UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. CONAGRA FLOUR MILLING COMPANY, Respondent.	:	Docket No. 88-1250

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 22, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling Jr.

Ray H. Darling, Jr.
Executive Secretary

April 22, 1993
Date

Docket No. 88-1250

NOTICE IS GIVEN TO THE FOLLOWING:

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July 16, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

CON AGRA FLOUR MILLING COMPANY OSHRC DOCKET NO. 88-1250

NOTICE IS GIVEN TO THOSE LISTED BELOW:

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NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on July 16, 1990. The decision of the Judge will become a final order of the Commission on August 15, 1990 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before August 6, 1990 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91. Under Rule 91(h) petitioning corporations must also file a declaration of parents, subsidiaries, and affiliates.

All pleadings or other documents that may be filed shall be addresses as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
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A copy of any petition for discretionary review must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S4004, Washington, D. C. 20210. If a Direction for Review is filed the Counse for Regional Trial Litigation will represent the Department of Labor.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

(3/90)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELIZABETH DOLE, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Complainant, v. CON AGRA FLOUR MILLING COMPANY, AND ITS SUCCESSORS, Respondent.	OSHRC DOCKET NO. 88-1250

Appearances
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3535 Market Street
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FOR RESPONDENT:
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Decision and Order

ORINGER, J.: This is a proceeding brought under section 10(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. §651 et seq., hereinafter sometimes referred to as 'the Act') to review citations issued by the Secretary of Labor pursuant to section 9(a) and a proposed assessment of penalties thereon issued pursuant to section 10(a) of the Act.

Subsequent to an April 12, 1988 inspection of respondent's flour milling facility in Martins Creek, Pennsylvania, a serious citation and an other-than-serious citation were issued on May 9,

1988.

Respondent timely filed with a representative of the Secretary of Labor a notification of intent to contest the citations and proposed penalties. A hearing on the matter was held in Philadelphia, Pennsylvania on June 7, 8 and 9, and November 13, 14, 15 and 16, 1989. Parties filed post-hearing briefs in March of 1990.

Background

Respondent, ConAgra Flour Milling Company, is a conglomerate consisting of 60 operating companies and 28 flour mills (Transcript, 11/15, p.534). Respondent is an employer engaged in a business affecting commerce within the meaning of §§3(3) and 3(5) of the Act.

In the packing room of ConAgra's Martins Creek facility, a powered industrial truck enters several times a day and delivers empty flour bags on a pallet. The employee known as the "packer" fills the empty bags with flour by way of the packing machine which is fed flour by a hopper above it (Tr. 6/8, p.8). When the bag is full, it is sent down a conveyor belt to the station manned by the "sewer" who, with a sewing pedestal, sews the bag closed (Tr. 6/8, p.10). The closed bag is then sent on the v-belt conveyor to the end where it falls on to an incline flat belt conveyor which ascends from two to ten feet off the ground. The bags then fall off the conveyor on to another elevated belt conveyor of the same height.

The filled bags then travel down this conveyor to the

palletizer, an elevated device which loads the bags on to wooden pallets (Tr. 6/8, p.12). The palletizer operator then loads damaged bags which are picked up by the fork lift operator (C-20).

On April 12, 1988, Compliance Safety and Health Officer Donald Newell was assigned to conduct an inspection of ConAgra's Martins Creek facility in response to a formal complaint (C-1; Tr. 6/7, p. 10). Mr. Jackson, the company plant manager, and a union representative accompanied Newell on his inspection (Tr. 6/7, p.13). Consequently, the following citation items were issued and remain in dispute.[1]

Citation Number One
Item 1: Alleged Serious Violation of §5(a)(1) of the Act, the General Duty Clause.

ConAgra maintains a Bemis flour bagging machine at its cited facility. The packer takes a bag with either a 50 or 100 pound capacity and slides it on to a tube on this machine. He then steps on a foot pedal whereupon the machine's clamps close to hold the bag in place. Flour is fed into a hopper above the machine and the auger proceeds to fill the bag with flour (Tr. 6/7, p. 18; 11/15, p.464). After the cycle is complete, in approximately four seconds time, the bag is released and sent down a conveyor (Tr. 11/15, p. 464). Approximately 2,500 to

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[1] After the hearing, the parties were able to settle with respect to six items. Respondent agreed to withdraw its notice of contest to Citation No. 1, Items 6 and 8d and Citation No. 2, Item 1 and their proposed penalties. The Secretary agreed to withdraw Citation No. 1, Items 5, 7a(c), and 11a, and Citation No. 2, Item 5 and their proposed penalties.

3,000 bags are packed in an eight-hour shift.

Compliance Officer Newell testified that the foot pedal on this machine was unguarded at the time of the inspection posing the recognized hazard of having an employee's hands or fingers become pinched, fractured, or crushed by the clamp by the inadvertent activation of the pedal (C-3; Tr. 6/7, p.19, 21).

Robert J. Farronato, safety supervisor for the OSHA Wilkes Barre Area Office, testified that an unguarded foot pedal is a recognized hazard in the industry (Tr. 11/14, p.218, 221).

On one occasion, James E. Smith, a sanitarian and fumigant handler for ConAgra was injured by this machine when he unintentionally hit the foot pedal causing the clamps to close on the tip of his thumb, holding it for four seconds, which resulted in a minor bruise (Tr. 11/15, p.466). Smith testified that the type of injury that he sustained would be the worst possible physical harm that could be caused by the clamps (Tr. 11/15, p.467). Only one other known incident of this nature, at another ConAgra facility, had occurred (11/15, p.539).

Wayne R. Bellinger, corporate safety director at ConAgra, testified that none of the 25 or 30 Bemis packers maintained in ConAgra's facilities have guards on their foot pedals (11/15, p. 536). This item was abated with the installation of a foot pedal guard by December, 1988 (C-4; Tr. 6/7, p.13).

To prove a violation of the general duty clause,[2]

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[2] Section 5(a)(1) of the Act states that,
"(a)Each employer ---
(1) shall furnish to each of his employees employment and a

> [T]he Secretary must prove (1) that the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing or likely to cause death or serious physical harm."

Usery v. Marquette Cement Mfg. Co., 568 F.2d 902, 909 (2nd Cir. 1977) quoting National Realty and Construction Co., Inc. v. OSHRC, 489 F.2d 1257, 1265 (D.C. Cir. 1973). See also Connecticut Light & Power Co., 13 BNA OSHC 2214, 2217 (No. 85-1118)(Rev. Comm. 1989).

"[T]he term 'recognized' connotes knowledge" and is proven if the "dangerous potential of a condition or activity" is "actually...known either to the particular employer or generally in the industry." Pratt & Whitney Aircraft, Etc. v. Secretary of Labor, 649 F.2d 96, 100 (2d. Cir. 1961) quoting Usery v. Marquette Cement, supra at p. 910.

The Secretary relies on the testimony of Compliance Officer Newell and Safety Supervisor Farronato, who claimed that an unguarded foot pedal is a recognized hazard throughout general industry. Newell testified that foot pedal guards were in place in three bagging operations which he had observed: those involving whey, dog kibble, and chemical resins (Tr. 6/7, p.120).

Respondent contends that these named industries are separate and distinct from the grain handling or processing industry in which it is involved, and thus, it is not within the

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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;"

sphere of recognized hazards pertinent to its industry. Respondent also points to the low rate and severity of injury caused by the bagging machine to refute any imputation of employer knowlege of this alleged hazard. Moreover, ConAgra notes, none of the other Bemis machines have such a guard.

The record was bereft of evidence showing that the grain handling industry recognizes an unguarded foot pedal on this type of machine as a hazard. The Secretary submits, however, that the proper industry for determining recognition of this hazard is "businesses in general industry using foot pedal operational controls." (Secretary's Brief, p.6). See, Eddy Bakeries Company, 9 BNA OSHC 2149, 2150. In addition, that the level of knowledge in the industry may be so low or the hazard so obvious that the industry's standard is not controlling (see Secretary's Brief, p. 3, citing Usery v. Marquette Cement, supra).

Was this a recognized hazard?

The Secretary is correct in noting that industry recognition is not dispositive proof of an employer's knowledge of a hazard. Similarly she is correct in asserting that the lack of accidents caused by this machine does not negate the existence of a hazard. "...The Act does not establish as a sine qua non any specific number of accidents or any injury rate." Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974, reh. denied (1974). Although the absence of accidents is entitled to great weight, this fact alone is not dispositive of the question whether a violation has occurred. Faultless Div., Bliss & Laughlin Inds.,

Inc., v. Secy. of Labor, 674 F.2d 1177 (7th Cir. 1982), citing A.E. Burgess Leather Co. v. OSHRC, 576 F.2d 948, 951 (1st Cir. 1978); Allis-Chalmers Corp. v. OSHRC, 542 F.2d 27, 30-31 (7th Cir. 1976).

The purpose of the Act is to prevent the first accident, "not to serve as a source of consolation for the first victim or his survivors." Mineral Industries & Heavy Construction Group v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981); Lee Way Motor Freight, 511 F.2d 864, 870 (10th Cir. 1975) citing Ryder Truck Lines, supra, at 233.

The Secretary, however, failed to prove that there was any recognition by this employer or its industry that an unguarded foot pedal on this machine was a hazard, nor that the hazard was so obvious that the industry's standard would not be controlling. The near absence of injuries caused by this machine, coupled with the only minor injuries which have resulted, is evidence that the employer was not on notice that more stringent safety methods were required.

Causing or Likely to Cause Death or Serious Physical Harm.

Regardless of whether or not ConAgra recognized an unguarded foot pedal as a hazard, the Secretary failed to prove that the hazard was "causing or likely to cause death or serious physical harm." While Newell and Farronato were of the opinion that crushing or fractures could result from the force of the clamps, the employee who worked with and was injured by the machine, and who was also a witness for the Secretary, testified otherwise.

Accordingly, this item is vacated.

Item 2a(a): Alleged Serious Violation of 29 CFR §1910.132(a).

The Secretary alleges that respondent was in serious violation of 29 CFR §1910.132(a) by its having failed to provide employees servicing forklift truck batteries with personal protective equipment. This standard provides:

> (a) Application. Protective equipment including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of proccesses or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Newell testified that the forklift operator, when adding water to truck batteries, a process he performed weekly, was not protected from the hazard of having electrolyte (a mixture of sulfuric acid and water) from the battery splash on him. It is undisputed that contact with electrolyte can cause chemical burns (Tr. 6/7, p. 23, 24, 31; C-2 at "B"). The forklift operator used a funnel to fill the batteries with water. Newell did not observe this process, any spillage, nor was he aware of any employee having been splashed in this manner (Tr. 11/13, p. 26, 29, 46, 48). He testified that employees at other facilities in which batteries are filled with water are required by their employers to wear protective clothing.

Farronato testified that while he also did not observe an accident or spillage, the use of a funnel does not alleviate the

possibility of a splash hazard; the process of removing the funnel from the battery is potentially hazardous, he claimed (Tr. 11/14, p.224, 225). He would recommend eye, hand, and mid-section protection with available eye wash and a quick drenching shower (Tr. 11/14, p. 232).

Philip Ascani, forklift operator at ConAgra for 17 years, put water in the battery once a week, filling it one to two inches from the top of the battery cap. He testified that he was never given any protective gloves, shields, or glasses, nor did he receive any training on how to prevent splashes or the recommended course of action in the event that electrolyte was splashed on to him (Tr. 11/14, p. 279, 280). He claimed that, though unlikely, one would have to overfill the battery in order to be splashed with electrolyte (Tr. 11/14, p.304).

Bellinger did not dispute the fact that ConAgra failed to provide protective clothing, but contended only that no splashing or chemical burns have occurred at any ConAgra facility and that, in his opinion, he did not believe that splashing could occur with the use of a funnel (Tr. 11/15, p.550, 553, 641).

The Secretary claims that the lack of protection is a hazard and finds support for her position in the testimony of Newell and Farronato, as well as by documentation of the National Safety Council, which recognizes the handling of battery electrolytes as a hazard and advocates the use of personal protective equipment and a deluge shower and eye wash fountain where electrolyte acid

is handled (C-8: NSC data sheet I-635-79, 1979).[3] Further, the Owners and Operators Guide to the Hyster Electric Lift Truck owned and operated by Respondent states that "electrolyte is very caustic and must be neutralized immediately." (C-15; Tr. 6/7, p.33).

Respondent refutes the contention that this is a hazard based on the absence of injuries and the rare likelihood of becoming splashed.

As discussed previously, the Act is designed to prevent the first accident. "The application of §1910.132...involves evaluating whether a 'reasonable man' would require the use of protective equipment, considering common understanding, industry practice...and the circumstances of the job in question." Marshall v. Hayside Div. of Synthane Taylor Corp., [9 BNA OSHC 1443] (3rd Cir. 1980); McLean Trucking v. OSHRC, 503 F.2d 8 (4th Cir. 1974).

While the record reveals that there were no known accidents caused by such spillage, the hazardous potential for contact with this substance was well documented. The evidence showed that, however unlikely, such spillage was possible, and any resulting injury, serious.

This conclusion does not conflict with Republic Paper Board

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[3] The National Safety Council Data Sheet I-635-79, states in pertinent part,

"50. Personnel should wear acid-resistant gloves, arm gauntlets, aprons, and face shields for proper eye protection. Running water should be immediately available, and the type of protection should be governed by local circumstances." (C-8, p.7).

Co., 13 BNA OSHC 1335 (1987) in which an ALJ vacated a citation for §1910.132(a). In that case, the Secretary alleged a violation of this standard in that respondent failed to require its employees to wear rubber boots during an acid transfer operation. The citation was vacated since there was no spillage and testimony that no acid could reach the plant floor during the transfer.

Here, however, while there was no proof that such spillage occurred, the record revealed that spillage could occur if the battery was overfilled. The Secretary established that ConAgra had knowledge of a hazard in its facility which required the use of personal protective equipment. Cape & Vineyard Div. of the New Bedford Gas & Edison Light Co. v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975).

Accordingly, this item is affirmed. The penalty is reduced, however, because of the absence of prior accidents.

Item 2a(b): Alleged Serious Violation of 29 CFR §1910.132(a).

The Secretary contends that ConAgra was in violation of this provision by its failure to provide and require the use of hard hats by employees exposed to the risk of sustaining the impact of 50 and 100 pound flour bags which could fall from an elevated conveyor which was ten feet above the floor.

In the packing room an elevated conveyor, approximately three feet wide, carries flour bags which are approximately two feet wide, ten feet above the floor (Tr. 6/7, p.36, 37; C-16). Employees who must walk through the packing room are the forklift

operator, the sanitarian, the railcar loader and the packer. While employees normally walk within five to six feet of the incline conveyor, they are able to walk, and have walked, closer (Tr. 11/15, p. 473). Employee Smith had observed employees walking next to and crossing under the conveyor while it is running (Tr. 11/15, p.469, 471, 473). In the past, he has observed flour bags fall off the conveyor and break (Tr. 11/15, p.475). If a packer must straighten out a flour bag that is on the belt at a height greater than six feet, he explained, he will turn off the machine first (Tr. 11/15, p. 502).

Forklift operator Philip Ascani must go into the packing room hourly. When he removes damaged bags from underneath the palletizer he must drive underneath the belt and can come within approximately two feet of the conveyor (Tr. 11/14, p. 280, 297).

At the time of the inspection, Ascani did not recall that falling bags were a problem at the Martins Creek facility. He explained that ConAgra had installed railings around the conveyor system at this facility, as a result of a prior OSHA inspection, which ameliorated the problem of falling bags. The conveyor system was perfected six months prior to the hearing (Tr. 11/14, p.297, 298, 300, 315, 317).

Neither Newell nor Farronato observed any bags falling. Neither witness knew of whether any injuries have been sustained by such an occurrence (Tr. 11/13, p.30, 34, 41, 42; 11/14, p. 266)

ConAgra employees are required to wear bump caps in this

area for the purpose of restraining hair (Tr. 6/7, p.44). Farronato testified that walking underneath this conveyor without head protection is a recognized hazard; a hard hat, but not a bump cap, he opined, would lessen the impact of a falling flour bag (Tr. 11/14, p. 230, 231, 265).

Smith and Bellinger testified, however, that a hard hat would not afford any greater protection from the impact of a falling flour bag than a bump cap (Tr. 11/15, p.509, 556).

The Secretary asks that the testimony of Farronato and Newell be credited more favorably. Further, she notes that in mills that were acquired from P.B. Company by ConAgra, which have the same bagging process, the employees wear hard hats as part of the predecessor company's policy (Tr. 11/15, p. 559, 560).

ConAgra maintains that employees do not come within the potential zone of danger. In the past, Respondent notes, a flour bag has never fallen on an employee; the packer turns off the machine if he must straighten out a flour bag and the forklift operator is adequately protected by the overhead guard of his truck.

"The Secretary may establish a violation of §1910.132(a) by showing that an employer had either actual or constructive knowledge of a hazard in its facility which required the use of 'personal protective equipment.'" Cape & Vineyard, supra, at 512 F.2d 1148, 1152. The record established that ConAgra was aware of the hazard of falling bags as manifest in its construction of a railing system around the conveyor. The Secretary, however,

failed to prove that a reasonable person familiar with the circumstances at this facility would have recognized a hazard requiring protection by a hard hat. The unlikelihood of employee exposure, the absence of any head injuries from falling flour bags, and the lack of evidence that the use of hard hats would have prevented or significantly reduced any injuries establishes that the employer was not on notice that such protective equipment was required. See Helmark Steel, Inc., 13 BNA OSHC 1331 (1987); ConAgra, Inc., 12 BNA OSHC 1071 (1984).

Accordingly, this item is vacated.

Item 2b: Alleged Serious Violation of 29 CFR §1910.151(c).

The standard at 29 CFR 1910.151(c) states:

> §1910.151 Medical services and first aid.
>
> (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.

The Secretary alleges that the forklift operator was exposed to electrolyte, an injurious corrosive material, when checking the forklift batteries and that ConAgra failed to provide eye wash or other suitable facilities for quick drenching in the event of exposure. Newell testified that the nearest flushing facility would be in the building adjacent to the location where the forklift operator fills the batteries (Tr. 6/7, p.54).

Bellinger testified, as he did with respect to Citation Number One, Item 2a(a), that a drenching facility is not needed due to the lack of employee exposure to this substance (Tr.

11/15, p. 647).

Respondent relies on OSHA Instruction STD 1-8.2 paragraph d. for the proposition that since the Secretary did not substantiate employee exposure to electrolyte, that no need for an emergency facility was established. This paragraph reads:

> d. At construction sites and in commercial and manufacturing facilities at locations where powered industrial trucks are parked for overnight storage and routine battery recharging only, no need for emergency facilities exists unless potential exposure to electrolyte is substantiated. Where exposure is possible (i.e. servicing batteries) the provisions of E.2.b. and E.2.e. should be evaluated for applicability.

(R-2).

The Secretary asserts that ConAgra's reliance on this part of the Instruction is inappropriate, as the record revealed that the forklift operator serviced the battery. I agree. Moreover, the Instruction states that it is the potential exposure to elecrolyte which must be substantiated, not actual exposure. See, Donovan v.Adams Steel Erection, Inc., 766 F.2d 804 (3rd Cir. 1985).

"Whether a violation [of 1910.151(c)] exists depends on a consideration of all circumstances." Gibson Discount Center, Store No.15, 6 BNA OSHC 1526 (No. 14657)(Review Commission, 1978); see also Continental Electric Co., 14 BNA OSHC 1345 (No. 83-921)(Review Commission 1989). Because potential exposure to this corrosive material was established, I find Respondent to have violated this standard by failing to provide emergency eye wash facilities.

Item 3: Alleged Serious Violation of 29 CFR §1910.178(c)(2)(vi).

The standard at 29 CFR 1910.178(c)(2)(vi) states,

> (vi)(a) Only approved power operated industrial trucks designated as EX shall be used in atmospheres in which combustible dust is or may be in suspension continuously, intermittently, or periodically under normal operating conditions, in quantities sufficient to produce explosive or ignitable mixtures, or where mechanical failure or abnormal operation of machinery or equipment might cause such mixtures to be produced.

The Secretary alleges that in the packing room of the cited facility, a type "E" electric forklift was used; in this location, due to "mechanical failure or abnormal operation of machinery or equipment", ignitable or explosive mixtures of combustible dusts might be produced. The Secretary asserts that ConAgra violated this standard by allowing the use of a type E rather than an approved type EX powered industrial truck.

Compliance Officer Newell classified the packing room as a Class II, Division 2 area.[4] He observed that flour dust had accumulated in the room but was more concerned about an abnormal occurrence such as a flour bag breaking and dispersing its contents into the room (Tr. 6/7, p.64).

John Nagy, an expert in the area of explosions testified

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[4] 29 CFR §1910.399(a)(25)(ii) defines a Class II, Division 2 location as one in which: "(a) combustible dust will not normally be in suspension in the air in quantities sufficient to produce explosive or ignitible mixtures, and dust accumulations are normally insufficient to interfere with the normal operation of electrical equipment or other apparatus; or (b) dust may be in suspension in the air as a result of infrequent malfunctioning or handling or processing equipment, and dust accumulations resulting therefrom may be ignitible by abnormal operation or failure of electrical equipment or other apparatus."

that anywhere that combustible dust is handled is a hazardous location and would be categorized as Class II, Division 2 (C-45; Tr. 11/14, p.393-396, 400).[5] When he visited the Martins Creek Facility, he noted that it was extraordinarily free of accumulated dust but he did not dismiss the possibility that dust could be dispersed into the air if a flour bag were to fall (Tr. 11/14, p.402). He observed sufficient amounts of dust within the plant that could pose a hazard under unusual circumstances (Tr. 11/14, p. 404, 407).

A type E forklift, Nagy testified, offers no protection against explosive hazards, only fire hazards. In this plant, he claimed, a model EX forklift should be employed (Tr. 11/14, p. 403, 404, 409).

The minimum explosive concentration of industrial dust is equivalent to 50 grams per cubic meter. Two hundred pounds of flour dust would be required to fill the room to meet this lower explosive limit concentration. This concentration has been described as "more than a dense fog" (Tr. 11/13, p.49; 11/14, p. 417, 421). Nagy stated, however, that dust could fill a portion of the room and with a source of ignition such as a hot surface,

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[5] The National Fire Protection Association recognizes this as a hazardous location and does not authorize the use of a type E truck in such a location (C-13, Table 1-7; Tr. 6/7, p.65-75).

Factory Mutual System's Loss Prevention Data Sheet 7-39 (April, 1975) describes the safeguards particular to types E, ES, EE, and EX trucks (C-11). Factory Mutual System's Loss Prevention Data Sheet 7-76 (August, 1976) concerning combustible dusts states under the heading "Control of Ignition Sources" that "industrial lift trucks should be as recommended for Class II, Division 1 or 2 locations (C-9; Tr. 6/8, p.19-21).

flame, or electrical arcs and sparks, an explosion could occur. Only five to ten pounds of dust around a type E forklift, he explained, could create the requisite amount of dust. An employee in the middle of such a dust cloud could be severely burned even if the cloud did not fill the entire room (Tr. 11/13, p. 57; 11/14, p.416, 429, 432).

Employee Smith testified that the bin on the packer holds up to 60 bags or 6,000 pounds of flour. The bin indicator may malfunction, he explained, causing flour to spill on to the flour (Tr. 11/15, p. 478). While he could only recall this breakdown having happened four times in fifteen years, he described that the packing room, at these times, became foggy and cloudy for approximately five to six minutes (Tr. 11/15, p.479, 513). The whole room was covered with dust and it had taken 20 to 30 minutes to clear once the packing machine was shut off (Tr. 11/15, p. 480). He claimed that 30 to 40 bags, or 3,000 to 4,000 pounds of flour could be dispersed and has seen four or five bags fall off at a time (Tr. 11/15, p. 480, 482).

Bellinger conceded that parts of the bagging room could be considered Class II, Division 2 locations, and that at the time of the inspection, there had been a problem with bin overflow (Tr. 11/15, p. 564; 11/16, p. 650, 675). He claimed that not enough dust could circulate into the air which could create a dense fog in the warehouse. He conceded, however, that this was possible in a localized area (Tr. 11/15, p. 563; 11/16, p.651).

Bellinger determined that the type E truck meets Class II,

Division 2 standards by his visual inspection of the forklift and by an unsuccessful attempt to ignite flour dust accumulations at the cited facility with a "bic" ligher (Tr. 11/15, p.572; 11/16, p. 666). Further, he believed that the equipment in the forklift truck met the requirements of the National Electric Code and the standard at 29 CFR §1910.307(d)[6] (Tr. 11/15, p. 565).

Respondent also relies on a May 13, 1985 settlement agreement in which the Secretary vacated a citation for an alleged violation of 29 CFR 1910.178(c)(2)(vii) at the Martins Creek Facility due to insufficient evidence and the Respondent's housekeeping procedures for the packing room (R-3).

The issue to be determined is whether, due to mechanical failure or abnormal operation of machinery or equipment, combustible dust may be in suspension continuously, intermittently, or periodically in quantitites sufficient to produce explosive or ignitable mixtures at the cited location.

No air sampling was performed by the compliance officer. Thus, the Secretary was "minimally obliged to prove such a density by some rule of thumb based upon the appearance of a dust cloud." ConAgra, Inc., 8 BNA OSHC 1498 (No.78-5010)(1980).

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[6] That standard states in pertinent part: "General purpose equipment or equipment in general-purpose enclosures may be installed in Division 2 locations if the equipment does not constitute a source of ignition under normal operating conditions."

Respondent contends that the type E truck is "general purpose equipment" which "does not constitute a source of ignition under normal operating conditions." Respondent does not substantiate its claim that this type of truck can be classified as "general purpose equipment" nor that the standard at 1910.178(c) may be supplanted by this provision.

Expert witness Nagy described this concentration as "more than a dense fog" (Tr. 11/13, p.49; 11/14, p.417, 421). This is an amorphous criterion, at best. Nagy testified, nevertheless, that a quantity capable of causing an explosion could be produced by five to ten pounds of flour dust in a localized area in the vicinity of a type E truck.

Employee Smith testified that he had observed the bin indicator malfunction, causing flour spillage and the packing room to become "foggy" and "cloudy". While Bellinger refuted the assertion that enough dust could disperse into the entire packing room to meet the lower explosive limit, he did not deny that this was possible in a localized area.

In Foseco, Inc., 10 BNA OSHC 1949 (No. 81-944)(1982), a citation for an alleged violation of 1910.178(c)(2)(vi) was vacated when air samples of the cited area were never analyzed and the compliance officer based his conclusion of the hazard merely upon observing the pre-batching operation and the transportation of aluminum dust. The Secretary's expert, as in the case at bar, testified that an explosion could occur because of the presence of dust and the potential ignition sources in the area. The Respondent's expert testified otherwise, however, and there was no evidence that either the electrical systems or the forklift trucks had ever malfunctioned.

In Luis A. Ayala Colon, Inc., 12 BNA OSHC 1533 (No.84-624)(1985), a citation for an alleged violation of 1910.178(c)(2)(vi)(a) was vacated when the Secretary based his

allegation of a violation on the fluctuating statements of employees and the OSHA Area Director, which asserted that there was a potential for explosion, rather than by air sampling to determine the explosive character of the atmosphere.

To require the Secretary to provide photographic evidence or air sampling results of the flour dust emissions in this case, which were described as having occurred infrequently, due to the malfunctioning of mechanical equipment rather than to normal operating conditions, would present an anomalous result. The weight of the evidence revealed, however, that the amount of dust dispersed into the air at those times was of a quantity sufficient to sustain a violation of the standard. The Secretary's expert witness testified that the amount of dust maintained at the Martins Creek Facility exhibited the potential for such an explosion under unusual circumstances; employee testimony revealed that the amount of flour dispersed into the plant under the abnormal occasion that the bin indicator malfunctioned was "in quantities sufficient to produce explosive or ignitable mixtures." This is underscored by Bellinger's concession that enough dust could accumulate in a localized area to meet the lower explosive limit.

Accordingly, I find that this item must be affirmed.

Item 4: Alleged Serious Violation of 29 CFR §1910.178(g)(11).

The standard at 29 CFR 1910.178(g)(11) provides:

> (g) Changing and charging storage batteries...
>
> (11) Precautions shall be taken to prevent open flames, sparks, or electric arcs in battery charging areas.

The Secretary alleges a violation of this provision in that an unprotected incandescent bulb was located four feet above a battery charging area (C-5; C-6).

The forklift truck operator is responsible for charging batteries at the plant (Tr. 6/8, p.30). Compliance Officer Newell testified that in the process of being charged lead-acid batteries give off a flammable hydrogen gas. He claimed that the explosive limit for hydrogen gas is four per cent and that the exposed 75-watt light bulb, if turned on,[7] could cause arcing. On cross-examination, Newell testified that charging the battery could not produce four per cent of the atmosphere of the warehouse (Tr. 11/13, pp.68-70). Presumably, given this testimony, the lower explosive limit for hydrogen gas could not be reached during battery charging at the cited location.

Bellinger testified that the standard does not specifically require that an incandescent bulb over a battery charging area must be enclosed (Tr. 11/15, p. 573). He corroborated Newell's testimony that not enough hydrogen gas could escape from the battery in an eight-hour period to reach the lower explosive limit (Tr. 11/15, p.574; 11/16, p.682).

The Secretary failed to meet her burden of proof as to this item. There was no testimony to show that the unprotected light bulb was a potential harbinger of flames, electrical arcs or sparks. The Secretary's sole witness who testified on this

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[7] This light bulb was not lit during Newell's inspection (Tr. 11/13, p.72),

issue, Newell, recanted his assertion that the battery could emit the requisite amount of hydrogen gas to create such a hazard.

Accordingly, this item is vacated.

Item 7a(a): Alleged Serious Violation of 29 CFR §1910.212(a)(1).

The general machine guarding standard at 29 CFR §1910.212(a)(1) provides:

> §1910.212 General requirements for all machines.
>
> (a) Machine guarding--(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

The Secretary alleges that the Bemis bagging machine (involved in Citation Number One, Item 1) bore a nip point between the bag holding sleeve and an augur chute which was unguarded, exposing employees to the risk of getting a hand caught in the clamp between the chute and the sleeve (Tr. 6/8, p.32; C-3).

As discussed previously, approximately 2,500 to 3,000 flour bags are filled in an eight-hour shift at the cited facility, each bag requiring approximately four seconds time to load (Tr. 6/8, p.35). It was employee Smith's finger which was injured by this allegedly unguarded "nip point". (Tr. 11/13, p.75).

Newell and Farronato's suggested method of abatement would be the use of two-hand tripping devices instead of the foot pedal control in addition to further modification of the machine. They recommended that a fork or raised conveyor be used to

support the flour bag to obviate the need for manual placement of the bag (Tr. 6/8, p. 35, 36; 11/14, p. 236). Newell had seen this type of support on whey bagging and dry dog food packaging machines (Tr. 6/8, p.38-39). Farronato was not aware if this particular modification was available for this machine at the time of the inspection (Tr. 11/14, p.251).

Although he conceded that a finger could get pinched by the "pinch point" on the machine's clamp, Bellinger attested that the manufacturer's modification of this machine was not available at the time of the inspection (Tr. 11/15, p.578). Further, Respondent notes that the low incidence and minimal degree of severity of injuries caused by this machine is evidence that it had no knowledge of this hazard.

29 CFR 1910.212(a)(1) is a general, introductory standard setting forth guarding requirements applicable to "all machines." Faultless Div. Bliss & Laughlin Inds., Inc. v. Secretary of Labor, 674 F.2d 1177 (7th Cir. 1982); Irvington Moore, Division of U.S. Natural Resources, Inc. v. OSHRC, 556 F.2d 431 [5 BNA OSHC 1585] (9th Cir. 1977). It requires protection from "hazards such as those created by point of operation,[8] ingoing nip points, rotating parts, flying chips and sparks."

In Stacey Manufacturing Company, the Review Commission held that in order to establish a violation of this provision, the Secretary must first prove the existence of a hazard which is

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[8] The "point of operation" is defined as "the area on a machine where work is actually performed upon the material being processed." §1910.212(a)(3).

revealed "by how the machine functions and how it is operated by the employees." 10 BNA OSHC 1534 (No. 76-1565)(1982), citing A.E. Burgess Leather Co., 5 BNA OSHC 1096 (No. 12501)(1977) aff'd 576 F.2d 948 [6 BNA OSHC 1661] (1st Cir. 1978); Rockwell International Corp., 9 BNA OSHC 1092 (No. 12470)(Review Commission 1980).

While Bellinger agreed that an employee could get his fingers pinched between the chute and the sleeve if he inadvertently activated the machine's foot pedal, I find that the near absence of accidents, which were relatively minor in nature, revealed that the employer did not and could not with the exercise of reasonable diligence know of the presence of the violation.

Moreover, the Secretary did not establish the existence or availability of the two-hand tripping device or other modification of this machine,[9] nor that the alleged hazard caused or was likely to cause death or serious physical harm.

Accordingly, this item is vacated.

Item 7a(b): Alleged Serious Violation of 29 CFR §1910.212(a)(1).

The Secretary alleges that in the packing area, ConAgra failed to guard a nip point "created by the conveyor running over

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[9] Proof of feasibility "places an eminently reasonable limitation on the breadth to which the standard's literal language might otherwise be extended." Diebold, Inc. v. Marshall, 585 F.2d 1327, 1333 (6th Cir. 1978)('the standard applies only where there exists an identifiable and practical means for guarding the specific machine in the specific uses to which the cited employer puts it').

an idler roller located on the underside of the inclined conveyor belt." (Tr. 6/8, p. 48, 50; C-22, C-23). The roller was three to four feet above ground and ran at a brisk speed (Tr. 11/14, p.269, 270). Newell claimed that this presented a hazard to three employees whose job it was to straighten out the flour bags on the belt, although he did not know whether any injuries have resulted from this nip point (Tr. 11/13, p. 87; 11/14, p.55, 58). Farronato testified that the nip point can cause fractures, other major injuries, or possibly fatalities (Tr. 11/14, p. 238, 239).

The portion of the conveyor under which the idler roller operates is located in the ten to twelve foot-wide path which an employee must follow to exit the room. Employee Smith testified that the packer and the sanitarian must get within one to two feet of the idler roller to either straighten out bags or clean up and that it is approximately three feet away from the sewer (Tr. 11/15, p.483, 519). Smith testified that it would be difficult for one to get his hand caught in the roller (Tr. 11/15, p.484).

Bellinger countered that the roller is not a hazard because there are barriers built into the design of the machine conveyor (Tr. 11/15, p. 579). He also claimed that there would be nothing to draw one's hand in there, and in the unlikely event that this would occur, that the roller is so loose that no injury could result (Tr. 11/15, p.579). An employee, he claimed would hav to stoop to come into contact with the idler roller.

Respondent also notes decisions of Review Commission

Administrative Law Judges which have found no hazard to exist when machines were found to be operating at slow speeds. See, Marathon Letourneau Company, 7 BNA OSHC 1170; Eeckel Manufacturing Company, 9 BNA OSHC 2145.

The record does not support the finding that the machine in this case ran at a slow speed. In fact, just the opposite was testified to be true. Further, Newell disagreed with Bellinger's assertion that the brace supporting the conveyor acts as a barrier guard (Tr. 11/14, p.86). The photographic evidence supports Newell's rebuttal.

I do find, however, that the brace supporting the conveyor belt discourages contact and that the low position of the machine would make inadvertent contact with the idler roller unlikely. Because the probability of injury from this nip point is so remote as to be negligible, as would the injury, I find that this item warrants the classification of "other than serious" with no resulting penalty.

Item 7a(c): Alleged Serious Violation of 29 CFR §1910.212(a)(1).

The Secretary's Brief and Proposed Findings of Fact and Conclusions of Law indicate that this item was subsequently settled by the parties. Respondent, however, included defenses to this item in its Brief. In the event that there is a discrepancy concerning this item, it will be dispelled here.

Compliance Officer Newell, himself, testified that ConAgra complied with the letter of the standard. Respondent's manlift

contained three separate safety devices which would stop the manlift before it could reach the purported nip point. In light of this testimony, this item is hereby vacated.

Item 7b: Alleged Serious Violation of 29 CFR §1910.212(a)(1).

This item involves a Howe-Richardson scale spill mechanism which allows an amount of flour to accumulate in a hopper to be weighed and then spilled into another container. This takes place every 23 to 24 seconds, twenty four hours a day (Tr. 11/14, p. 355, 357). Rotating parts, cams, and levers of the device move as the contents are spilled. The Secretary claims that these parts were unguarded in violation of the standard (Tr. 6/8, p.70; C-27, C-28; R-6).

Newell testified that the scale is located 16 inches beside an aisleway in the mill and that an employee could come into inadvertent contact with the exposed parts if he fell or reached into it with his hands (Tr. 6/8, p. 72; 11/13, p. 101). Farronato testified that a fractured finger or hand could result from being caught in these moving parts (Tr. 11/ 14, p. 240). Neither witness knew of any injuries associated with this machine (Tr. 11/14, p. 276).

Henry Salinas, a sanitarian at ConAgra, and Head Shop Steward of the Bakery and Confectionary Union, Local 6 testified that when he cleans around the Howe Richardson scale, he comes within a foot of the exposed parts approximately three times a day. The millers are similarly exposed (Tr. 11/14, p. 319, 324). One miller, Robert Sarisky, testified that he did not believe the

scale was a hazard, although included a caveat that while he was around the machine hourly, he did not work around it as much as the sanitarians do (Tr. 11/14, p. 363, 364). Sarisky testified that an employee could get a pinched finger when trying to replace "cotter pins" in the machine, as this process is performed when the machine is running and cannot be turned off (Tr. 11/14, p. 365).

Bellinger testified that the machine presented no hazard and noted that the piping system around the scale provided a barrier guard to these exposed parts (Tr. 11/15, p. 582-586; R-11, R-12). Newell and Farronato disagreed with Bellinger's design-guard contention, attesting that this piping did not constitute an appropriate guard and that employees remained within the zone of danger (Tr. 11/14, p. 276).

It is not disputed that these parts were unguarded. While the piping around the scale appears to provide a partial obstruction to the exposed parts of the scale, it does not completely protect an employee from contact with the uncovered cams, levers, and rotating parts of the scale (See C-27, C-28; R-11, R-12). The aisle through which employees exit the room is adjacent to this machine and it is this side of the scale, closest to the aisleway, which is unprotected by piping. In addition, an employee tesitified that it was possible that a pinched finger could result from contact with these parts.

I find that this allegation was proven by the Secretary and must be affirmed.

Item 8a: Alleged Serious Violation of 29 CFR §1910.219(c)(2)(i).

In the milling house, Newell observed an unguarded horizontal rotating machine drive shaft which was six feet from the floor (Tr. 6/8, p. 79-82; 11/14, p. 329, 330; C-29). This, he claims, was in violation of 29 CFR §1910.219(c)(2)(i) which provides:

> (c) Shafting...
>
> (2) Guarding horizontal shafting. (i) All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform, excepting runways used exlusively for oiling, or running adjustments, shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

One exception to this requirement is found at 29 CFR §1910.219(c)(5) which provides that "All mechanical power transmission apparatus located in basements, towers, and rooms used exclusively for power transmission equipment shall be guarded...except...when...(i)The...room occupied by transmission equipment is locked against unauthorized entrance."

Newell acknowledged this exception, but claimed that during the inspection, the room was not locked and he had no knowledge of whether it was locked otherwise (Tr. 11/13, p. 110, 116, 195).

Employee Salinas testified that millers and their assistants and sanitarians periodically enter the basement line shaft room where the machine drive shaft was located to check to see that the pipes are not choked (Tr. 11/14, p. 327, 328). He testified that the steel doors were always kept open to this ten foot by 100 foot room, and that if he stood up in the room, he

would hit his head on the unguarded machine drive shaft (Tr. 11/14, p. 329, 332, 333).

Bellinger claimed that the series of doors to this room which consist of a single door leading to double steel doors are normally closed but were open on the day of the inspection. Further, that a sign on one of the doors reads, "Danger Moving Machinery. Authorized Personnel Only. Not An Exit" which was the suggested means of abatement at the time of an earlier inspection (Tr. 11/15, p. 591; R-4).

In addition, Bellinger claimed that the horizontal drive shaft is smooth and that while admitting that an employee could come into conact with it, he contended that no injury could occur (Tr. 11/15, p.594; 11/16, p.692). Newell disagreed, and testified that scalping or abrasions could occur from contact with this exposed machinery.

The Secretary refutes Respondent's argument that this room falls into one of the exceptions to the guarding requirement. She notes that it cannot qualify under the exception in subpart (c)(5), because this area is not used "exclusively for power transmission equipment." The room contains piping as well, used to transport flour to the upper floors of the facility.

I find the standard was violated. Respondent failed to prove that the basement line shaft room fell into this excepted category. In addition, the room on the day of the inspection, as admitted by Respondent's witness, was not locked against unauthorized entrance. It is undisputed that the horizontal

shaft was unguarded. Therefore, I find that this item must be affirmed.

Item 8b(a): Alleged Serious Violation of 29 CFR §1910.219(d)(1).

The standard at 1910.219(d)(1) requires:

> (d) Pulleys---(1) Guarding. Pulleys, any parts of which are seven (7) feet or less from the floor or working platfrom, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section. Pulleys serving as balance wheels (e.g. puch presses) on which the point of contact between belt and pulley is more than six feet six inches (6 ft. 6 in.) from the floor or platform may be guarded with a disk covering the spokes.

The Secretary contends that ConAgra did not fully guard the five inch rotating pulley, located three feet from the floor, of a Simon mill in the milling area, exposing employees working at or walking in aisles in between the machines to an inrunning nip point (Tr. 6/8, p. 84, 89; C-30).

Newell attested that there was only a partial guard on the pulley, while Bellinger countered that it was fully guarded (Tr. 11/13, p. 198; 11/15, p. 595, 596). Newell claimed that guards were installed on other such machines in the same plant (Tr. 6/8, p. 85, 86).

There are a series of 25 such machines on both sides of an outrig on each floor of the facility (Tr. 11/14, p.359). Employee Sarisky stated that there would be nothing to cause him to go between pulleys, but that several times a day he might be within two feet of the roller (Tr. 11/14, p. 360). He testifed that if one's hand got caught in the pulley, the resulting injury could be anything from broken skin to a fractured finger.

The issue is whether the pulley in this case was guarded in accordance with sections (m) and (o) of the standard[10]. While the evidence revealed that the pulleys were partially guarded (see C-30), there was substantial exposure of the moving parts.

I find that this item must be affirmed.

Item 8b(b): Alleged Serious Violation of 29 CFR §1910.219(d)(1).

The Secretary alleges that ConAgra failed to guard a pulley on its micro ingredient feeder, located in the flour blending plant, which adds ingredients to flour as it is blended (Tr. 11/15, p.486). The pulley was within three feet of the floor and there were two belts, one that was five inches and the other four inches wide running over a six inch pulley which created an inrunning nip point (Tr. 6/8, p. 94, 95).

Smith testified that blenders and sanitarians can come within 12 to 18 inches of the pulley to clean and set the feeder. He noted that the danger existed of getting caught in the pulley or belt (Tr. 11/15, p. 490).

The unrebutted testimony showed that the machine's pulley was unguarded presenting a hazard to employees who must work near it. This item is affirmed.

Item 8b(c): Alleged Serious Violation of 29 CFR §1910.219(d)(1).

The Secretary alleges that Respondent failed to guard a

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[10] The Secretary claims that sections (m) and (o) are irrelevant to a determination of compliance with the cited standard. I disagree. If there is a guard which Respondent claims to exist, sections (m) and (o) which are necessarily incorporated in section (d)(1) act as a reference upon which to determine compliance.

pulley on the sewing machine pedestal. The pulley was located approximately two feet above the employee work station, four to five feet above the floor, and was eight to twelve inches wide (Tr. 6/8, p. 97, 98, 99; C-31, C-32).

Smith testified that the preexisting guard on the pulley had been off for six to eight months prior to the inspection (Tr. 11/15, p.491). He stated that the sewer does not have to go near the pulleys and drive belt of the machine when it is in operation. If there is a jam, or if the bagger must change the needle, the machine is first turned off (Tr. 11/15, p.492, 521, 600). During performance of regular work, an employee can come within two feet of the pulley at shoulder level. Contact with the pulley would have to be inadvertent (Tr. 11/13, p.127, 129, 130, 132).

Smith claimed that if an employee slipped and fell in the area of the machine, the sewing machine pedestal would probably prevent contact with the pulley. The only danger that he perceived was the possibility that the belt, if unguarded, could fly off and hit an employee (Tr. 11/15, p.494).

Respondent asserts that there was no showing that this machine exposed employees to injury, and thus, the item must be vacated. Rockwell International Corporation, 9 BNA OSHC 1092.

The record established that the pulley was unguarded but at the times employees must come near the pulley, the machine is turned off. The possiblity of exposure to injury or inadvertent contact with the pulley when in operation was revealed to be so

remote as to be negligible. Therefore I find that this item must be reduced to a de minimis classification.

Item 8c(a): Alleged Serious Violation of 29 CFR §1910.219(e)(1)(i).

The Secretary alleges Respondent to be in violation of section 1910.219(e)(1)(i) in that it failed to guard the horizontal riveted belt of a dump sifter in the flour mill (Tr. 6/8, p.102, 103; C-33). The sifter operates twice a day for varying periods of time. The belt was 18 inches above the floor and Newell testified that employees who must clean and perform maintenance work while the belt is in motion could brush against it or lean into the machine (Tr. 6/8, p. 106, 107; 11/13, p.137). He attested that this type of belt is more hazardous than a solid feed belt.

The standard provides:

> (e) Belt, rope, and chain drives---(1) Horizontal belts and ropes. (i) Where both runs of horizontal belts are seven (7) feet or less from the floor level, the guard shall extend to at least fifteen (15) inches above the belt or to a standard height (see Table O-12), except that where both runs of a horizontal belt are 42 inches or less from the floor, the belt shall be fully enclosed in accordance with paragraphs (m) and (o) of this section.

It is undisputed that the belt was unguarded. Sarisky testified that employees come within twelve inches of the pulley while it is operating (Tr. 11/14, p. 334, 335). Respondent presented no evidence on this item. Accordingly, this item is affirmed.

Item 8e(a): Alleged Serious Violation of 29 CFR §1910.219(e)(3)(i).

The standard at section 1910.219(e)(3)(i) provides:

(3) Vertical and inclined belts. (i) Vertical and inclined belts shall be enclosed by a guard conforming to standards in paragraphs (m) and (o) of this section.

The Secretary alleges that the micro-ingredient feeder (cited as the subject in item 8b(b)) had an improperly guarded vertical v-belt exposing employees to three hazards: 1)contact with the rotating belt itself; 2) the inrunning nip point between the pulley and the belt; and 3) the risk of a flying broken belt. (Tr. 6/8, p.109).

Newell testified that contact with the belt may occur when an employee cleans and sets the feeder when the blender and sanitarians come within a foot of the belt and pulley (Tr. 11/13, p.111, 141; 11/15, p.488, 490). Smith testified that an employee could get caught in the belt.

It is undisputed that there was no guard on the belt and that employees had accesss to this hazardous condition. Accordingly, this item is affirmed.

Item 8e(b): Alleged Serious Violation of 29 CFR §1910.219(e)(3)(I).

The Secretary contends that Respondent failed to guard the incline belt of the Simon flour mill described in item 8b(a). The additional hazard presented by an unguarded belt on this machine is that of the belt flying off and hitting an employee (Tr. 6/8, p.112)

Newell stated that employees milling flour could trip and fall coming into accidental contact with the belt, which was partially guarded on top, but not on the bottom (Tr. 11/13, p.142). Newell stated that a full barrier enclosure guard, which

was provided to all other machines of this kind at the plant, was required (Tr. 6/8, p.112-116; 11/13, p.142; C-30).

Sarisky stated that if he had to replace the feeder belt while it was running, he might break the skin on his finger or fracture it if he fell into the moving belt (Tr. 11/14, p. 369). Bellinger testified only that the belt would break if one stuck his hand into it (Tr. 11/16, p.694).

The belt on this machine was not fully guarded as required by the standard. Because Sarisky works near the machine, his testimony concerning the possible injury from contact with the belt should be credited more favorably than Bellinger's. Accordingly, this item is affirmed.

Item 9: Alleged Serious Violation of 29 CFR §1910.242(b).

The standard at section 1910.242(b) proveds:

> §1910.242 Hand and portable powered tools and equipment, general....
>
> (b) Compressed air used for cleaning. Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

The Secretary alleges that ConAgra violated this provision by maintaining a compressed air hose in its warehouse above 30 p.s.i. (Tr. 6/8, p.118). Newell measured the pressure with an air pressure gauge and determined it to be 90 p.s.i. (C-34). Newell was told by Ascani or Jackson that the air hose was used daily by the forklift operator to blow off flour from bags before loading them into trucks. Newell claimed that if the pressure is greater than 30 p.s.i., foreign particles could be injected into

an employee's body causing an air embolism which is potentially fatal (Tr. 6/8, p. 120, 121).

Ascani testified that the thin layer of flour dust which accumulates on flour bags must be blown off with the air hose once a week for approximately 15 to 20 minutes (Tr. 11/14, p. 288-290). He stated that there had been an air pressure reducing device but that it had been missing for months before and during the inspection. When the pressure reducing device is used, he testified, the air is not strong enough to remove the flour dust completely (Tr. 11/14, p. 290, 293).

Bellinger did not deny the absence of a pressure reducing device, but contended that the air hose was not used for "cleaning purposes" within the purview of the standard, but for a "process" purpose as part of the manufacturing practice (Tr. 11/16, p. 697, 698).

A similar argument was rejected in Pymm Thermometer Corp. 13 BNA OSHC 2059 (No. 87-401 and 402)(1989) where the employer argued that an employee using a compressed air gun to remove broken glass from automatic bulb setting machines was not using the air gun for a "cleaning purpose" but rather "for a special purpose" to dislodge and remove particles caught inside the chuck.

Respondent's argument must be rejected here as well. The fork lift operator used the air hose to clean off flour bags, clearly a "cleaning purpose" as contemplated by the standard. Nor does this activity pose any different or lesser hazard

because used to clean flour bags rather than other types of machinery. Accordingly, this item is affirmed.

Item 10a: Alleged Serious Violation of 29 CFR §1910.252(a)(2)(ii)(b).

The standard at section 1910.252(a)(2)(ii)(b) provides:

§ 1910.252 Welding, cutting and brazing.

(a) Installation and operation of oxygen-fuel gas systems for welding and cutting---
(2) Cylinders and containers---
(ii) Storage of cylinders---general.
(b) Inside of buildings, cylinders shall be stored in a well-protected, well-ventilated, dry location, at least 20 feet from highly combustible materials such as oil or excelsior. Cylinders should be stored in definitely assigned places away from elevators, stairs, or gangways. Assigned storage spaces shall be located where cylinders will not be knocked over or damaged by passing or falling objects, or subject to tampering by unauthorized persons. Cylinders shall not be kept in unventilated enclosures such as lockers and cupboards.

The Secretary alleges that Respondent violated this provision by allowing an acetylene cylinder to be stored in an assigned location where the cylinder could be knocked over or damaged.

Newell observed an empty acetylene cylinder in Respondent's maintenance shop sitting upright and unsecured (Tr. 6/8, p.123-125; C-35). The container had held liquid acetone, a highly flammable substance capable of causing thermal burns. The cylinder was placed at this location to be picked up by the supplier the next day and was not to be used again until refilled (Tr. 11/13,p. 147, 148).

Full acetylene cylinders were stored in an area beneath the shop (Tr. 11/14, p.384; 11/15, p.605). Empty cylinders were kept

in the maintenance shop awaiting pick up (Tr. 11/15, p.606; 11/16, p.701).

Millwright Robert Bray stated that this cylinder had been in this area for a couple of days but no longer than a week before pick-up (Tr. 11/14, p. 375,376). He testified that employees carry materials, tools, hardware, and steel when passing through this area which is next to the door to the maintenance shop (Tr. 11/14, p. 375). He claimed that it was possible for an employee to trip and fall into the cylinder (Tr. 11/14, p.389).

Respondent argues that this was not the "assigned storage area" for these cylinders but does not contend that the hazards to be prevented by the standard do not also present themselves here.

The Review Commission has held that for the standard to apply, cylinders must be "in storage". Grossman Steel & Aluminum Coprporation, 6 BNA OSHC 2020 (Review Commission 1978) citing United Engineers & Constructors, Inc., 3 BNA OSHC 1313 (No. 2414)(1975) appeal dismissed (3rd Cir. 1975). See also Williams & Davis Boilers, Inc., 8 BNA OSHC 2148 (79-3817)(1980). Although the cylinders in those cases were found not to be "in storage" because they were "available for use", I find that the facts in this case warrant the vacation of this item for the same reason. Respondent had a designated storage area for its full acetylene cylinders. The empty cylinder awaiting pick-up was not in storage for purposes of the standard's prohibition.

Accordingly, this item is vacated.

Item 10b: Alleged Serious Violation of 29 CFR §1910.252(a)(2)(iv)(c).

Section 1910.252(a)(2)(iv)(c) provides:

> **(iv) Oxygen storage...**
> (c) Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet or by a noncombustible barrier at least 5 feet high having a fire-resistance rating of at least one-half hour.

The Secretary contends that Respondent violated this provision by permitting an oxygen cylinder to be stored within 20 feet of a fuel gas cylinder in absence of a noncombustible barrier.

A partially full oxygen cylinder was stored 11 inches to two feet away from and acetylene cylinder (Tr. 6/8, p.131; 11/13, p.152, 153; 11/14, p.378; C-35). This location, Bray and Bellinger testified, was the normal storage area for the oxygen cylinder, which was chained to the wall (Tr. 11/14, p.377, 385; 11/16, p.705).

Newell testified that oxygen increases the fire hazard in the area potentially causing severe burns. In addition, if oxygen is stored near fuel gases, the risk of spontaneous organic burns could result (Tr. 6/8, p.132).

Respondent argues, again, that the acetylene cylinder was not "stored" in that location, but was only there briefly. Under these circumstances, however, the standard addresses the storage of oxygen cylinders. It is undisputed that this was the normal storage area for the oxygen cylinder. Because the oxygen was

stored in violation of the standard, I find that this item must be affirmed. See, Sea Land Associates, Inc., 8 BNA OSHC 2194 (79-4135)(1980).

Item 11b: Alleged Serious Violation of 29 CFR §1910.272(i)(3).

The Secretary alleges that in the milling area, compressed air lines were used to clean equipment which was not first turned off before cleaning was performed. The standard at section 1910.272(i)(3) provides:

> (i) Housekeeping...
> (3) The use of compressed air to blow dust from ledges, walls, and other areas shall only be permitted when all machinery that presents an ignition source in the area is shut-down, and all other known potential ignition sources in the area are removed or controlled.

Salinas testified that in the mill, sanitarians "blow down" a floor, using an air gun to blow dust from sifters, pipes, around and underneath motors and other areas when they vacuum the floor (Tr. 11/14, p. 336). This is done while the machinery in the mill is in operation. Salinas stated that he was never trained to shut machines off during blow-down operations (Tr. 11/14, p.337). Bellinger claimed that this procedure is followed in all other ConAgra plants as well (Tr. 11/15, p.620).

Newell testified that this practice is dangerous, causing combustible dust to be blown into the atmosphere and setting the scene for an explosion in the presence of electrical ignition sources such as sparks from machines[11](Tr. 6/9, p.6). Newell did

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[11] As stated previously, the quantity of flour dust necessary to meet the lower explosive limit for dust is 50-60 grams per cubic meter (Tr. 11/13, p.156).

not observe the blow-down operation nor did he see any arcs or sparks during his inspection (Tr. 11/13, p.158).

In defense of its housekeeping practice, ConAgra submitted correspondence concerning OSHA's interpretation standards for grain handling facilities (R-13, R-14, R-15). In a paragraph from a letter from John A. Pendergrass, Assistant Secretary for the Occupational Safety and Health Administration, he expresses OSHA's intent with respect to section 1910.272(i)(3):

> It is OSHA's position that all equipment and machinery, including equipment used in milling flour, can be a potential ignition source in grain handling facilities. The Agency's intent is to assure that such potential ignition sources are controlled during "blow-down" operations. If an effective preventive maintenance program is implemented; and electrical wiring, motors, and machinery are in compliance with 29 CFR Part 1910, Subpart S and other appropriate provisions, OSHA would consider these to be adequate controls. Under these circumstances "blow-down" operations would be permitted when equipment and machinery are in operation.

Respondent submits that it had an effective preventive maintenance program at the Martins Creek facility and that the electrical wiring, motors and machinery were in compliance with 29 CFR §1910 subpart S (Tr. 11/16, p.709). Finally, that there was no evidence to suggest that there would be enough dust in the atmosphere to support combustion.

The Secretary disagrees with Respondent's assessment of its preventive maintenance program. She points to item six of Other-Than-Serious Citation Number 2 of this case to show that certification records were not maintained on all equipment as required. This record, she correctly argues, is part of the preventive maintenance program. Thus, she contends, Respondent

was not in a position to claim that it had effected alternative means of compliance with the standard.

Bellinger testified that ConAgra has a "vast preventive maintenance program" for "greasing, lubrication, for regular inspections of a whole host of equipment in that flour mill." He continued to describe that the Martins Creek facility is "down" four hours every Monday to repair malfunctioning equipment which is placed on a list on Friday by the miller and maintenance superintendent (Tr. 11/16, p.708, 709). Bellinger stated that this is a program which is committed to writing and that employees understand that they are to periodically inspect certain equipment (Tr. 11/16, p. 711). There was no written plan for regular inspections of these items and no written program or other evidence that such a program existed was produced.

Respondent did not establish that it effected alternative means of compliance with this provision. In light of the fact that its preventive maintenance program was the subject of a citation in this case (see, infra), its adequacy, in absence of any proof that it exists, has not been verified.

Accordingly, this item is affirmed.[12]

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[12] Respondent contended that section 1910.272(i)(3) was stayed at the time of the inspection. It submitted the Preamble to the standard which stated, "EFFECTIVE DATE: This final rule becomes effective March 30, 1988, except for the information collection requirements contained in §1910.272(d) and (i) which are subject to Office of Management and Budget approval...." (R-16). As Newell testified, and as the Secretary correctly argues, this aspect of part 272(i) does not impose an information gathering enterprise on the employer. Thus, this stay was inapplicable to this part of the cited standard.

Items 12(a), 12(b) and 12(c): Alleged Serious Violations of 29 CFR §1910.304(f)(5)(v).

The Secretary alleges that with respect to three items in Martins Creek facility, Respondent failed to electrically ground in violation of 29 CFR §1910.304(f)(5)(v). This standard provides:

> (f) Grounding...
> (5) Supports, enclosures, and equipment to be grounded---
> (v) Equipment connected by cord and plug. Under any of the conditions described in paragraphs (f)(5)(v)(A) through (f)(5)(v)(C) of this section, exposed non-current-carrying metal parts of cord-and plug-connected equipment which may become energized shall be grounded.

Item 12(a): the pedestal fan.

Newell testified that the metal chassis of a pedestal fan located in the work area of the packing room was not electrically grounded. At the time of the inspection, the plug did not have a ground prong and the third prong of the plug was broken off (Tr. 6/9, p.10; 11/13, p. 165, 172). Smith testified that since the switch on the fan had been broken, they would activate the fan by plugging and unplugging the fan into the electric socket (Tr. 11/15, p. 497, 524).

Newell measured the electric potential of the fan with a tif-tic tester and determined that if an electrical short were to occur, the chassis could be energized and present a shock hazard (Tr. 6/9, p.10,11; 11/13, p.204).

Bellinger agreed with Newell that the concrete floor in the packing room was a grounded surface (Tr. 11/13, p. 201; 11/16, p. 712). He considered the area of the packing room in which the pedestal fan was located to be an unclassified area (Tr. 11/15,

p. 621). Earlier, however, he agreed with Newell and Nagy that this was a Class II, Division 2 location (see discussion in Item 3, supra).

I find that this equipment was not grounded in accordance with (f)(5)(v)(A), because it is located in a "hazardous (classified) location", and (f)(5)(v)(C)(5), because it is a "[c]ord and plug-connected [appliance] used...by employees standing on the ground...." Accordingly, this item is affirmed.

Item 12(b): the time clock.

A time clock located in the milling area office was used by employees to punch in and out of daily. The metal parts of the chassis on the clock were exposed and the clock had a two-prong plug that was not grounded at the time of the inspection (Tr. 6/9, p.13, 14,16). Newell again measured with a tif-tic tester to determine the risk of shock.

While Newell considered this area to be a hazardous location, Bellinger disagreed. The office is separated from the mill by a wall, therefore, it cannot be considered a Class II, Division 2 location, he argues (Tr. 11/13, p.203,204; 11/15, p. 622; 11/16, p.713).

Respondent is correct in noting that this is not a classified location and therefore, cannot come within the hazardous location restriction. The time clock must be grounded, however, according to subpart (C)(5): the clock is a "cord and plug-connected appliance used...by employees standing on the ground." Since this appliance exposed employees to the risk of

electric shock, I find that this item must be affirmed.

Item 12(c): the farinograph.

Newell observed a farinograph in the plant laboratory which is used for testing grain. The machine was not electrically grounded and the counter upon which the machine was situated was wet due to the mixing of water and grain on top of it. This wetness, he testified, provided a source to ground, exposing an employee to electric shock if the machine were to experience an electrical short (Tr. 6/9, p.17-20). Later, however, Newell contradicted his testimony on direct, stating that he saw the water inside the machine (which was appropriate), but did not recall any on the table or floor (Tr. 11/13, p.176).

Respondent argues that the counter was not a wet location as defined in section 1910.399(a)(78)(i) or (iii).[13] The Secretary failed, however, to meet her burden of proof as to this item. Newell's inconsistent testimony failed to establish that the farinograph was in a wet location as provided by the standard. Accordingly, this item is vacated.

Other than Serious Citation Number 2

Item 2: Alleged Violation of 29 CFR §1910.24(h).

The standard at 29 CFR §1910.24(h) provides:

(h) **Railings** and handrails. Standard railings shall

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[13] A "wet location" is defined as "Installations underground or in concrete slabs or masonry in direct contact with the earth, and locations subject to saturation with water or other liquids, such as vehicle-washing areas, and locations exposed to weather and unprotected."

be provided on the open sides of all exposed stairways an stair platforms. Handrails shall be provided on at least one side of closed stairways preferably on the right side descending. Stair railings and handrails shall be installed in accordance with the provisions of §1910.23.

Newell observed that fixed industrial stairs in the maintenance shop were not fitted with handrails presenting the danger of falling (Tr. 6/9, p.27; C-36).

Bray supporting this testimony and noted that this stairwell was used daily by maintenance personnel (Tr. 11/14, p.378, 379).

The unrebutted testimony established a violation of this item. It is therefore affirmed.

Item 3: Alleged Violation of 29 CFR §1910.212(b).

The standard at 29 CFR §1910.212(b) provides:

(b) **Anchoring fixed machinery.** Machines designed for a fixed location shall be securely anchored to prevent walking or moving.

Newell observed, and Bray confirmed, that a drill press located in the maintenance shop was not anchored. Such a condition, Newell stated, created the danger of this equipment "walking" as it vibrates, possibly tipping and falling over. He claimed that the drill press is top-heavy and can easily tip over (Tr. 6/9, p.34; 11/13, p.181). Through employee interviews, he learned that this machine was permanently wired with a flexible cord of limited length and is normally anchored to the floor with lag bolts or affixed to a heavy plate (Tr. 6/9, p.34, 35, 37).

Bray testified that several times a week the press is used to drill holes in metal (Tr. 11/14, p.380). He and Bellinger stated that while it was not anchored, it is incapable of

"walkin" by itself and can only move if pushed by the operator. Bray explained that since it is blocked on both sides, only the operator has access to the machine (Tr. 11/14, p. 381, 386, 389; 11/15, p.626).

The Secretary claims that a hazard is presumed in this case by noncompliance. Ormet Corporation, 9 BNA OSHC 1060 (Review Commission, 1980). Since the press has three holes in its base, she argues, it was designed to be anchored to the floor, thus, while the difficulty of movement reduces the hazard, the hazard continues to exist and must be abated. I agree. The machine was designed for a fixed location. Accordingly, the item is affirmed.

Item 4: Alleged Violation of 29 CFR §1910.215(b)(9).

The standard at 29 CFR §1910.215(b)(9) provides:

> (b) Guarding of abrasive wheel machinery---
> (9) Exposure adjustment. Safety guards of the types described in subparagraphs (3) and (4) of this paragraph, where the operator stnds in front of the opening, shall be constructed so that the peripheral protecting member can be adjusted to the constantly decreasing diameter of the wheel. The maximum angular exposure above the horizontal plane of the wheel spindle as specified in paragraphs (b)(3) and (4) of this section shall never be exceeded, and the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch.

Newell testified that in the maintenance shop, a baldor pedestal abrasive wheel grinder used to dress metal had an excessive gap of one half inch between the abrasive wheel and the tongue guard (C-41). Newell claimed that a work particle or broken wheel fragment could exit from the top of the wheel and

strike an operator (Tr. 6/9, p.40).

Bray testified that he was not trained in the use of tongue guards on a bench grinder, a piece of machinery which is used daily. (Tr. 11/14, p. 382, 388).

Respondent provided no testimony on this issue. Accordingly, this item is affirmed.

Item 6: Alleged Violation of 29 CFR §1910.272(l)(3).

The standard at 29 CFR §1910.272(l)(3) provides:

> (l) Preventive maintenance...
> (3) A certification record shall be maintained of each inspection, performed in accordance with this paragraph (l), containing the date of the inspection, the name of the person who performed the inspection and the serial number, or other identifier, of the equipment specified in paragraph (l)(l)(i) of this section that was inspected.

The equipment in section (l)(l)(i) includes:

> (i) Regularly scheduled inspections of at least the mechanical and safety control equipment associated with dryers, grain steam processing equipment, dust collection equipment including filter collectors, and bucket elevators;....

Newell testified that he was informed by plant manager Jackson during his inspection that no certification records were maintained on the equipment (Tr. 6/9, p. 52, 53). While the record revealed that an elevator inspection was performed on April 18, 1988, other equipment was not inspected, including, Newell stated, roll grinders and dust collection equipment (Tr. 11/13, p.187).

Bellinger asserted that the only certification record required under the standard is for the bucket elevator which, he claimed, is regularly filled out weekly and kept on file (Tr.

11/16, p. 722; R-15; R-16). Respondent points to correspondence from Mr. Pendergrass expressing OSHA's intent with respect to the standard (R-15).

The Secretary argues that Pendergrass' April, 1988 letter merely iterates that certain dust collection systems are not covered by 29 CFR §1910.272(k) but in no way exempts ConAgra dust collection systems from the inspection certification requirements. Moreover, she argues, ConAgra has failed to demonstrate the certification of inspections of both its hammer mills and bucket elevator.

Respondent failed to demonstrate that certification records were maintained for its hammer mills, grain steam processing equipment and dust collection equipment. The Secretary's interpretation of Pendergrass' correspondence is correct. Accordingly, this item is affirmed.

PENALTIES

Having assessed the factors contained in sections 17(j) of the Act, 29 U.S.C. §661(i), I find that, giving due consideration to the size of the employer's business, the gravity of the violations, the good faith of the employer, and the history of previous violations, that the penalties contained in this order are appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law contained in this opinion are incorporated herein in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

In view of the foregoing, good cause appearing therefore, it is ORDERED that:

(1) The allegation of serious violation by this respondent of the general duty clause, section 5(a)(1) of the Act, found in item 1 of serious citation number one is vacated.

(2) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.132(a) found in item 2a(a) of serious citation number one is affirmed, and of the standard set forth at 29 CFR §1910.151(c) found in item 2b of serious citation number one is affirmed, and a penalty of $200.00 assessed herein to reflect both items.

(3) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.132(a) found in item 2a(b) of serious citation number one is vacated.

(4) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.178(c)(2)(vi) found in item 3 of serious citation number one is affirmed and a penalty of $280.00 assessed herein.

(5) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.178(g)(11) found in item 4 of serious citation number one is vacated.

(6) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.212(a)(1) found in item 7a(a) of serious citation number one is vacated.

(7) The allegation of serious violation by this respondent

of the standard set forth at 29 CFR §1910.212(a)(1) found in item 7a(b) of serious citation number one is affirmed as other-than-serious with no penalty assessed herein.

(8) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.212(a)(1) found in item 7a(c) of serious citation number one is vacated.

(9) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.212(a)(1) found in item 7b of serious citation number one is affirmed and a penalty of $100.00 assessed herein.

(10) The allegations of serious violations by this respondent of the standards set forth at 29 CFR §1910.219(c)(2)(1) and 29 CFR §1910.219(d)(1) found in items 8a, 8b(a), and 8b(b) of serious citation number one are affirmed and a penalty of $100.00 assessed herein to reflect all three items.

(11) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.219(d)(1) found in item 8b(c) of serious citation number one is affirmed as de minimis with no penalty assessed herein.

(12) The allegations of serious violations by this respondent of the standards set forth at 29 CFR §1910.219(e)(1)(i) and 29 CFR §1910.219(e)(3)(i) found in items 8c(a), 8e(a), and 8e(b) of serious citation number one are affirmed and a penalty of $100.00 assessed herein to reflect all three items.

(13) The allegation of serious violation by this respondent

of the standard set forth at 29 CFR §1910.242(b) found in item 9 of serious citation number one is affirmed and a penalty of $200.00 assessed herein.

(14) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.252(a)(2)(ii)(b) found in item 10a of serious citation number one is vacated.

(15) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.252(a)(2)(iv)(c) found in item 10b of serious citation number one is affirmed and a penalty of $200.00 assessed herein.

(16) The allegation of serious violation by this respondent of the standard set forth at 29 CFR §1910.272(i)(3) found in item 11b of serious citation number one is affirmed and a penalty of $200 assessed herein.

(17) The allegations of serious violations by this respondent of the standard set forth at 29 CFR §1910.304(f)(5)(v) found in items 12a, 12b of serious citation number one are affirmed, and of the standard set forth at 29 CFR §1910.304(f)(5)(v) found in item 12c of serious citation number one is vacated and a penalty of $450 assessed herein to reflect both items.

(18) The allegation of other-than-serious violation by this respondent of the standard set forth at 29 CFR §1910.24(h) found in item 2 of other-than-serious citation number two is affirmed with no penalty assessed herein.

(19) The allegation of other-than-serious violation by this

respondent of the standard set forth at 29 CFR §1910.212(b) found in item 3 of other-than-serious citation number two is affirmed with no penalty assessed herein.

(20) The allegation of other-than-serious violation by this respondent of the standard set forth at 29 CFR §1910.215(b)(9) found in item 4 of other-than-serious citation number two is affirmed with no penalty assessed herein.

(21) The allegation of other-than-serious violation by this respondent of the standard set forth at 29 CFR §1910.272(1)(3) found in item 6 of other-than-serious citation number two is affirmed.

IT IS SO ORDERED.

DAVID G. ORINGER, Judge, OSHRC

Dated: _____
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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NOTICE OF DECISION

IN REFERENCE TO:

Secretary of Labor v. CON AGRA FLOUR MILLING COMPANY
OSHRC Docket No. 88-1250

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on July 5, 1990. The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless within that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.

2. Any party adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. A petition may be filed with this Judge within twenty (20) days from the date of this notice. Thereafter, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. See Paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health Review Commission
1825 K Street, N.W., Room 401
Washington, D.C. 20006

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. § 2200.91 (51 Fed. Reg. 32026, September 8, 1986). (Part of Rule 91 is attached hereto).

DAVID G. ORINGER
Judge, OSHRC

Dated: June 14, 1990
Boston, Massachusetts

§ 2200.91— Discretionary review; Petitions for discretionary review; Statements in opposition to petitions.

(a) Review discretionary. Review by the Commission is not a right. A Commissioner may, as a matter of discretion, direct review on his own motion or on the petition of a party.

(b) Petitions for discretionary review. A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review. Discretionary review by the Commission may be sought by filing with the Judge a petition for discretionary review within the twenty-day period provided by § 2200.90(b). Review by the Commission may also be sought by filing directly with the Executive Secretary a petition for discretionary review. A petition filed directly with the Executive Secretary shall be filed within 20 days after the date of docketing of the Judge's report. The earlier a petition is filed, the more consideration it can be given. A petition for discretionary review may be conditional, and may state that review is sought only if a Commissioner were to direct review on the petition of an opposing party.

* * * *

(d) Contents of the petition. No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: Whether the Judge's decision raises an important question of law, policy or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. A petition shall not incorporate by reference a brief or legal memorandum. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) When filing effective. A petition for discretionary review is filed when received. If a petition has been filed with the Judge, another petition need not be filed with the Commission.

(f) Failure to file. The failure of a party adversely affected or aggrieved by the Judge's decision to file a petition for discretionary review may foreclose court review of the objections to the Judge's decision. See Keystone Roofing Co. v. Dunlop, 539 F.2d 960 (3d Cir. 1976). (See other Side).

(g) Statements in opposition to petition. Statements in opposition to petitions for discretionary review may be filed in the manner specified in this section for the filing of petitions for discretionary review. Statements in opposition shall concisely state why the Judge's decision should not be reviewed with respect to each portion of the petition to which it is addressed.

(h) Number of copies. An original and three copies of a petition or a statement in opposition to a petition shall be filed.

Employer

Dean G. Kratz, Esq.
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Suite 1100 One Central Park Plaza
Omaha, Nebraska 68102

I hereby certify that a copy of the decision in this case has been served by First Class Priority Mail upon the parties whose names and addresses appear on this notice.

Boston, Linda M. Quinn

June 14, 1990 (date)

Regional Solicitor

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Regional Solicitor
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 88-1250
CON AGRA FLOUR MILLING CO.,	:	
Respondent.	:	

DECISION

BEFORE: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

Respondent, Con Agra Flour Milling Company ("Con Agra"), was issued citations alleging serious and other than serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), at its flour-milling facility in Martins Creek, Pennsylvania. The issue before us is whether Review Commission Administrative Law Judge David G. Oringer erred in (1) affirming seven items of the serious citation, (2) finding another item of that citation to be *de minimis* in nature, and (3) affirming one item of the other than serious citation. For the reasons that follow, we affirm the judge's decision in part and reverse in part.

1. Citation No. 1, Item 2a(a), 29 C.F.R. § 1910.132(a) and Citation No. 1, Item 2b, 29 C.F.R. § 1910.151(c)[1]

[1]The standards provide:

> **§ 1910.132 General requirements.**
> (a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

(continued...)

Facts

1. Citation No. 1, Item 2a(a), Personal Protective Equipment

Con Agra uses electrically-powered forklifts at the Martins Creek facility. One employee regularly services the batteries of these forklifts, recharging them daily and checking the level of the battery fluid ("electrolyte") once a week. When the level of the electrolyte is low, this employee adds water using a funnel. While Con Agra's employees do not handle electrolyte, the Secretary's inspector, compliance officer Donald R. Newell, believed that when water is added to electrolyte, the two liquids become mixed and distributed evenly, and as a result the funnel will necessarily come into contact with electrolyte. In Newell's opinion, it was "possible" that electrolyte could drip on an employee when he removed the funnel. Electrolyte could also splash on an employee when he removed the caps from the battery, and Newell believed that the bubbles which normally form in the electrolyte when a battery is recharged could escape and get on an employee. Newell felt that Con Agra's employees should be protected by goggles or a face shield and by gloves, arm gauntlets, and an apron. He stated that he had seen employees of other companies, such as Lehigh Valley Dairies, Bethlehem Steel, and United States Steel, using such equipment when adding water and checking batteries.

Robert J. Farronato, a safety supervisor in the OSHA area office, also conducted an inspection of the facility. Farronato was admitted as an expert in forklifts and testified that there is a hazard of a splash when water is added to the battery through the funnel and when the funnel is removed. He explained that there is a "possibility" that electrolyte might remain in the funnel when it is removed and that because a battery "probably" is filled to the top, there would "always" be "a little bit" in the funnel unless the person filling the battery was very careful. Farronato recommended the same types of protective equipment

---

[1](...continued)

§ 1910.151 Medical services and first aid.

. . . .

(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.

as did Newell. Farronato stated that when he was employed as a forklift operator, he had used eye protection and rubber gloves when filling batteries. Farronato also stated that he had seen protective equipment in use at two other companies in addition to Bethlehem Steel. Neither Newell nor Farronato, however, observed any batteries being filled at the time of their inspections, and they did not determine whether there had ever been any injuries to Con Agra's employees from this operation.

Philip Ascani, who had been servicing batteries for the seventeen years he had been employed by Con Agra as a forklift operator, testified that he had never had any electrolyte splash or spill on him, nor had it ever dripped off a funnel. Ascani explained that the funnel did not leave any space for water to splash out from around the funnel and that he only poured enough water into the battery to cover the battery elements themselves, about an inch and a half below the top of the battery. Ascani stated that he did not think that liquid could escape out of the battery unless the battery were overfilled, and even in that event, liquid would not splash out but would simply flow down the sides of the battery. Wayne R. Bellinger, Con Agra's corporate safety director, stated that he had observed employees adding water to batteries in Con Agra's various facilities. Bellinger denied that use of a funnel could produce any splashing. He stated that he had never seen any liquid splash or drip on an employee, nor did he know of any injuries resulting from this process in any Con Agra facilities. Because Con Agra's employees only added water and did not directly handle electrolyte, Bellinger felt that protective equipment was not needed.

2. Citation No. 1, Item 2b, Emergency Eyewash or Eyeflush Facility

Newell regarded an emergency eyeflush facility under section 1910.151(c) as a necessary "backup" in case the electrolyte containing sulfuric acid "would get past" the personal protective equipment required by section 1910.132(a) and onto an employee's body or into his eyes. The nearest flushing facility was in another building; in Newell's opinion, a facility would have to be located within 25 feet in order to be considered suitable under the standard.[2] Farronato also stated that an emergency eyewash with spouts to spray water

[2]A document introduced by the Secretary, National Safety Council Data Sheet 1-635-79, *Lead-Acid Storage Batteries* para. 53 (rev. 1979), specifies 25 feet as the maximum distance between a battery charging room and an eyewash facility.

directly into the eyes would be needed at a minimum and that a quick-drenching shower to wash down other parts of the body might be needed depending on exposure. According to Farronato, normally the equipment available is a dual purpose combination eyewash and shower. In the operation in question here, Farronato said he would recommend both the shower and eyewash, and he had seen such equipment in use in other companies in similar operations. Bellinger testified, however, as he had with respect to the allegation that employees should have worn protective equipment, that a quick-drenching facility was not necessary because employees were not exposed to corrosive material.

Judge's Decision and Parties' Contentions

The judge concluded that while there were no known accidents resulting from filling the battery, the hazard of contact with electrolyte was "possible," although unlikely. He determined that Con Agra had knowledge of a hazard in its facility requiring the use of personal protective equipment, citing *Cape & Vineyard Div., New Bedford Gas & Edison Light Co. v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975). In that case the court held that section 1910.132(a) is satisfied either by proof that an employer has actual knowledge that a practice is hazardous or by the "objective" test of whether a reasonably prudent person familiar with the circumstances of the industry would have protected against the hazard.

Similarly, the judge found a violation of section 1910.151(c) on the basis that the Secretary had shown "potential exposure" to a corrosive material.

Con Agra takes issue with this finding, contending that forklift operator Ascani is the employee most familiar with the circumstances of the industry under the test defined in *New Bedford Gas* and that his testimony clearly establishes that a reasonable person would not see a hazard requiring protective equipment in the circumstances here. In Con Agra's view, the judge's decision is contrary to Commission decisions involving section 1910.132(a), *Armour Food Co.*, 14 BNA OSHC 1817, 1987-90 CCH OSHD ¶ 29,088 (No. 86-247, 1990), and *General Motors Corp., GM Parts Div.*, 11 BNA OSHC 2062, 1984-85 CCH OSHD ¶ 26,961 (No. 78-1443, 1984) (consolidated), *aff'd*, 764 F.2d 32, 12 BNA OSHC 1377 (1st Cir. 1985). Con Agra notes that in *General Motors* the Commission relied on a low injury rate in finding that no hazard existed and asserts that the incidence of injury resulting from its process at issue here is even less than in *General Motors*. Con Agra reiterates that Ascani

stated that only spilling would occur if the battery were overfilled and disputes that the five other companies named by the compliance officers establish an industry-wide custom or practice to use protective equipment when adding water to lead storage batteries. Con Agra contends that the item alleging a violation of section 1910.151(c) is "closely related" to the section 1910.132(a) allegation and should be vacated for the same reasons: electrolyte has never spilled out of a battery, and employees only handle water, not electrolyte.

The Secretary agrees that an employer must have either actual or constructive knowledge of a hazard requiring protective equipment under section 1910.132(a) and, further, that constructive knowledge is determined under the reasonable person test. In concluding that a hazard was shown here, the Secretary contends that evidence showing a lack of injuries does not negate the existence of a hazard. The Secretary asserts that here the existence of a hazard is supported by (1) the testimony of experienced compliance officers that "numerous businesses" protect employees from electrolyte and (2) the documentary evidence, *see infra* note 4. This evidence, which shows that a hazard is known not only in the grain handling industry but also in the broader category of industry that services batteries generally, distinguishes this case in the Secretary's view from *General Motors* and *Armour Food*, where there was no evidence of industry practice to wear protective equipment. The Secretary also argues that unlike *Armour Food*, where employees testified that they did not perceive a hazard, here Ascani testified that exposure could occur if a battery was overfilled.

The Secretary contends that a violation of section 1910.151(c) is shown because it is undisputed that Con Agra's nearest flushing facility was in another building and because Con Agra does not assert that that facility was of the appropriate type.

Analysis

As the judge properly stated, the test for determining whether a hazard exists requiring personal protective equipment under general personal protective equipment standards such as section 1910.132(a) is whether the employer had actual notice of a need for protective equipment or whether a reasonable person familiar with the particular industry would recognize such a hazard. *Armour Food*, 14 BNA OSHC at 1820, 1987-90 CCH OSHD at p. 38,881. In this case, there is no evidence to show that Con Agra had

actual knowledge that the conditions warranted the use of protective equipment when its employees serviced the batteries, and the Secretary does not contend that a violation should be found on the basis of actual knowledge. In determining whether Con Agra should have been aware of a need to use protective equipment in the circumstances, we apply the well-established principle that a broad regulation such as section 1910.132(a) must be interpreted in the light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation. *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). *See Brennan v. OSHRC (Santa Fe Trail Transport Co.)*, 505 F.2d 869, 872-73 (10th Cir. 1974).

General Motors, on which Con Agra relies, involved a citation under section 1910.132(a) for failure of employees handling parts of various sizes and weights to wear foot protection. There had been five foot injuries in a 2½-year period. The inspector, a former corporate safety director with some familiarity but no first-hand experience with parts-handling facilities of the type at issue, testified that a person acquainted with the circumstances of the warehousing industry would have used safety shoes in those situations. He also stated that a hazard was evidenced by the injury rate, and he mentioned three employers who used safety shoes in warehouses. The employer presented two safety officials who opined that the injury record did not warrant protective equipment. In vacating, the Commission concluded that since the rate equated to 1.33 injuries per million parts handled, it was too low to give the employer actual notice that a hazard existed. The Commission further noted that of five employees who testified, only two wore safety shoes even after they had been injured, and most employees declined to wear them. The Commission specifically characterized employees as "those persons most clearly familiar with the industry." 11 BNA OSHC at 2066, 1984-85 CCH OSHD at p. 34,612. The appellate court affirmed the Commission's decision, essentially for the same reasons the Commission gave. The court noted that the Secretary's witnesses had considerably less experience with the automobile parts warehouse industry than did the employer's witnesses, and it reiterated that employees themselves are the persons most familiar with that industry.

In *Armour Food*, the Commission vacated a citation under section 1910.132(a) alleging employees were not wearing mesh gloves while sharpening the blades of a meat slicer. As is the case here, there were no injuries over an extensive period of time. Noting that blades were sharpened four times each day, the Commission analogized the injury rate to that in *General Motors*. Citing *General Motors* for the proposition that evidence of industry custom will aid in determining whether a reasonable person would see a hazard in a particular industry practice but is not determinative, the Commission found that the Secretary had introduced no evidence to show it is customary for mesh gloves to be worn in Armour's industry when slicer blades are sharpened.

Consistent with this precedent, we conclude that the Secretary failed to establish the existence of a hazard warranting personal protective equipment. Not only are Con Agra's witnesses more familiar with the manner in which Con Agra services its forklift batteries, but the Secretary's witnesses, Newell and Farronato, testified in a speculative and hypothetical fashion. Both of the Secretary's witnesses, neither of whom observed the batteries being filled, gave opinions as to ways in which a hazard could conceivably occur. The testimony of Con Agra's witnesses, having actual experience with the operation, indicates that the opinions of Newell and Farronato are not persuasive because they are not grounded in a realistic understanding of how Con Agra performs the operation. For example, Ascani testified that he never filled the battery more than an inch and a half below the top, thereby refuting Farronato's belief that the battery liquid could escape because the battery was filled to the top. Essentially, the Secretary's witnesses merely stated their supposition that a hazard could occur, whereas the testimony of Ascani and Bellinger convincingly establishes that there is no substantial likelihood or probability of an employee coming into contact with battery electrolyte based on the manner in which Con Agra's employees add water to the batteries.

Generally speaking, where employees testify from their own knowledge and experience on matters that pertain to their specific work activities, their testimony should be given greater weight than that of witnesses who do not have first-hand experience with

the operation in question. *General Motors*; *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726 (6th Cir. 1980); *Jefferson Smurfit Corp.*, 15 BNA OSHC 1419, 1421, 1992 CCH OSHD ¶ 29,551, p. 39,953 (No. 89-553, 1991). Furthermore, it is of no consequence that Farronato, who opined that a hazard could exist, was admitted as an expert. The testimony of an expert is not necessarily controlling even if it is unrebutted. *United States Steel Corp. v. OSHRC*, 537 F.2d 780 (3d Cir. 1976). In this case, moreover, the Secretary's witnesses did not give any opinion as to the likelihood of a hazard occurring. Accordingly, on that question, the testimony of Con Agra's witnesses is entitled to weight even though they were not admitted as experts. *Bay State Ref. Co.*, 15 BNA OSHC 1471, 1473, 1992 CCH OSHD ¶ 29,579, p. 40,022 (No. 88-1731, 1992). *See also Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. Unit B 1981).

The judge, in his decision, found that a hazard was only possible and not likely. Since a preponderance of the evidence supports that finding, we conclude that the judge erred in affirming the citation item with respect to section 1910.132(a). A violation of that standard cannot be founded on a mere unsubstantiated possibility that a hazard could occur. As the court stated in *Arkansas-Best Freight Systems v. OSHRC*, 529 F.2d 649, 655 (8th Cir. 1976), "the phrase 'hazards of processes or environment'. . . . must be read in the light of the objective test of foreseeability." *See Pratt & Whitney Aircraft v. Secretary of Labor*, 649 F.2d 96 (2d Cir. 1981), and *Pratt & Whitney Aircraft v. Donovan*, 715 F.2d 57 (2d Cir. 1983). In those decisions the Second Circuit considered section 1910.94(d)(7)(iii), a ventilation standard which, like section 1910.132(a), requires proof of the existence of a hazard. The court held that the Act "is intended to guard against significant risks, not ephemeral possibilities," 649 F.2d at 104, and that therefore the Secretary "must show more than the mere possibility of injury" and "must show the existence of conditions *likely to lead* to the [hazard]." 715 F.2d at 64, 65 (emphasis added). *See also Anoplate Corp.*, 12 BNA OSHC 1678, 1681-82, 1986-87 CCH OSHD ¶ 27,519, pp. 35,679-80 (No. 80-4109, 1986) (expressing agreement with the reasoning in *Pratt & Whitney* and applying a "significant risk" test to a

standard requiring proof of the existence of a "danger"); *cf. General Motors*, 764 F.2d at 35-36 (applying a "significant level of risk" test in determining whether an employer has actual knowledge of a hazard under section 1910.132(a)).

In addition to the evidence showing only a mere possibility that a hazard could exist, no employee had ever been injured when filling the forklift batteries. While the occurrence of an injury is not an essential element in establishing a violation, *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1098, 1980 CCH OSHD ¶ 24,979, p. 30,846 (No. 12470, 1980), the absence of any injuries is consistent with a finding that a reasonable person, considering all the circumstances, would not perceive a sufficient likelihood of a hazard to warrant the use of protective equipment. Although the refilling of batteries, which is performed weekly, is not as frequent or as intensive as the work activities at issue in *Armour Food* and *General Motors*, it still has been performed on a consistent and regular basis over an extended period of time. As the Commission stated in *Armour Food*, "[t]he evidence that no employee had been injured while sharpening the blades in over 20 years strongly suggests that no hazard was present." 14 BNA OSHC at 1820, 1987-90 CCH OSHD at p. 38,881.

Furthermore, we do not regard the Secretary's evidence regarding the custom and practice in other companies to indicate a need for the use of protective equipment in the circumstances here.[3] Newell referred to other companies that use protective equipment, but gave no opinion as to whether their circumstances were representative of the conditions in Con Agra's facilities. Farronato, the expert, testified likewise, but since he also stated that some companies did not use such protection, his testimony fails to show even that there is a general, consistent industry-wide practice. *Cf. Inland Steel Co.*, 12 BNA OSHC 1968, 1971-73, 1986-87 CCH OSHD ¶ 27,647, p. 35,998-36,000 (No. 79-3286, 1986) (in order to establish that the employer's industry recognizes a need for protective equipment, the

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[3]In most federal circuit courts, industry custom and practice is relevant to the reasonable person test but not dispositive. *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1992 CCH OSHD ¶ 29,770 (No. 90-998, 1992) (lead and partial dissenting opinion). As *Farrens* indicates, the Fifth and Eleventh Circuits require that in the absence of actual recognition of a hazard, an employer can only be required to implement the protective measures that are customary in its industry. This case does not arise in either of those circuits.

Secretary must show that the equipment is generally in use throughout the relevant industry under generally similar circumstances).[4]

We reach a similar conclusion with respect to the alleged violation of section 1910.151(c) for lack of an eyewash facility. As is the case under section 1910.132(a), this standard by its plain terms requires the Secretary to prove the existence of a hazard requiring the use of the protective measures specified, here quick-drenching or flushing facilities. The purpose of section 1910.151(c) is to protect employees who are exposed to corrosive chemicals by giving them a means to wash such chemicals from their eyes or body before they suffer injury. *Bridgeport Brass Co.*, 11 BNA OSHC 2255, 1984-85 CCH OSHD ¶ 27,054 (No. 82-899, 1984). As the judge correctly noted, whether there is a violation of this standard depends on the totality of the circumstances, including the nature and amount of the substance in question. *E.I. du Pont de Nemours & Co.*, 10 BNA OSHC 1320, 1325, 1982 CCH OSHD ¶ 25,883, p. 32,381 (No. 76-2400, 1982); *Gibson Discount Center*, 6 BNA OSHC 1526, 1978 CCH OSHD ¶ 22,669 (No. 14657, 1978). The judge, however, erred in finding that a violation can be found based solely on a "potential" hazard. The standard applies generally to all situations in which corrosive materials are used and does not specifically address battery charging. Accordingly, the Secretary must demonstrate that the employer is on notice of a need for a washing or flushing facility in the circumstances in

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[4]The Secretary introduced into evidence and the judge relied on two documents. The first, an operator's manual for the Hyster electric lift truck used by Con Agra warns that "[e]lectrolyte is very caustic and must be neutralized immediately." The second, National Safety Council Data Sheet 1-635-79, *Lead-Acid Storage Batteries* (rev. 1979) "discuss[es] the construction, use, and safe practices that should be followed when lead-acid storage is used for commercial and industrial purposes" and states that "[p]ersonnel should wear acid-resistant gloves, arm gauntlets, aprons, and face shields for proper eye protection." A similar instruction also appears in a third exhibit, a brochure from the Industrial Truck Division of Eaton Corporation, which is not mentioned either in the judge's decision or in the parties' submissions before us.

Like all evidence of industry custom or understanding, these documents are not controlling but are simply additional evidence to be considered as part of the entire record. *See Gold-Kist, Inc.*, 7 BNA OSHC 1855, 1859-60 (No. 76-2049, 1979) (standard using broad terms acquires meaning when read together with other codes or indicia of industry custom). Weighing these documents together with the other evidence showing only a remote possibility of a spill or other contact with electrolyte, we conclude that the documentary material stating that generally equipment should be used to protect against such contact does not indicate a need for protection in the particular circumstances here.

question. *See Hamilton Die Cast, Inc.*, 11 BNA OSHC 2169, 2172, 1984-85 CCH OSHD ¶ 26,983, p. 34,690 (No. 79-1686, 1984). *See generally Miami Indus.*, 15 BNA OSHC 1258, 1261-65, 1991 CCH OSHD ¶ 29,465, pp. 39,739-43 (No. 88-671, 1991), *aff'd in part without published opinion*, 983 F.2d 1067 (6th Cir. 1992). For the reasons discussed above, the mere possibility that battery electrolyte might splash onto an employee's body or into his eyes does not establish that a sufficient hazard existed to require a facility for washing or flushing the eyes or body. Since the Secretary did not satisfy his burden of proof, we vacate this citation item as well.[5]

2. Citation No. 1, Item 3, 29 C.F.R. § 1910.178(c)(2)(vi)(*a*)[6]

Facts

The allegations at issue in this item deal with the packing room, at the Martins Creek facility, where empty bags are filled with 50 to 100 pounds of flour from a hopper at the packing machine. A V-shaped conveyor then transports the filled bags in an upright position, across a scale where they are weighed, to a work station where the bags are sewn shut. The bags are then taken by a 3-foot-wide inclined flat belt conveyor to a height of 10 feet where they are deposited onto a level conveyor leading to an elevated device known as a palletizer

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[5]The parties dispute whether Con Agra's operation comes within the scope of an exception to the requirements of the standard set forth in an administrative interpretation by the Secretary which Con Agra introduced into evidence: OSHA Instruction STD 1-8.2, *29 CFR 1910.151(c), Medical Services and First Aid; 29 CFR 1926.50 and .51, Medical Service and First Aid, and Sanitation, Respectively; Applicable to Electric Storage Battery Charging and Maintenance Areas* (Mar. 8, 1982), 1 BNA OSHR Ref. File 21:8408-:8409. Since we conclude that Con Agra did not violate the standard because the Secretary failed to establish the existence of a hazard requiring an eyewash facility, we do not reach the question of whether Con Agra would have been exempted from complying with the standard if a hazard in fact were present.

[6]The standard provides:

> **§ 1910.178 Powered industrial trucks.**
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> . . . .
>
> (c) *Designated locations.*
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> . . . .
>
> (2) . . . .
>
> . . . .
>
> (vi)(*a*) Only approved power operated industrial trucks designated as EX shall be used in atmospheres in which combustible dust is or may be in suspension continuously, intermittently, or periodically under normal operating conditions, in quantities sufficient to produce explosive or ignitable mixtures, or where mechanical failure or abnormal operation of machinery or equipment might cause such mixtures to be produced.

which loads the bags onto pallets. The forklift used to deliver empty bags and remove full and damaged bags had an "E" classification, which is a designation assigned by independent testing laboratories such as Underwriter's Laboratories or Factory Mutual Engineering Corporation.[7]

Newell was not concerned about normal operations, but about the possibility that there could be an accidental accumulation of combustible dust. He observed that some bags of flour had broken as they were being taken to the palletizing area and noted that Con Agra had a separate pallet where the palletizer operator places damaged bags. He felt that combustible or ignitable dust could be produced if flour spilled from the hopper or the hopper conveyor, if a malfunction caused a discharge of dust into the air, if a bag fell off the conveyor and broke, or a damaged bag opened. If the concentration of dust in the air reached the "lower explosive limit" of 50 to 60 grams of dust per cubic meter of air, it could then be ignited by the "non-standard" electrical circuitry in the truck, causing an explosion. Newell conceded, however, that he did not know that any malfunctions had ever occurred.

John Nagy, a consultant with an extensive background as a research physicist in the hazards of dust explosions, testified for the Secretary as an expert in that field. Having visited the packing room, Nagy testified that he found it "quite clean" with a "very limited" quantity of dust in comparison to the average manufacturing plant. Nagy also testified,

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[7]Section 1910.178(a)(7) provides that "[a]s used in this section, the term, *approved truck* or *approved industrial truck* means a truck that is listed or approved for fire safety purposes for the intended use by a nationally recognized testing laboratory, using nationally recognized testing standards."

Section 1910.178(b) describes various designations of electrically-powered industrial trucks. Type E trucks have "minimum acceptable safeguards against inherent fire hazards." Section 1910.178(b)(4). The ES, EE, and EX designations in that order have increasingly greater fire protection, based on the quality of the enclosures for the electrical circuitry. For example, an ES type truck, unlike a Type E, is designed to eliminate emission of sparks and to have lower surface temperatures. Section 1910.178(b)(5). Table N-1 of section 1910.178 describes hazardous locations by class and division within class but also by groups within classes as a subcategory of class. Class II locations "are hazardous because of the presence of combustible dust"; within this class are three "groups" of dust: Group E (metal dust), Group F (coal dust and coke dust), and Group G ("[g]rain dust, flour dust, starch dust, organic dust"). According to this table, type E trucks are not permitted in any Class II location.

Newell opined that the packing room was a Class II, Division 2 area and that the truck was not suitable for this location. Bellinger agreed that areas within the packing room around the packing machine, the sewing machine, and the conveyor would be Class II, Division 2 locations.

however, that there is "always a potential" for dust to reach an explosive concentration. He testified that a possibility of dust dispersal existed, if, for example, an employee filling a bag did not shut off the flow of grain when the bag was full, a bag was not sewn properly or was defective, or a bag was dropped or torn. Nagy also stated that the forklift itself could cause dust to be dispersed. Nagy did not observe the forklift in operation, however.

Based on his background and experience, and taking into consideration the dimensions of the packing room, Nagy estimated that a concentration of dust sufficient to cause an explosion would require that approximately 200 pounds of flour dust be dispersed evenly throughout the entire room. However, Nagy testified, it is not necessary for the entire packing room to be evenly filled with dust in order for there to be a fire hazard if a source of ignition were present. For instance, 5 to 10 pounds of dust dispersed through a volume of 1000 cubic feet could cause a flame, and 50 pounds of dust would fill three-quarters of the packing room with flame if ignited. An explosion resulting from a limited amount of dust dispersion would not be very forceful and would cause only minimal damage, but the temperature of burning dust would be high enough to cause serious injury. Nagy stated that it is not uncommon for injuries from flour dust flame to be fatal, depending upon a person's position within the dust cloud. Someone in the middle of a dust cloud in the packing room would probably be severely burned even if the cloud did not fill up the entire room. In his opinion, if there were a source of ignition on the forklift, approximately 5 to 10 pounds of dust dispersed around the forklift would cause enough of a flame to seriously or possibly fatally injure an employee.

An employee, James E. Smith, testified for the Secretary that he had seen bags fall and break, spreading dust out on the floor and producing a "little cloud" of dust about 3 feet high which remained suspended in the air for less than a minute before it fell to the floor. Nagy conceded that normally "most" of the dust would drop immediately to the floor if a bag broke rather than being dispersed in the air but insisted that dispersal could occur if a bag fell from the elevated conveyor and tore open by striking the side of the equipment before it reached the floor or if a bag were open or became torn while traveling on the conveyor. Ascani, however, testified that bags no longer fell off the conveyor because two years previously (about five months prior to the inspection) Con Agra had installed railings

along the conveyor and that at the time of the inspection, Con Agra had no problem with bags falling.

Smith testified that the only equipment dealing with dust that has ever malfunctioned is a "bindicator" that regulates the flow of flour into the hopper that supplies the packing machine. According to Smith, there have been four or five times during his fifteen years of employment when this bin has overflowed, spilling between 3000 and 4000 pounds of flour and causing the room to fill up with a cloud or fog of dust, during which time the employees usually leave the room until the dust settles. The most recent such overflow was within the past two years, or not earlier than November 1987, five months before the inspection. Bellinger, however, did not believe that a malfunction could result in any substantial quantity of dust escaping. Bellinger observed that normally a bag is in place at the packing machine and that even if a bag were missing, which is "extremely unlikely," the bagger operator can immediately shut off the machine. Therefore, he testified, the packing machine could not malfunction in any way that would result in more than the contents of one bag, 100 pounds of flour, falling on the floor. In the event that were to occur, the amount of dust dispersed into the air would be the same as that caused by a bag falling and breaking open. Most of the dust would stay on the floor; the rest would rise 2 or 3 feet before sinking back down. Bellinger also could not conceive of any abnormal condition that would form a dense cloud of dust. Bellinger stated that the overflows Smith described were not due to a defective bindicator but to a malfunction in the blender and that that defect had been corrected at least for the past two years by additional safety devices on the flour stream. At the time of the inspection, it would not have been possible for flour to spill out of the hopper in the manner Smith described unless all three new safety devices were to malfunction simultaneously.

Judge's Decision and Parties' Contentions

The judge concluded that the Secretary had satisfied his burden of proof because (1) Nagy testified that 5 to 10 pounds of dust in a localized area around the forklift would be sufficient, (2) Smith had observed the room become foggy or cloudy from dust accumulations, and (3) Bellinger did not "deny" that the lower explosive limit could be achieved in a "localized area." The judge concluded that the weight of the evidence showed that the

amount of dust discharged into the air on infrequent occasions was sufficient to establish a violation of the standard.

The Secretary argues that Nagy's testimony, as corroborated by Smith, establishes that an explosion as well as fire hazard existed and that Bellinger's testimony also is consistent with Nagy's opinion that combustible concentrations of dust could exist in "localized areas." Con Agra contends that Bellinger's testimony, taken in its entirety, indicates that Bellinger did not believe that there would ever be enough ambient dust to present a hazard and that Nagy's testimony is not "undisputed," as the Secretary claims.

Analysis

There is no dispute that the forklift did not have the rating required by the standard to ensure that the forklift would not be capable of igniting combustible concentrations of dust.[8] The issue before us is whether the Secretary established that such concentrations might be produced by "mechanical failure or abnormal operation of machinery or equipment." Nagy's testimony that a combustible concentration of dust would exist if as little as 5 to 10 pounds of dust were dispersed around the forklift is unrebutted. However, the Secretary's evidence showing that there could be conditions that would cause a dispersal of dust in the air sufficient to create a combustible concentration suffers from the same deficiency as discussed in the previous items: it is hypothetical, speculative, and rebutted by

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[8]We reject Con Agra's contention that the citation should be vacated because Bellinger testified that the forklift complied with the specifications set forth in the electrical standards in Subpart S of Part 1910, specifically the "Design Safety Standards for Electrical Systems" and section 1910.307, which is entitled "Hazardous (classified) locations." The hazard at issue here is the operation of an industrial truck in combustible dust atmospheres. As the judge correctly pointed out, section 1910.178 is the standard more specifically applicable to that hazard. *See Bratton Corp.*, 14 BNA OSHC 1893, 1895, 1987-90 CCH OSHD ¶ 29,152, p. 38,991 (No. 83-132, 1990). Section 1910.178(c)(2)(vi)(*a*) does not require proof that a forklift presents a source of ignition but rather presumes that a forklift not properly rated is hazardous when a combustible concentration of dust is present.

Although it is not necessary to our disposition, we also note that Con Agra erroneously argues that there is a distinction between a forklift which presents a source of ignition to cause a fire and one which constitutes a source of ignition for purposes of causing an explosion. That contention results from a misunderstanding of the record and the judge's decision. The record shows that whether a fire or an explosion will result from the ignition of combustible dust depends on the manner in which the dust is dispersed and not on the nature of the ignition source presented.

the testimony of Con Agra's personnel who are familiar with the day-to-day operations in the plant.

The testimony of Ascani and Bellinger shows that Con Agra had taken effective measures to prevent bags from falling and breaking and machinery from malfunctioning and these measures were in effect at the time of the inspection.[9] Smith, in fact, was the only witness who explicitly stated that malfunctions had occurred, and he testified that the most recent malfunction occurred before the inspection and two years prior to the hearing. His testimony, therefore, corroborates Bellinger's testimony that corrective measures had been implemented for at least a 2-year period. Nagy also agreed that generally speaking, dust would not be dispersed even if a bag did break open, but claimed that dispersal could occur if a bag opened while it was traveling on the conveyor. However, there is no evidence to support Nagy's supposition that there are any devices on the conveyor that could tear a bag. While the record does show that bags do get damaged, there is no specific showing of how that damage occurred or that such damage ever caused an airborne dispersal of dust. Accordingly, we conclude that the Secretary has failed to meet his burden of proof and vacate this citation item.[10]

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[9]Under section 9(c) of the Act, the Secretary may allege that the violation occurred up to six months prior to the citation. Here, however, the citation and complaint specifically allege that the violation occurred on the inspection date, April 12, 1988.

[10]We find it unnecessary to address, and we express no opinion on, Con Agra's remaining contentions that (1) the standard at issue is invalid because it delegates the authority to create legally binding requirements to private testing laboratories and (2) the Secretary in a prior settlement agreement of other citations issued to Con Agra had agreed that operation of a forklift in the packing room was not hazardous.

3. Citation No. 1, Item 7a(b), 29 C.F.R. § 1910.212(a)(1)[11]

Facts

This item concerns the inclined conveyor in the packing room. Newell observed an unguarded idler roller located about 3 to 4 feet above the floor on the underside of this conveyor, on the conveyor return belt. The record establishes that occasionally bags will get turned sideways on the conveyor and have to be straightened to prevent jamming the conveyor. Smith testified that when straightening the bags employees would come within 1 to 2 feet of the unguarded roller. Newell testified that this roller was 4 feet from the operator of the sewing machine and that the operator could reach over from his work station to straighten a bag. Newell also felt that employees could be exposed as they walked alongside the conveyor when exiting the room, although he conceded that the aisle was 10 to 12 feet wide and that the employees were not required to walk "close to" the roller. Smith stated that employees normally would walk by no closer than 4 to 6 feet from the conveyor, but he had, albeit infrequently, seen employees walk right next to the conveyor and cross under it near the roller while it was running. Smith also stated that a cleaning employee normally would sweep the floor within 2 or 3 feet of the idler roller and would have occasion to cross underneath it while the conveyor is running.

Smith, however, did not consider the roller hazardous; the conveyor return belt is loose, and Smith did not think there would be any injury if someone put his hand under the belt at the roller. Bellinger likewise testified that there is slack in the belt and that an employee's hand could not be drawn into the roller. In fact, Bellinger had placed his own hand in the area of the roller without any injury. Bellinger also stated that both the metal structure that supports the conveyor and the conveyor itself constitute a barrier to contact

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[11]The standard provides:

> **§ 1910.212 General requirements for all machines.**
>
> (a) *Machine guarding*—(1) *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.

with the roller. While Smith did not know whether an employee could get his hands into the roller, he believed it would be difficult to reach in there and saw no reason for an employee to do so. Smith stated that he had never known anyone to get his hand caught in the roller, and did not believe that someone would accidentally get caught if he lost his balance; he felt that an employee would first grab the support structure. Newell, however, denied that this support would act as a barrier between an employee and the roller.

Farronato testified that the likelihood that an employee would get caught in the nip point would depend on the speed of the belt and whether it was loose or tight. Farronato did not know specifically whether it was loose, but he observed no sagging in the belt which would indicate looseness. He gave the following description of the speed: "[I saw it running at] a brisk speed. It was running slowly."

Newell concluded that if an employee caught a portion of his body, his hands and arms or perhaps his hair, in the inrunning nip point between the elevated side of the belt and the pulley, he could suffer abrasions and contusions. However, he had no knowledge of there having been any injuries from the roller. Farronato stated that injuries could range from a fractured finger or hand to a fatality if someone's entire body became wedged in the nip point area.

Judge's Decision and Parties' Contentions

The judge noted that Con Agra had cited unreviewed judges' decisions dealing with an absence of a hazard when machinery is operating at a slow speed. He found those cases distinguishable on the ground that the evidence showed that the conveyor here did not operate at a slow speed.[12] He also found that the photographic exhibits supported Newell's opinion that the supporting structure of the conveyor would not prevent access to the nip point, but he found the violation other than serious rather than serious in nature as alleged because the support and the low height of the roller made inadvertent contact unlikely and

[12]In finding that a hazard existed, the judge interpreted Farronato as saying that the roller ran at a "brisk" speed. There is a dispute on review as to what Farronato actually said. The Secretary claims that the court reporter transcribed the testimony incorrectly and that Farronato really said the conveyor did *not* run slowly. Con Agra points out that the Secretary never formally asked for the record to be corrected and therefore, the record must stand as it is. Resolution of this precise question is not necessary to our disposition.

indeed would "discourage" such contact. The judge concluded that "the probability of injury from this nip point is so remote to be negligible, as would the injury."

Con Agra contends that the facts show that there was no possibility for injury. In addition to the absence of any injuries, it asserts that the Secretary has shown only a mere speculative possibility of a hazard occurring. It asserts that greater weight should be given to the testimony of Smith and Bellinger than that of the compliance officers and that the Secretary has not proven by a preponderance of the evidence that it could "reasonably anticipate" an injury. The Secretary asserts that exposure to a hazard is shown because employees who straighten bags were "required" to be "near" the roller, and it is located in the path they use to exit the room. The Secretary also contends that the violation should be found serious in nature in view of his testimony of the type of injuries that could occur.

Analysis

Section 1910.212(a)(1) requires the Secretary to prove that a hazard within the meaning of the standard exists in the employer's workplace. *Armour Food*, 14 BNA OSHC 1817, 1821, 1987-90 CCH OSHD at p. 38,883 (No. 86-247, 1990). The Secretary must show that employees are in fact exposed to a hazard as a result of the manner in which the machine functions and is operated. *Jefferson Smurfit*, 15 BNA OSHC at 1421, 1992 CCH OSHD at p. 39,953.

The testimony establishes that employees would come within 1 to 2 feet of the unguarded roller when adjusting bags and would on occasion come close to it while walking by. On the other hand, the judge found that while the surrounding structure would not preclude contact, it would "discourage" inadvertent contact and that circumstance, combined with the low height of the roller, would make the likelihood of an injury negligible. That finding is also supported by the evidence, and no basis is shown for us to disturb it on review. *Okland Constr. Co.*, 3 BNA OSHC 2023, 1975-76 CCH OSHD ¶ 20,441 (No. 3395, 1976). *See E.L. Jones & Son*, 14 BNA OSHC 2129, 2132-33, 1991 CCH OSHD ¶ 29,264, pp. 39,231-32 (No. 87-8, 1991). Generally speaking, employees who pass within close proximity to moving parts are not exposed to a hazard within the meaning of section 1910.212(a)(1) if other factors are present that would hinder access or make it unlikely. As

the Commission held in *Armour Food*, the mere fact that it may be physically possible for an employee to come into contact with the moving parts is not sufficient to establish a violation of the standard. Applying this principle in *Armour Food*, the Commission vacated an allegation that unguarded mixer blades located 12 to 14 inches below the top of the mixing unit violated section 1910.212(a)(1) on the ground that the configuration of the equipment prevented any employee from actually falling into the blades and made it difficult for anyone to reach the blades with his hand. 14 BNA OSHC at 1821-22, 1987-90 CCH OSHD at p. 38,883. *See also Jefferson Smurfit*, 15 BNA OSHC at 1422, 1992 CCH OSHD at p. 39,954 (no exposure to a hazard where adjusting devices and control buttons are designed and positioned in such a way as to keep employees' hands away from nip points), and *Syntron, Inc.*, 83 OSAHRC 83/C1 (No. 81-1491S, 1983) (ALJ), *aff'd*, 11 BNA OSHC 1868, 1983-84 CCH OSHD ¶ 26,841 (1984) (citation under section 1910.212(a)(1) vacated where an employee stood about 1 foot from the unguarded blade of a bandsaw while setting it up and then turned away from the saw, which automatically made the cut and then shut off).

Furthermore, Smith and Bellinger testified that even if an employee did come into contact with the nip point, he would not suffer injury. This testimony is contrary to the opinion testimony of Newell and the expert opinion testimony of Farronato. The judge implicitly credited the testimony of Smith and Bellinger when he found that the possibility of any injury resulting from contact would be negligible, and no basis is shown for us to disturb that finding. In addition, no injuries were known to have occurred. While not dispositive, the absence of injuries corroborates Smith's and Bellinger's testimony and supports a finding that no hazard exists. *Armour Food*, 14 BNA OSHC at 1822, 1987-90 CCH OSHD at p. 38,883. A violation of section 1910.212(a)(1) cannot be found where contact with unguarded moving parts would not result in injury to an employee. *Blocksom & Co.*, 11 BNA OSHC 1255, 1261, 1983-84 CCH OSHD ¶ 26,452, p. 33,600 (No. 76-1897, 1983). Accordingly, based on the evidence we vacate this citation item.

4. Citation No. 1, Item 8a, § 1910.219(c)(2)(i)[13]

Facts

On the lower level of the milling house Newell saw an unguarded horizontal drive shaft which in his opinion could cause abrasions, contusions, or "scalping" if a portion of an employee's body came into contact with the shaft or his hair got caught in it. The shaft is 6 feet above the floor, and approximately 6 feet of the total shaft length of 30 feet was unguarded. The shaft is positioned in front of a system of vacuum pipes which transport flour to an upper floor. An employee, Henry Salinas, stated that this equipment is checked regularly to ensure that the flow of flour is unimpeded, and when unclogging the pipes employees would stand directly under the shaft while it is rotating. Occasionally employees, including Salinas himself, would touch the shaft with their heads, but they are required to wear a "bump cap," which protects against bumps and minor blows to the head but, unlike a hardhat, is not intended to protect against falling objects. If an employee wearing a bump cap contacts the shaft, the only result will be that the shaft will scratch the cap. Also, Bellinger stated that the shaft is completely smooth; it has no protuberances whatever that could cause injury. An employee who placed his hand on the shaft would simply feel it moving; he would not be hurt, and there have never been any injuries from the shaft.

Newell in his testimony referred to section 1910.219(c)(5)(i), which states an exception from the requirements of section 1910.219(c)(2)(i).[14] Newell testified that the

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[13]The standard provides:

> **§ 1910.219 Mechanical power-transmission apparatus.**
> . . . .
> (c) *Shafting*. . . .
> (2) *Guarding horizontal shafting*. (i) All exposed parts of horizontal shafting seven (7) feet or less from floor or working platform, excepting runways used exclusively for oiling, or running adjustments, shall be protected by a stationary casing enclosing shafting completely or by a trough enclosing sides and top or sides and bottom of shafting as location requires.

[14]Section 1910.219(c)(5) provides as follows:

> (5) *Power-transmission apparatus located in basements*. All mechanical power transmission apparatus located in basements, towers, and rooms used exclusively for power transmission equipment shall be guarded in accordance with this section, except that the requirements for

(continued...)

enclosure in which the shaft is located was not locked at the time of his inspection and in fact its doors were fully open; moreover, Salinas testified that the doors were always kept open.

Judge's Decision and Parties' Contentions

The judge found that the standard had been violated because the shaft was not guarded. He rejected Con Agra's argument that it came within the exception set forth in section 1910.219(c)(5)(i). The judge concluded that Con Agra had not shown that it came within the scope of the exception because the area in which the shaft was located was not used exclusively for power-transmission apparatus but contained the flour transport piping as well and because the door to this area was not locked.

Con Agra asserts that the shaft is not hazardous because its surface is smooth, and Con Agra emphasizes that there have never been any injuries. It also contends that it came within the exception set forth in section 1910.219(c)(5)(i). The Secretary argues that a violation is shown because employees frequently passed under the shaft and could come close to it. The Secretary also argues that the exception stated in the standard is not satisfied for the reasons the judge gave.

Analysis

Unlike section 1910.212(a)(1) discussed above, the standard at issue here imposes a mandatory requirement that horizontal shafting no more than 7 feet high be guarded. Thus, the standard does not require proof of the existence of a hazard. *American Steel Works*, 9 BNA OSHC 1549, 1551 n.4, 1981 CCH OSHD ¶ 25,285, p. 31,270 n.4 (No. 77-553, 1981).

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[14](...continued)

> safeguarding belts, pulleys, and shafting need not be complied with when the following requirements are met:
> (i) The basement, tower, or room occupied by transmission equipment is locked against unauthorized entrance.
> (ii) The vertical clearance in passageways between the floor and power transmission beams, ceiling, or any other objects, is not less than five feet six inches (5 ft. 6 in.).
> (iii) The intensity of illumination conforms to the requirements of ANSI A11.1-1965 (R-1970).
> (iv) [Reserved].
> (v) The route followed by the oiler is protected in such manner as to prevent accident.

(Brackets in original).

However, while the Secretary is not obligated to show that the conditions in question are themselves hazardous in order to prove a violation, he must establish that employees have access to the hazard. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2006, 1991 CCH OSHD ¶ 29,223, p. 39,127 (No. 85-369, 1991). Here, access is shown by the evidence that employees could and did come into contact with the unguarded shaft. Also, we agree with the judge for the reasons he states that the unguarded shaft does not come within the exception clause in section 1910.219(c)(5)(i). We additionally note that the clause requires a showing not only that access is restricted but that the remaining conditions set forth in the clause have been met. Con Agra, which has the burden of proof to show that it comes within the exception, *Dover Elevator Co.*, 15 BNA OSHC 1378, 1381, 1991 CCH OSHD ¶ 29,524, p. 39,849 (No. 88-2642, 1991), has not presented evidence showing that it complied with the other requirements pertaining to vertical clearance, intensity of illumination, and safety of employee routes of travel.[15] The record, however, establishes that any injuries resulting from contact with the unguarded shaft would be minor. Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is not serious in nature unless it presents "a substantial probability that death or serious physical harm could result." Accordingly, we find the violation other than serious in nature rather than serious as it was alleged.

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[15]Con Agra contends that it reasonably relied on a representation by a compliance officer at a previous inspection that posting a warning sign at the main door of the room in which the shaft enclosure is located would be sufficient to comply with the cited standard. The Secretary, in response, argues that it is not bound by representations of compliance officers as to the abatement requirements of a standard.

Contrary to the Secretary's argument, statements of compliance officers are relevant to whether an employer has fair notice of the requirements of a standard in a particular set of circumstances. *Miami Indus.*, 15 BNA OSHC 1258, 1262, 1991 CCH OSHD ¶ 29,465, p. 39,740 (No. 88-671, 1991), *aff'd in part without published opinion*, 983 F.2d 1067 (6th Cir. 1992). Here, however, the requirements of the cited standard are clear, and the exception clause on which Con Agra relies by its plain wording does not allow an exemption from the standard simply through the posting of a sign. *Compare Cardinal Indus.*, 14 BNA OSHC 1008, 1011-12, 1987-90 CCH OSHD ¶ 28,510, pp. 37,801-02 (1989) (reliance on statements by OSHA representatives where standards do not clearly delineate the employer's obligations). Furthermore, the Secretary is not estopped from enforcing a standard except where he has engaged in affirmative misconduct. The record here does not support a finding of active misrepresentation and resulting injustice to the employer necessary to establish affirmative misconduct on the part of the Secretary. *Erie Coke Corp.*, 15 BNA OSHC 1561, 1570, 1992 CCH OSHD ¶ 29,653, p. 40,155 (No. 88-611, 1992), *petition for review filed*, No. 92-3297 (3d Cir. June 8, 1992); *Miami Industries*, 15 BNA OSHC 1258 at 1266, 1991 CCH OSHD at pp. 39,743-44.

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that the Commission must assess penalties based on four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations. Because the unguarded shaft would result at most in only minor injuries, the gravity of the violation is low. Also, Newell testified that the Secretary's proposed penalties gave Con Agra credit for good faith because it had made efforts to improve employee safety and indicated a willingness to correct conditions which Newell regarded as hazardous. On the other hand, Con Agra is a large employer which operates a number of facilities. It also has a history of prior violations of the Act. The judge assessed a combined penalty of $100 for item 8a and two other subitems, item 8b(a) and 8b(b), which are not before us for review. Considering the factors set forth in section 17(j), we conclude that the judge's assessment is appropriate.

5. Citation No. 1, Item 8b(c), § 1910.219(d)(1)[16]

Facts

This citation item concerns the machine used to sew shut bags of flour. The machine's operator, who works at the machine almost continuously, normally places his hands 1 to 1½ feet below the belts and pulleys which run the sewing needle. The belts and pulleys, which were not guarded at the time of the inspection, are approximately 4 to 5 feet above the floor. Newell was of the opinion that the operator could inadvertently reach into the pulleys while the equipment is operating and that his hair or face could contact the belt or pulleys if the employee leaned forward, either of which would result in abrasions and fractures from the pulley or the nip point between the pulley and the belt.

Both Smith and Bellinger agreed that an employee would suffer injury if he got caught in the pulley when it was operating, but they testified that no employee would have

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[16]The standard, in pertinent part provides:

> **§ 1910.219 Mechanical power-transmission apparatus.**
>
> . . . .
>
> (d) *Pulleys*—(1) *Guarding.* Pulleys, any parts of which are seven (7) feet or less from the floor or working platform, shall be guarded in accordance with the standards specified in paragraphs (m) and (o) of this section.

The referenced sections prescribe detailed specifications for the design and installation of guards.

any reason to come into contact with the nip point during operation, nor has anyone ever been injured in the pulleys or belts.

Judge's Decision and Parties' Contentions

The judge found that the possibility of inadvertent contact during operation or of injury was "so remote as to be negligible," and he concluded that the violation was *de minimis* in nature. Con Agra argues that the judge should have vacated the item instead because employees were not exposed to a hazard. Con Agra emphasizes that: (1) an employee normally would come no closer than 1 foot to the pulleys and belts when the machine is operating, (2) the compliance officer agreed that contact with the pulleys would have to be inadvertent, and (3) there have been no injuries.

On the other hand, the Secretary argues that the judge should have affirmed the item as a serious violation. He contends that exposure to a hazard is shown because it is "reasonably predictable" that employees would enter the zone of danger represented by the unguarded pulley. In the Secretary's view, the facts here are similar to those in other cases in which exposure to a hazard was found where employees came within 1 to 2 feet of hazardous machinery. The Secretary also points out that the Commission has previously held, with respect to the general machine guarding standard at section 1910.212, that employers must use guarding devices for protecting employees and cannot rely on employee skill or attention. Lastly, the Secretary contends that the violation cannot be appropriately found *de minimis* because the hazard could "potentially" lead to serious injury.

Analysis

The standard at issue here imposes a mandatory requirement to guard pulleys located no more than 7 feet in height. As in the case of the standard at issue in item 8a, the Secretary does not have to establish that unguarded pulleys present a hazard, but the Secretary must show that employees have access to the hazardous conditions. The Commission's test for determining access is whether in the course of the employees' duties, it is "reasonably predictable" that they will be, are, or have been in a "zone of danger."

Clement Food Co., 11 BNA OSHC 2120, 2123, 1984-85 CCH OSHD ¶ 26,972, p. 34,633 (No. 80-607, 1984); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003, 1975-76 CCH OSHD ¶ 20,448, p. 24,425 (No. 504, 1976). We conclude that this test has been satisfied here.

The operator of the sewing machine regularly worked with his hands in relatively close proximity to the unguarded belts and pulleys. Unlike other cases in which the Commission has vacated citations for unguarded machinery where the circumstances were such that an employee would not be likely to come into the area of danger, here neither the operation of the machine nor its configuration would prevent or impede the employee from approaching the belts and pulleys. *Compare Jefferson Smurfit*, 15 BNA OSHC at 1422, 1992 CCH OSHD at p. 39,954 (no exposure to a hazard based on specific configuration and design of the control and adjustment devices for the machinery); *Armour Food*, 14 BNA OSHC at 1821-22, 1987-90 CCH OSHD at p. 38,883 (same conclusion where surrounding structure makes entry into the area of moving blades difficult and unlikely). As the Commission stated in *Hughes Bros.*, 6 BNA OSHC 1830, 1832, 1834, 1978 CCH OSHD ¶ 22,909, pp. 27,716, 27,718 (No. 12523, 1978), in order to comply with standards requiring that employees be protected from contact with machinery, an employer may not rely on the skill or attention of employees to keep themselves away from the moving parts but rather must install protective devices that are not primarily dependent on employee behavior. Accordingly, as the Secretary correctly points out, the Commission has consistently held that working in close proximity to unguarded machinery where access is not otherwise impeded or obstructed is sufficient to show exposure to a hazard. *See True Drilling Co. v. Donovan*, 703 F.2d 1087 (9th Cir. 1983) (hazard found where employees regularly pass within 2 feet of rotating parts); *Clement Food*, 11 BNA OSHC at 2124, 1984-85 CCH OSHD at p. 34,633 (No. 80-607, 1984) (access to a hazard established where employee reaches within 1 foot of unguarded pulleys); *Consolidated Aluminum Corp.*, 9 BNA OSHC 1144, 1155-56, 1981 CCH OSHD ¶ 25,069, p. 30,975 (No. 77-1091, 1980), *aff'g* 80 OSAHRC 125/C10 (1978) (ALJ) (finding exposure on evidence showing that employees worked and stood "in close proximity" to nip points and walked past the machine "directly adjacent" to the nip points). We note that while we vacated a citation item in *Armour Food* because we found that

contact with the machinery would be unlikely, we affirmed another machine guarding allegation in that case where the facts showed that employees could inadvertently place their hands within a nip point. 14 BNA OSHC at 1822, 1987-90 CCH OSHD at p. 38,884.

Because we find that it was reasonably predictable that the operator of the sewing machine could come into contact with the unguarded belts and pulleys, we conclude that exposure was shown despite the fact that no injuries have resulted. As we have stated above, the occurrence of injuries is not dispositive in determining whether a violation exists. We have previously held that "evidence of this type [absence of injuries] does not preclude a finding of employee exposure to a hazard when the presence of a hazard is established by the objective facts concerning the configuration and operation of a machine." *Consolidated Aluminum*, 9 BNA OSHC at 1156, 1981 CCH OSHD at p. 30,975.

Accordingly, the judge erred in concluding that there was only a remote possibility that the operator could come into contact with the unguarded belts and pulleys and that the violation was *de minimis*. However, we reject the Secretary's contention that it should be found serious in nature. The evidence fails to show that serious injury would be likely to result from contact with the moving parts in question. We therefore affirm the violation as other than serious. For purposes of a penalty assessment, we will combine item 8b(c) with items 8a, 8b(a), and 8b(b).

6. Citation No. 1, Item 9, § 1910.242(b)[17]

Facts

It is undisputed that the forklift operator uses a compressed air hose to blow flour dust off bags before they are loaded onto trucks. Using a gauge, Newell measured the pressure in the hose at 90 pounds per square inch ("psi"). Newell stated his opinion that

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[17]The standard provides:

> **§ 1910.242 Hand and portable powered tools and equipment, general.**
>
> . . . .
>
> (b) *Compressed air used for cleaning.* Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

pressure of this magnitude could force a foreign object into the employee's body, inject air into the body causing an "air embolism," or even dislodge an eye.

Con Agra blows dust off the bags because its customers will not accept bags covered with dust. Therefore, Bellinger opined that Con Agra was not engaged in "cleaning" within the meaning of the standard but rather was performing an operation that is part of its manufacturing process.

Judge's Decision and Parties' Contentions

The judge concluded that the terms of the standard had not been met. He further concluded that cleaning off flour bags is a cleaning purpose within the meaning of the standard. Con Agra does not dispute that air pressure in excess of 30 psi was being used, but argues that compressed air was not being used for cleaning purposes but for meeting food sanitation requirements. Con Agra cites *Anoplate*, 12 BNA OSHC at 1691, 1986-87 CCH OSHD at p. 35,689, in support of this contention. The Secretary briefly argues that the standard does not distinguish between cleaning a workplace and cleaning a product and that *Anoplate* is factually distinguishable. The Secretary further contends that the Commission has previously held that section 1910.242(b) does not exclude cleaning performed as part of a manufacturing process, citing *Simmons, Inc.*, 6 BNA OSHC 1157, 1977-78 CCH OSHD ¶ 22,387 (No. 12862, 1977), to support his argument.

Analysis

There is no dispute that Con Agra used compressed air in excess of the limit of 30 psi set forth in the standard. The issue before us is whether Con Agra was using compressed air at excessive pressures for cleaning purposes. In *Anoplate*, on which Con Agra relies, the employer used a series of open tanks to apply finishes to its products. The parts were first placed in a cleaning tank and then a rinsing tank. The Commission concluded that this standard was not violated where compressed air at 70 to 80 psi was used to blow excess water and chemicals off the parts after they were removed from the rinsing tank. On the facts in *Anoplate*, the Commission reasoned that the air pressure was only being used to dry parts which had previously been cleaned. As the Secretary contends, *Anoplate* is distinguishable because the facts there showed that the parts had already been cleaned before the

air pressure was applied. Here, Con Agra's witnesses concede that the bags were being cleaned of dust. As we stated in *Simmons*, section 1910.242(b) "does not exclude cleaning as part of a production process." 6 BNA OSHC at 1159, 1977-78 CCH OSHD at p. 26,988. While *Simmons* involved cleaning of machinery as opposed to a product, our holding in that case is applicable here inasmuch as the standard makes no distinction between cleaning a product and cleaning the equipment used to manufacture the product. Accordingly, we affirm the judge's finding of a violation.

The judge assessed a penalty of $200. Although the record indicates that no employees had ever been injured by the excessive pressure of compressed air, the evidence shows that the violation presents a potential for serious injury. Considering the statutory penalty assessment factors, we conclude that the judge's assessment is appropriate.

7. Citation No. 1, Item 11b, § 1910.272(i)(3) and Citation No. 2, Item 6, § 1910.272(l)(3)[18]

Facts

1. Citation No. 1, Item 11b, Dust Cleaning

Con Agra also uses compressed air to clean equipment and surfaces within the plant, an operation referred to as a "blowdown." This procedure removes dust from areas that

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[18]The standards require:

> **§ 1910.272 Grain handling facilities.**
> . . . .
> (i) *Housekeeping*. . . .
> . . . .
> (3) The use of compressed air to blow dust from ledges, walls, and other areas shall only be permitted when all machinery that presents an ignition source in the area is shut-down [sic], and all other known potential ignition sources in the area are removed or controlled.
> . . . .
> (l) *Preventive maintenance*. (1) The employer shall implement preventive maintenance procedures consisting of:
> (i) Regularly scheduled inspections of at least the mechanical and safety control equipment associated with dryers, grain stream processing equipment, dust collection equipment including filter collectors, and bucket elevators;
> . . . .
> (3) A certification record shall be maintained of each inspection, performed in accordance with this paragraph (l), containing the date of the inspection, the name of the person who performed the inspection and the serial number, or other identifier, of the equipment specified in paragraph (l)(1)(i) of this section that was inspected.

cannot be cleaned through other means. Newell opined that blowing dust into the air in this fashion could produce the explosive concentration of 50 to 60 grams of dust per cubic meter. Milling machines which were operating at the time could generate sparks and arcs which could ignite the dust, and "static type" sparks could also be produced from machinery or parts rubbing together. Salinas testified that equipment operates normally during blowdowns and that he has never been instructed to shut off the mill machinery.

Con Agra introduced into evidence copies of correspondence between Tom Klevay, vice president of the Millers' National Federation, and then-OSHA administrator John A. Pendergrass regarding the application of section 1910.272(i)(3). Bellinger also testified with respect to this correspondence. Klevay wrote to Pendergrass that in his view "[e]quipment used in milling wheat flour is not considered a known or potential ignition source. Electrical equipment and systems in compliance with appropriate codes for the area also would not be considered an ignition source." In a letter dated shortly after the inspection occurred here, Pendergrass replied:

> It is OSHA's position that all equipment and machinery, including machinery used in milling flour, can be a potential ignition source in grain handling facilities. The Agency's intent is to assure that such potential ignition sources are controlled during "blow-down" operations. If an effective preventive maintenance program is implemented; and, electrical wiring, motors, and machinery are in compliance with 29 CFR Part 1910, Subpart S and other appropriate provisions, OSHA would consider these to be adequate controls. Under these circumstances, "blow-down" operations would be permitted when equipment and machinery are in operation.

Bellinger testified that Con Agra has "an effective preventive maintenance program" in effect at the Martins Creek facility. Regular inspections are conducted; any defects which are detected are scheduled for repair. Every Friday a maintenance schedule is prepared listing the maintenance or repairs to be conducted. The mill is shut down four hours the following Monday for the maintenance work. All electrical wiring, motors, and machinery are in compliance with the Secretary's electrical standards in Subpart S of Part 1910, and all equipment in the area of the blowdown complies with the National Electrical Code.

2. Citation No. 2, Item 6, Certification of Equipment Inspections

Newell requested that Jackson, Con Agra's plant manager, supply copies of the records certifying that Con Agra had conducted maintenance inspections of its equipment, but Jackson indicated that Con Agra did not maintain such records. Newell testified that records should be kept of "critical equipment such as the safety equipment, bearings, belts and pulleys." He noted that section 1910.272(l)(1)(i), which is referenced in section 1910.272(l)(3), lists some of the equipment for which regularly scheduled inspections are required. Newell testified that he was told that the motion detectors on Con Agra's bucket elevators are inspected and certified that they are operable, and he stated that the bearings on elevators are critical equipment which also should be certified. Newell felt that Con Agra's violation of the certification provision was other than serious in nature because Con Agra did in fact perform maintenance; its failure to be able to certify its maintenance meant that it did not have a "formal" program. By not having formal certification in effect, Con Agra might overlook some needed maintenance items.

Bellinger in his testimony referred again to Klevay's letter to Pendergrass and Pendergrass' reply. Members of the flour milling industry, including Con Agra, wanted clarification as to what equipment was subject to the certification requirement. Klevay's letter notes that section 1910.272(l)(i) requires inspection of "mechanical and safety control equipment associated with" dryers, grain stream processing equipment, dust collection equipment, and bucket elevators and that section 1910.272(m) states that "grain stream processing equipment" consists of "hammer mills, grinders, and pulverizers." The letter proposes that "[e]quipment used routinely in the production of flour such as separators, aspirators, scourers, tempering equipment, entoleters, rollers, sifters, purifiers, packaging equipment and pneumatic systems handling products are not subject to certification record requirements." Pendergrass replied that "[i]t is OSHA's intent that all equipment receive appropriate maintenance as part of an effective preventive maintenance program" (emphasis added) but that the equipment mentioned in Klevay's proposal "would not be considered 'grain stream processing equipment' and, consequently, not subject to the certification record requirements." Bellinger claimed that Con Agra has no dryers, grinders, or pulverizers and that while it has a hammer mill, there is no mechanical safety and control equipment

associated with that mill. He also asserted that Pendergrass' letter excuses dust collection equipment associated with product handling from the certification requirement. Thus, Bellinger concluded that the only certification record required is for Con Agra's bucket elevator, and he testified that Con Agra in fact does have a form for certifying the inspections of its elevators. According to Bellinger, this form is filled out on a weekly basis and kept in Con Agra's files.

Judge's Decision and Parties' Contentions

The judge determined that Con Agra had not complied with section 1910.272(i)(3), which prohibits blowing down where operating machinery presents a source of ignition, as alleged in item 11b of citation no. 1. He also concluded that Con Agra had not established that it had effectuated "alternative means of compliance" as set forth in the Pendergrass letter because it had not shown that it had an "effective preventive maintenance program" within the meaning of that letter. The judge noted that Con Agra's maintenance program is in issue in citation no. 2, item 6. In affirming the latter item as well, the judge found that Con Agra had failed to demonstrate that records were kept for hammer mills, grain stream processing equipment, and dust collection equipment. He specifically noted that the Pendergrass letter did not exempt dust collection systems from the certification requirement.

Con Agra contends that the Secretary presented no evidence that there was any machinery which could present an ignition source in the area of the blowdown. It also contends that vacation of this citation item is dictated by a judge's decision in an earlier case, *Con Agra, Inc.*, 85 OSAHRC 28/A3 (No. 84-311, 1985) (ALJ). In that decision, Review Commission Judge Ramon M. Child vacated a citation alleging that a blowdown operation performed at Con Agra's flour mill in Alton, Illinois violated section 5(a)(1) of the Act, which requires that an employer keep his workplace free of "recognized hazards that are causing or are likely to cause death or serious physical harm." Judge Child concluded that the Secretary had failed to show that the blowdown created a fire or explosion hazard on the facts in that case. Asserting that the blowdown process is the same wherever it is conducted, Con Agra contends that the Commission must find that there was no hazard here based on Judge Child's decision. Con Agra also argues that it was exempted from the requirement of the standard that blowdown operations cannot be conducted while machinery

is in operation because it met the two criteria for exemption set forth in the Pendergrass letter--its equipment was in compliance with the Secretary's electrical standards and it had an effective maintenance program.

The Secretary contends that section 1910.272(i)(3) presumes the existence of a hazard if its terms are not met, and that therefore the Secretary is not required to prove that a blowdown operation presents a hazard of fire or explosion. In the Secretary's view, Judge Child's decision on which Con Agra relies is distinguishable because it involved a provision of the Act which requires the Secretary to prove that a hazard exists. Because it is undisputed that compressed air was used for housekeeping purposes, and Newell testified that ignition sources were present, the Secretary argues that a violation has been shown here.

With respect to the certification provision of section 1910.272(l)(3), Con Agra does not deny that no records were presented to Newell and indeed concedes that records were not available to be put into evidence. It asserts, however, that its list of items to be repaired or maintained constitutes a certification within the meaning of section 1910.272(l)(3). The Secretary contends that Bellinger's opinion that records were required only for bucket elevators is erroneous and supports a finding that records had not been maintained for the other equipment set forth in section 1910.272(l)(i)(i). The Secretary also contends that because performing inspections is not the same as documenting them, Con Agra's equipment maintenance program is not a substitute for the certification required under the standard.

Analysis

1. Compliance With Section 1910.272(i)(3)

In relying on Judge Child's decision, Con Agra is raising the doctrine of collateral estoppel: a determination by a court in a prior action is subsequently binding on the parties to that action. The purpose of collateral estoppel is to foreclose the relitigation of issues litigated and decided in the prior litigation. *Caterpillar Tractor Co.*, 12 BNA OSHC 1768, 1986-87 CCH OSHD ¶ 27,554 (No. 80-4061, 1986). That principle is inapplicable here, however, because section 5(a)(1) imposes a higher burden of proof on the Secretary than does section 1910.272(i)(3). As the Secretary correctly argues, section 1910.272(i)(3) presumes that the use of compressed air to conduct a blowdown operation is hazardous where

a source of ignition is present. Unlike section 5(a)(1), the existence of a hazard is not an element of proof of a violation of section 1910.272(i)(3). *See Bunge Corp. v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981) (distinguishing a specific standard from section 5(a)(1)). Accordingly, while the Secretary in a prior case involving Con Agra may have been unable to prove that a blowdown operation constitutes a hazard within the meaning of section 5(a)(1), he is not estopped from proceeding against Con Agra under a specific standard which does not require such proof. *See Brock v. Williams Enterp.*, 832 F.2d 567 (11th Cir. 1987) (collateral estoppel is not present where prior litigation does not involve same facts and there has been an intervening change in the relevant law).[19]

There is no dispute that blowdown operations were conducted while machinery was running. Contrary to Con Agra's argument, Newell did testify that the machinery presented ignition sources. Bellinger did not directly refute that testimony, but stated that all equipment was in conformity with the Secretary's electrical standards and the National Electrical Code. The Secretary, however, through the Pendergrass letter has in effect issued an interpretation that all operating equipment is presumed to present an ignition source within the meaning of section 1910.272(i)(3) but that compliance with the standard will be excused under two circumstances: the equipment must meet the specifications of the OSHA electrical standards *and* there must be an effective maintenance program as well. Although the Commission is obligated to defer to the Secretary's interpretation of a standard if the interpretation is reasonable, *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S. Ct. 1171 (1991), the Commission may review an interpretation by the Secretary to determine whether it satisfies the Court's criteria for reasonableness. *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1992 CCH OSHD ¶ 29,828 (No. 89-1300, 1992), *petition for review filed*, No. 92-2237 (1st Cir. Oct. 23, 1992). In this case, however, Con Agra does not assert that the interpretation embodied in Pendergrass' letter is not reasonable and is not entitled to deference; instead, Con Agra contends that it has come within the terms of that interpretation. In other words, since blowdowns are conducted while machinery is operating, the terms of

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[19]The citation at issue in Judge Child's case predated the grain dust standard. Section 1910.272 was not promulgated until December 1987, 52 Fed. Reg. 49,625 (1987), well after the proceedings before Judge Child arose.

the standard have been violated; the question then is whether Con Agra, having the burden to show that it comes within an exemption, has established that it met the stipulations set forth in the Pendergrass letter. We address this issue below.

2. Compliance With Section 1910.272(l)(3)

Section 1910.272(l)(3) requires that records be maintained certifying that maintenance inspections have been conducted for the types of equipment specified in section 1910.272(l)(i), including bucket elevators and dust collection equipment. Even assuming that Con Agra did in fact maintain certification records for its bucket elevators even though it did not produce those records during Newell's inspection and could not make them available for admission into evidence, the judge properly found from Bellinger's testimony that Con Agra did not maintain such records for its dust collection equipment. Despite Bellinger's opinion that certification of inspection of dust collection equipment is not required, section 1910.272(l)(i) includes dust collection equipment as part of the equipment which must be inspected, and, as the judge properly found, the Pendergrass letter on which Bellinger based his opinion does not exempt dust collection devices from that requirement. The Secretary therefore has established a prima facie case of noncompliance with section 1910.272(l)(3) inasmuch as there is sufficient evidence to support a finding that Con Agra failed to maintain certification records of all the types of equipment covered by the standard.

Although Bellinger believed that certification of inspections of dust collection equipment is not required, Con Agra contends that its written lists of items requiring maintenance constitute compliance with section 1910.272(l)(3). The standard, however, sets forth very specific requirements for certification records; they must show the date of the inspection, the name of the inspector, and serial number or identifier of the equipment inspected. Con Agra has not demonstrated that its lists of maintenance items includes this information. We therefore find that Con Agra has not rebutted the Secretary's case-in-chief, and we conclude that the judge properly affirmed item 6 of citation no. 2, alleging a violation of section 1910.272(l)(3).

3. Exemption From Section 1910.272(i)(3)

In affirming item 11(b) of citation no. 1, which alleges that Con Agra violated section 1910.272(i)(3) by performing a blowdown operation while sources of ignition were present,

the judge concluded that Con Agra was not exempted from compliance because it had not shown that it had "an effective preventive maintenance program" within the meaning of the Pendergrass letter. In reaching this conclusion, the judge noted that Con Agra's maintenance program was in issue in item 6 of citation no. 2. We agree with the judge's reasoning.

Section 1910.272(l) is entitled "Preventive maintenance." Because Con Agra's certification records do not satisfy the requirements of this section, Con Agra has not shown that it had "an effective preventive maintenance program" within the meaning of the Pendergrass letter and therefore is not exempted from compliance with the requirements of section 1910.272(i)(3).

The judge assessed a penalty of $200 for the violation of section 1910.272(i)(3). The Secretary did not propose a penalty for the violation of section 1910.272(l)(3) and the judge assessed none. We conclude that the judge's assessments for these two items are appropriate.

ORDER

For the reasons stated above, we reverse the judge's decision and vacate the following items of citation no. 1: item 2a(a) (section 1910.132(a)), item 2b (section 1910.151(c)), item 3 (section 1910.178(c)(2)(vi)(*a*)), and item 7a(b) (section 1910.212(a)(1)). We amend the characterization of item 8a (section 1910.219(c)(2)(i)) and item 8b(c) (section 1910.219(d)(i)) to other than serious. We assess a single penalty of $100 for items 8a, 8b(a), 8b(b), and 8b(c). We affirm the judge's decision affirming item 9 (section 1910.242(b)) and item 11b (section 1910.272(i)(3)) and assessing a penalty of $200 for each item. We also affirm the judge's decision affirming item 6 of citation no. 2 (section 1910.272(l)(3)) and assessing no

penalty for that item. The judge's disposition of other citation items not before us for review is a final order of the Commission.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 22, 1993