See* 29 C.F.R. § 1910.212(a)(1). It

1. Respondent attempted to have the matter removed from Simplified Proceedings; however, that motion was denied by Judge Schumacher on November 16, 2017.

failed to do so. As will be illustrated in more detail below, the Court finds Complainant established a serious violation of the guarding standard.

II. Stipulations & Jurisdiction

As indicated in their joint stipulation statement, the parties agree the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c), and Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The remaining stipulation merely indicates the parties agree Complainant alleges a violation of 29 C.F.R. § 1910.212(a)(1).

III. Factual Background

Approximately three years prior to the events of this case, Respondent made a change to the way its employees dried cars. Previously, employees waited outside the car wash bay as the customer drove their vehicle off the end of the conveyor and parked it in the drying area. (Tr. 152). Once the car was parked, the employees moved around the perimeter of the stationary car to hand dry it as the last part of the car wash process. (Tr. 62, 103). Now, car drying occurs inside the last portion of the car wash bay, right before the end of the car conveyor system.[2] (Tr. 62, 103; Ex. C-13 at 13, 22, C-24, C-25). As a result of this move, employees were taught how to dry vehicles using a process called side-drying, which required employees to clean the front, back, and sides of a vehicle while positioned along the side of the vehicle.[3] (Tr. 70, 103–104, 174–75). This procedure was implemented because employees were working on either side of a conveyor system designed to move cars. (Tr. 103–104).

2. To be clear, the move indoors did not expose employees to car wash equipment like you would see at a drive-through car wash facility. Instead, as shown in the video, it appears Respondent used a portion of the bay that formerly housed washing machinery but is now empty save for the conveyor system. (Exs. C-13 at 16–19, C-24, C-25).
3. This method of drying cars can be observed in the training videos and on-site photographs taken by CSHO Guerrero. (Ex. C-13 at 16–19, C-19, C-20).

The conveyor system uses a series of rollers that push a vehicle (in neutral gear) along a track. (Tr. 152; Exs. C-13 at 12–15, C-19, C-20). Once the vehicle exits the track, the rollers that were pushing the car move downward into a hole in the floor at the end of the track. (Tr. 169; Ex. C-13 at 22–24). Beneath the hole are a sprocket and chain for the car conveyor system. (Tr. 123). The hole is equipped with a trap door, which is designed to be pushed back by the incoming roller and return to its original position once the roller has gone back underground. (Tr. 124). While the trap door is waiting to receive rollers, it sits roughly two-and-one-half inches back from the end of the guides that hold the rollers above ground, creating the aforementioned hole. (Tr. 124; Ex. C-13 at 12–15, C-24, C-25). This gap increases to roughly six inches once the door is pushed backwards by an incoming set of rollers and returns to its original size once the rollers have gone through. (Tr. 124–125; Ex. C-13 at 12–15, C-24, C-25). According to [Redacted], this happens approximately once every few seconds, depending on the speed of the conveyor. (Tr. 45).

Depending on who was testifying, the rationale provided for shifting the drying operation indoors, and its impact on safety, was different. According to employees, like [Redacted] and Murillo, they believed the change was grounded in production and efficiency, because the time required to dry the cars was reduced and controllable. (Tr. 40, 83). [Redacted] believed this was the case because Respondent had to process both customers who had already paid for a monthly membership and those who preferred to pay on per-wash basis. (Tr. 84). This was echoed by Murillo, who testified that Respondent's area manager introduced the change as a way to speed up the drying process. (Tr. 102–103). Regardless of what they believe or what they were told, both [Redacted] and Murillo agreed the process felt more dangerous because the cars were no longer stationary as the employees were drying them. (Tr. 40, 62, 103). According to management, however, the change was precipitated by safety concerns. (Tr. 152). Specifically, Espinosa testified

the move indoors placed employees in a cooler, sun-shaded environment and removed the hazards that come with a car under a customer's control.[4] (Tr. 152–53).

With respect to the work practices, training, and rules governing the drying process inside the bay, the testimony was somewhat of a mixed bag. All who testified admitted that it was against the rules to step onto the conveyor. (Tr. 41, 77, 106, 159). The testimony was somewhat mixed, however, on the question of whether stepping *over* the conveyor was an acceptable work practice. According to [Redacted], the training video he watched said he was not supposed to step over the conveyor. (Tr. 41). According to Espinosa, it is acceptable to step over or around the conveyor. (Tr. 159). Morales testified that stepping over the conveyor is not preferred but admitted there was no rule against it. (Tr. 188). Further, even though everyone agreed the floor in the area surrounding the trap door could be slippery, which Respondent attempted to remedy by using rubber mats,[5] and even though Respondent has rules regarding proper footwear for washing and drying employees, just about everyone agreed the rules regarding non-slip shoes were rarely enforced. (Tr. 46, 105, 157, 161–62).

The foregoing inconsistencies in employees' understanding of the rules and in management's enforcement of those rules was highlighted by the accident in this case. According to [Redacted], the number of people allocated to drying vehicles could be 2, 3, or 4, depending on the volume of cars traveling through the system, the rate at which the conveyor is set, and the number of employees available.[6] (Tr. 80–82, 97). When three dryers were allocated it would result in an unequal number of dryers per vehicle side, placing one employee in the position of having

4. According to Espinosa, when drying used to occur outdoors, an employee was struck by a customer, who had mistaken the accelerator for the brake. (Tr. 153).
5. Respondent's own training video recognize these mats as additional tripping hazards. (Tr. 160–61).
6. At trial, [Redacted] clarified between average cars per hour, which refers to the number of actual cars processed, and line speed, which refers to the speed (measured in cars/hour) at which the conveyor is set. (Tr. 54).

to travel back and forth to opposite sides of the vehicles and, thus, the conveyor. (Tr. 187–88). When asked about training, [Redacted] and Murillo both testified they were not trained on how to perform the job with an uneven number of dryers, there were no policies discussing how to dry with three dryers, and further expressed that the training video showed the process at the slowest speed they were likely to encounter (and thus was unlike how they actually perform their jobs). (Tr. 37–38, 108; Ex. C-19, C-20).

On the day of the accident, Respondent only assigned three people to perform drying duties. Included in this group was [Redacted]. (Tr. 31; Ex. C-24). In the video of the accident, [Redacted] finished up drying the driver's side of a car that was getting ready to leave the conveyor and began to move to the passenger side of the next car in the queue. (Tr. 32–33; Ex. C-24). As he crossed over the conveyor, [Redacted]' foot slipped into the hole, where it became caught in the conveyor's sprocket and chain. (Tr. 34; Ex. C-24). [Redacted] suffered severe injuries requiring hospitalization as a result of the accident. (Tr. 39). Though he reviewed the video, [Redacted] could not recall how he got his foot stuck inside the hole. (Tr. 34).

Different members of Respondent's management team were shown the video of what [Redacted] was doing in the moments leading up to, and including, his injury. Each had a different take on what, specifically, [Redacted] did wrong as he passed between the two sides of the conveyor on a day where only three people were assigned to dry cars. According to Espinosa, the only thing [Redacted] did wrong was stepping backwards across the front of the oncoming vehicle; though even he admitted that it is not a violation of car wash safety rules. (Tr. 174). According to Morales, [Redacted] violated the rules when he moved from one side of the car to the other. (Tr. 187). Morales explained that each person is assigned to a side, where the front, sides, and back are dried. (Tr. 187). The third person is a floater of sorts, who touches up whatever is left unreached

by the other two dryers. (Tr. 187). When asked to clarify how that would be carried out in practice, Morales agreed it was acceptable to step over the conveyor while it was in operation but Respondent preferred that employees avoid doing so. Neither of these so-called rules are memorialized in any of Respondent's safety materials, policies, or manuals. (Tr. 174, 188; Ex. C-15, C-17, C-18).

Based on this incident, CSHO Guerrero recommended, and Complainant issued, a single-item Citation, alleging a violation of the guarding standard found at 29 C.F.R. § 1910.212(a)(1).

IV. Discussion

A. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1910.212(a)(1): One or more more methods of machine guarding was [sic] not provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips, and sparks:
>
> On or about June 8, 2017, employer did not ensure that the rotating chain and sprocket located in the soft close drop door opening was properly guarded. This condition exposed employee to caught-between hazards.

(Ex. C-1).

To establish a violation of an OSHA standard pursuant to Section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (*i.e.*, the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

i. The Cited Standard Applies and Was Violated

Subpart O of Part 1910 applies to Machinery and Machine guarding. Complainant alleges Respondent's employees were exposed to the sprocket and chain located below the trap door at the end of the car wash conveyor system. There is no dispute the conveyor belt is a machine within the meaning of the standard. Thus, the standard applies.

The Court also finds the terms of the standard were violated. To prove a violation of the guarding standard, Complainant must show "that a hazard within the meaning of [1910.212(a)(1)] exists in the employer's workplace." *Buffets, Inc. d/b/a Old Country Buffet*, 21 BNA OSHC 1065 (No. 03-2097, 2005) (string cite omitted). In practice, this requires "show[ing] that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated." *Id.* (citing *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421 (No. 89-553, 1991)). It is insufficient for Complainant to merely show that it is "not impossible" for an employee to come into contact with the moving parts of a particular machine; instead, Complainant "must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc.*, 18

BNA OSHC 1072 (No. 93-1853, 1997) (citing *Rockwell Int'l Corp.*, 9 BNA OSHC 1082 (No. 12470, 1980) & *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976).

Complainant contends the gap left between the trap door and the end of the conveyor—whether in its normal position or while expanded—exposed Respondent's employees to the hazard imposed by the sprocket and chain located underneath. In support, Complainant points to the fact that an accident occurred in this case, that the conditions surrounding the hole tended to be wet and slippery, and that work rules appeared to be inconsistently understood and enforced. Respondent contends that its conveyor policy, which prohibits stepping onto (and possibly over) the conveyor belt while it is in operation, when combined with other safety measures like the retracting metal plate, is sufficient to prevent exposure to the machinery below the hole in the floor. Further, Respondent contends that, if a violation occurred, it was the result of [Redacted]' unpreventable employee misconduct.

As highlighted by cases cited above, the key to this case is whether Respondent's employees are exposed to a hazard contemplated by the guarding standard. Just because an employer uses a machine with exposed parts does not automatically impose a duty to guard. *See, e.g., Buffets, Inc.*, 21 BNA OSHC 1065 (vacating citation because Complainant failed to show employees were exposed to moving parts under normal operating conditions). If there is exposed machinery, but exposure is not reasonably predictable given how the machinery works or how employees are expected to work around it, then there is no need to guard and no violation of the standard. *See, e.g.*, *Norman W Fries Inc.*, 2018 WL 4899174 (No. 17-0304, 2018 (ALJ Joys). Conversely, if it is reasonably predictable, through regular work practice or accident, that an employee will be in the zone of danger created by the machine, then the employer is required to guard it.

As previously noted, the key event in this case was Respondent's decision to move the drying operation inside the tunnel. Until that point, there was no concern about employee exposure to the conveyor components beneath the trap door because there were no employees working in proximity to it. Thus, the guard, if one existed at that time, was adequate for its purpose. By moving the employees indoors,[7] Respondent placed them closer to the sprocket and chain located beneath the trap door. At the very least, Respondent increased the likelihood of exposure by moving its employees inside of the tunnel, closer to the conveyor.

Both operational necessity and inadvertence played a role in Respondent's employees being exposed to the sprocket and chain of the conveyor. By moving employees closer to the trap door, Respondent increased the likelihood of exposure because employees were now working proximate to the hole and could, by mistake, step into it, which happened in this case. This possibility was exacerbated by additional factors: (1) the ground, as admitted by the employees who testified, was slippery around the trap door; (2) Respondent did not enforce its rules regarding non-slip shoes; (3) the trap door did not close completely, or at least to a sufficient degree to prevent a foot from entering; and (4) Respondent's allocation of three employees to perform the job, of necessity, required one employee to continually walk from one side of the conveyor to the other. Depending on what portion of the car this third employee was cleaning, such a step could take place near the trap door. Though Morales testified that such movement was discouraged, he admitted that it was not prohibited, and his co-worker, Espinosa, admitted that it was not against the rules. (Tr. 170, 187–88).

7. The Court expresses no opinion on the issue of whether the move indoors is inconsistent with industry standards. The results of CSHO Guerrero's internet research lack context, and it is unclear whether this particular insurance company's position on working indoors at a car wash facility contemplates the conditions at Respondent's car wash facility.

In cases where a guarding citation involving a conveyor has been vacated, it was because nothing about the job placed employees in proximity to the nip points, rollers, or other guarding-related hazards. *Norman W Fries Inc.*, 2018 WL 4899174 ("Although there is no question the injured employee was exposed, the Secretary failed to establish this exposure was reasonably predictable as a result of the manner in which the conveyor functions and the way it is operated."). For example, in *Norman W Fries*, the ALJ found the manner in which the employee was "accidentally" injured was not reasonably predictable because neither the normal operation of the conveyor nor the clean-up process the employee was engaged in at the time required him to go beneath the conveyor. *Id.*; *see also Evergreen Techs., Inc.*, 18 BNA OSHC 1528 (1998) (ALJ Spies) (finding employee's injuries were the result of idiosyncratic behavior, not the failure to replace a failing guard).[8]

In this case, there were no rules that prohibited employees from stepping near the hole; the process used to dry the cars (especially with three employees) placed employees in a position to slip and step into the hole because they were working in an area that was known to be wet and slippery; and the rules Respondent had on the books were not consistently enforced, if at all. At the very least, Respondent's employees were exposed to a hazard when working around the trap door of the conveyor. *See Calpine Corp.*, 2018 WL 1778958 (No. 11-1734, 2018) ("Calpine assigned its employees to complete a task that would bring them into the 'zone of danger' posed by the unguarded platform opening."). Just like the employer in *Calpine*, Respondent's work practice brought its employees into the zone of danger posed by the trap door. *Id.* The fact that

8. Contrary to Respondent's claim, this case is nothing like *Evergreen Technologies*. In that case, the citation was vacated because, even though a moving part was left unguarded, exposure to that part only occurred as a result of the employee intentionally "plac[ing] her body into the Instron machine while it was operating." *Evergreen Techs., Inc.*, 18 BNA OSHC 1528 (ALJ Spies). Here, Respondent's work practices placed its employees in a position to be inadvertently exposed to the machine's rotating parts. [Redacted]' exposure was not the result of some ill-conceived attempt to retrieve a dropped item from behind a machine by reaching through it while it was running; rather, it was the product of the ongoing performance of assigned job tasks.

[Redacted] was seriously injured by virtue of stepping into the hole is additional evidence of exposure by way of inadvertence.

Because Respondent's employees were exposed to a hazard, Respondent had an associated duty to ensure the conveyor was properly guarded. In that respect, the Court refers back to its previous conclusion that the trap door did not close enough to prevent the entry of a foot. This conclusion is buttressed by the standards governing floor holes and floor openings, which are regulated under both general industry and construction standards. *See* 29 C.F.R. § 1910.21 (defining a 'hole' as a "gap or open space in a floor, roof, horizontal walking-working surface, or similar surface that is at least 2 inches in its least dimension"); *see id.* § 1926.500 (same). Floor holes are smaller than floor openings and do not necessarily present a "fall-through" hazard, as it were, but instead present slip, trip, and fall hazards and potentially expose unwitting employees to whatever hazards may lie underneath. *See, e.g.,* 29 C.F.R. § 1910.28(b)(3)(ii) (employees must be protected from "tripping into or stepping into or through" any hole that is less than 4 feet above a lower level). Under both sets of standards, floor holes must be guarded. *See, e.g.,* 29 C.F.R. § 1910.28(b)(3) (listing requirements for how to protect employees from hazards imposed by floor holes). When those standards are applied to this case, the gap left by the trap door, which measured roughly 2.5 inches, would be considered a floor hole. As such, the hole should have been guarded insofar as there was exposure, which there was.

Ultimately, Respondent is a victim of its decision to move the drying process indoors. While this *may* have been a safer move overall,[9] the move itself was not inherently safe. Respondent had an obligation to ensure that any new hazards imposed by the move were addressed. With respect to the gap left by the retracting trap door, the Court finds Respondent's efforts to

9. The Court expresses no opinion on the relative safety of either option. The Court's concern is whether a hazard, as described in the standard, exists at Respondent's workplace.

prevent exposure to the machinery below were insufficient. Accordingly, the Court finds the standard was violated and that Respondent's employees were exposed to the hazard caused by the violation.

ii. Respondent Knew of the Hazardous Condition

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Central Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147 (No. 08-1656, 2016). To satisfy this burden, Complainant must show "knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Id.* "Although the Secretary has the burden to establish employer knowledge of the violative conditions, when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfied 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 (No. 91-862, 1993); *see also Dana Container*, 25 BNA OSHC 1776 (No. 09-1184, 2015) (citing *Dover* for same proposition).

There is no serious dispute about Respondent's knowledge of the hazardous condition. As part of the daily inspection procedures, Respondent requires its managers to perform a daily visual inspection of the trap door. (Tr. 72–73; Ex. C-23). Indeed, one of Respondent's managers performed this inspection on the day of [Redacted]' accident and noted the trap door was in place and in working order. (Tr. 73; Ex. C-23). Thus, Respondent, through its managers, was aware of the gap left by the trap door. Respondent was also aware the conditions surrounding the trap door were wet and slippery and that employees crossed over the conveyor when only three people were

assigned to dry vehicles. (Tr. 157–59). Respondent's training materials also relay the hazards associated with working on or around conveyors, indicating that they "can be dangerous and even deadly" and "present the risk of conveyor entanglement." (Tr. 65; Ex. C-17 at 14). This was echoed by Espinosa, who admitted that "it is possible for someone to slip on this wet surface and get their foot caught in the conveyor, even if they violate no safety rules." (Tr. 159). Because Respondent's managers were aware of the condition, the Court finds such knowledge is properly imputable to Respondent. Accordingly, the Court finds Complainant has made out a *prima facie* case of knowledge.

Though Respondent proffered a defense of unpreventable employee misconduct early in this case, it did not pursue that defense in its post-trial brief. Nevertheless, the Court shall briefly address the defense and illustrate why it does not apply. To prove this defense, an employer must show it: "(1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered." *Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007).

With respect to its work rules, Respondent was only clear about one of them: do not step on the conveyor or trap door. While this rule is clear, and was clearly communicated, it did not adequately address the hazard imposed by the trap door hole. As noted by Espinosa, it was acceptable for employees to step *over* the conveyor, especially when there was an odd number of dryers to wipe down a car. Although Morales said stepping over the conveyor was discouraged, there was no rule against it. For that matter, neither Espinosa nor Morales could articulate how [Redacted] violated the rules when he got his foot stuck in the trap door. (Tr. 174, 186–88). The

Court finds Respondent's claim of unpreventable employee misconduct must fail because Respondent lacks rules that specifically govern the behavior Respondent claims to be misconduct..

Respondent's claim of employee misconduct also fails because Respondent's enforcement history is mixed, at best. According to Espinosa, Respondent has rules mandating the use of non-slip shoes but does not make any effort to enforce those rules. (Tr. 161). Likewise, the rule prohibiting stepping onto the conveyor appears to have been enforced only a single time, which occurred six months after the events of this case. (Tr. 106–107; Ex. C-14). A progressive disciplinary program must be more than a "paper program", requiring "evidence of having actually administered the discipline outlined in its policy and procedures." *See, e.g., Connecticut Light & Pwr. Co.*, 13 BNA OSHC 2214 (No. 85–1118, 1989) (reprimand letters issued); *Pace Constr. Corp.*, 14 BNA OSHC 2216 (No. 86–758, 1991) (perennial verbal warnings ignored on a widespread basis). Respondent's managers testified that verbal warnings were given, but also admitted those warnings were not tracked such that progressive discipline could be imposed in a meaningful way.

By moving the drying operation inside the car wash bay, Respondent knowingly brought its employees closer to the hazard imposed by the machinery located beneath the trap door. Respondent was aware of the hazard imposed by the machinery and knew that the area surrounding the trap door was slippery. Further, Respondent's management was responsible for allocating employees to the drying area based on volume and availability. (Tr. 175). So, when only three individuals were assigned to dry, Respondent could reasonably anticipate one of those employees would cross over the conveyor, as [Redacted] did in this case. Since such an action was not prohibited by Respondent's work rules, and given that neither Espinosa nor Morales could identify

what [Redacted] did wrong, the only reasonable conclusion is that Respondent knew or, at the very least, could have known of the violative condition.

iii. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

After the accident, [Redacted] stated that he pulled his foot out of the hole, and it was just hanging there. (Tr. 34). As a result of his injuries, [Redacted] had to go to the hospital and had been out of work for over a year at the time of the hearing in this matter. (Tr. 56, 91). The Court finds [Redacted]' injuries were sufficiently severe to characterize this violation as serious.

V. Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the

applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

In his determination of gravity, CSHO Guerrero assessed the foregoing violation as medium severity and high probability. This conclusion was based on the type of injuries suffered by [Redacted] and the fact that similarly situated employees worked around the trap door opening all day long, thereby increasing the likelihood of exposure. (Tr. 118). Because Respondent has over 8,000 employees, Complainant did not provide a discount for size, nor did it provide a discount for history due to Respondent receiving a serious citation in the previous five years. (Tr. 119). Complainant did, however, award a 15% reduction for good faith because Respondent had an "average written safety and health program." (Tr. 119). The resulting penalty proposed by Complainant is $9,234. The Court agrees with the foregoing assessments and finds that they are supported by the record. Accordingly, a penalty of $9,234 shall be imposed.

ORDER

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

1. Citation 1, Item 1 is AFFIRMED, and a penalty of $9,234 is ASSESSED.

SO ORDERED

/s/_____
Peggy S. Ball
Judge, OSHRC

Date: April 17, 2019
Denver, Colorado