Some personal identifiers have been redacted for privacy purposes.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Purvis Industries, LLC, d/b/a Snake River Supply, Respondent.	OSHRC DOCKET NO. 19-1619

APPEARANCES:

Abigail G. Daquiz, Esquire
Department of Labor, Office of the Solicitor
Seattle, Washington
For the Secretary

David N. Deaconson, Esquire
Pakis, Giote, Page & Burleson, PC
Waco, Texas
For Respondent

BEFORE:

Christopher D. Helms
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §

659(c) (the Act). On July 16, 2019, an employee's hand was caught in the unguarded roller of a conveyor belt on a potato truck in Lewisville, Idaho. On July 17, 2019, the injury was reported to the Occupational Safety and Health Administration (OSHA) area office in Boise, Idaho. On August 7, 2019, OSHA Compliance Safety and Health Officer (CO) Andrew Martinson opened an inspection at Respondent's facility in Idaho Falls, Idaho.

OSHA issued a citation and notification of penalty (Citation) to Respondent on September 30, 2019, for one serious violation of 29 C.F.R. § 1910.212(a)(1) with a proposed penalty of $7,577. The Citation alleged employees were exposed to an unguarded ingoing nip point on a truck's conveyor belt. Respondent timely contested the Citation, bringing this matter before the Commission.

At the parties' request, in lieu of a hearing, this decision is on the stipulated record in accordance with Commission Rule 61(a).[1] Rule 61(a) states that:

> "[a] case may be fully stipulated by the parties and submitted to the Commission or the Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof."

29 C.F.R. § 2200.61(a).

The parties filed Joint Stipulated Facts (JSF) that included stipulated exhibits A through N, which are designated as Ex. J-*. Both parties filed initial briefs and response briefs, which included additional exhibits designated as Ex. S-* for the Secretary and Ex. R-* for Respondent. The exhibits included three signed declarations from CO Martinson (Ex. S-1), [redacted], sales

[1] The Commission has noted that "[t]he submission of a case on stipulated facts under Commission Rule 61 is not without some peril to a party having the burden of proof on particular issues." *Farrens Tree Surgeons Inc.*, 1992 WL 190282, at *1 (No. 90-998, 1992).

account manager for Snake River Supply (SRS) (Ex. J-G), and Cameron Barker, vice president of corporate operations for Purvis Industries, LLC (Purvis) (Ex. R-1).

The key issues in dispute are whether Respondent had knowledge of the hazardous condition and whether Respondent complied with the requirements for machine guarding set forth at 29 C.F.R. § 1910.212(a)(1). As set forth below, the Court finds the Secretary has not proved that Respondent did not comply with the cited standard and the Citation is vacated.

Jurisdiction

The Court finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). (JSF ¶ 5).

Facts

SRS, located in Idaho Falls, Idaho, supplies conveyor belts and related equipment to the agriculture, food processing, and aggregate industries in the Idaho Falls area. (JSF ¶ 2). Purvis, headquartered in Dallas, Texas, purchased SRS on March 4, 2019. (JSF ¶¶ 1, 3). Purvis employed more than 700 employees nationwide and 26 employees at the SRS facility. (JSF ¶ 4).

On July 16, 2019, warehouse technician, Nate Breese and sales account manager, [redacted] installed a conveyor belt on a potato truck owned and operated by KK Farms in Lewisville, Idaho. (JSF ¶¶ 6, 9). SRS had not previously provided products or services to KK Farms and [redacted] hoped to add KK Farms as a new account for his outside sales list. (JSF ¶¶ 1, 7; Ex. J-G). Management did not direct them to go to KK Farms. (Ex. J-J, ¶ 9).

KK Farms requested SRS remove the old conveyor belt from its potato truck and install the new belt. (JSF ¶ 6). Neither [redacted] nor Mr. Breese documented a job safety analysis for the work at KK Farms. (JSF ¶ 10). [redacted] saw that the pinch points on the truck and

conveyor belt were not guarded. (Ex. J-G ¶ 4). Based on his common sense and prior experience, [redacted] knew to be careful around these pinch point areas. (Ex. J-G ¶ 4).

After Mr. Breese installed the conveyor belt, the owner reactivated the belt so Mr. Breese could determine if adjustments were needed. (JSF ¶ 11). Both Mr. Breese and [redacted] were within five feet of the moving conveyor belt and its unguarded ingoing nip points and rotating parts. (JSF ¶¶ 12, 14; Ex. J-G ¶ 4). Mr. Breese watched and adjusted the conveyor belt from the top of the truck. (JSF ¶ 13). [redacted] kneeled on the ground at the back of the truck to observe the belt's tracking; he was not working on the truck or conveyor belt. (JSF ¶ 13; Ex. J-G ¶ 6). As he moved to get up from his kneeling position, [redacted] reached out to the truck for support and mistakenly placed his hand into the nip point of the moving conveyor belt's roller. (JSF ¶ 15; Ex. J-G ¶¶ 4, 9). This resulted in broken bones and the partial de-glovement of his hand. (JSF ¶ 15).

Secretary's Burden of Proof

To establish a violation of an OSHA standard, the Secretary must prove: (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982). The Secretary has the burden of proving his case by a preponderance of the evidence. *Id.*

Citation 1, Item 1

The Secretary alleges that Respondent violated 29 C.F.R. § 1910.212(a)(1), which states:

> (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.

OSHA alleged in the Citation that "on or about July 16, 2019 and at times prior, employees [were] exposed to ingoing nip points while installing a belt on a potato truck" at KK Farms.

Respondent asserts that it had no knowledge that either employee was going to install a conveyor belt on the potato truck at KK Farms or that the truck's moving parts and nip points were unguarded. Further, Respondent asserts it did not have the necessary control to install a guard on the truck.

Applicability

The parties stipulated the cited standard "applies to the installation and maintenance of conveyor belts on potato processing trucks, such as the truck and conveyor belt mechanism owned and operated by KK Farms." (JSF ¶ 9). Respondent installed a conveyor belt at KK Farms. (JSF ¶¶ 6, 11).

Nonetheless, Respondent asserts the standard does not apply to its work at KK Farms because it had no control over the potato truck. (R. Br. 7-8). This assertion fails. The Commission has long held that even at a worksite where the employer does not have complete control, an employer must take "all reasonable alternative measures to protect its employees from the violative condition." *Rockwell Int'l Corp.*, 17 BNA OSHC 1801, 1808 (No. 93-54, 1996) (consol.) (citations omitted). Respondent's lack of control over the worksite does not affect the applicability of the cited standard to its employees installing a conveyor belt at KK Farms. Respondent had a duty to provide safe working conditions for its employees regardless of its control at the offsite work area. The cited standard applies.

Compliance With The Standard

29 C.F.R. § 1910.212(a)(1), is a "performance standard, which means it states the result required . . . rather than specifying that a particular type of guard must be used." *Wayne Farms, LLC*, 2020 WL 5815506, *2 (No. 17-1174, 2020) (*Wayne*) (citations omitted); *see also, Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) (performance standards are interpreted in light of what is reasonable). To comply with a performance standard an employer must "identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Wayne*, 2020 WL 5815506 at *2 (citations omitted).

To prove the element of noncompliance,[2] the Secretary must prove that based on the function of the machine and how it was used "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Wayne*, 2020 WL 5815506 at, *3 (citations omitted). In other words, Respondent was required to guard the roller's ingoing nip point on the conveyor belt if, based on the necessary or normal process of replacement and installation of a conveyor belt, it was reasonably predictable an employee could be in the zone of danger.

The facts of this case are analogous to *Wayne* where the Commission stated that noncompliance "hinges on whether the [employee's] actions were reasonably predictable given the machine's normal operation." *Wayne*, 2020 WL 5815506 at *3. In *Wayne*, an employee was injured when his hand and arm were drawn into the mechanical paddles of a flour hopper after he removed the metal grate to manually clean the hopper. *Id.* at *1. The Commission found that it

[2] The Commission recently observed that "the noncompliance element in machine guarding cases overlaps with . . . but is not identical to, the exposure element of the Secretary's prima facie case. Thus . . . the injury sustained by [the employee] is only relevant to assessing actual exposure and would likely satisfy that element of the case if we were to reach that issue—it is not a substitute for establishing noncompliance as a separate element." *Wayne*, 2020 WL 5815506 at *5 n.2 (citation omitted).

was unnecessary to manually clean the hopper and that other operators did not. *Id.* at *4. The Commission found the employee's action was idiosyncratic and the Secretary had not established that the machine was "normally operated in a way that contemplated or anticipated such entry." *Id.* at *4 (citation omitted). Thus, the Commission held that the employer was not required to guard the area and that noncompliance with 1910.212(a)(1) was not established. *Id.*

Here, the Secretary has not shown that based on operational necessity or the normal installation process that it was reasonably predictable an employee would be in the zone of danger and make contact, intentionally or unintentionally, with the ingoing nip points of the conveyor belt's roller.

Even though supplying and installing a conveyor belt on a potato truck was a regular part of its business, the record contains little information about Respondent's normal process for installing a conveyor belt. (JSF ¶ 2). The evidence contains no information as to the usual role of a sales account manager during an installation process at a client's site. The record is silent as to whether it was a necessary or normal part of the installation process for a second person to observe the conveyor belt while the technician made adjustments. There was no evidence that it was an operational necessity or normal practice for an employee to be under the truck near the unguarded area of the conveyor belt's roller. To sum-up, the Secretary provided no evidence to show that it was reasonably predictable an employee would be near an unguarded roller at the back of the truck.

The Secretary has not proved that Respondent was required to guard the roller's ingoing nip point on the conveyor belt because there is insufficient evidence to show that it was reasonably predictable that an employee would be in the zone of danger. Thus, the Secretary has not proved the element of noncompliance.

Exposure To The Cited Condition

To prove exposure, "the Secretary must show either that Respondent's employees were actually exposed to the violative condition or that it is 'reasonably predictable . . . by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger."' *Dover High Performance Plastics, Inc.,* 2020 WL 5880242, *2 (No. 14-1268, 2020) (citations omitted).

Here, the sales account manager was actually exposed to the hazardous condition as shown by his contact with the unguarded conveyor belt's nip point and the resulting injury. Exposure to the cited hazard is established.

Knowledge

To establish knowledge, the Secretary must prove that Respondent "knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Am. Eng'g & Dev. Corp*., 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (*AEDC*) (citations omitted). Knowledge may be imputed to the employer "through its supervisory employee." *Id.*

Neither [redacted] nor Mr. Breese had a position of supervisory authority with Respondent. Further, there is no evidence that any supervisory employee of Respondent knew these two employees were delivering or installing a conveyor belt at KK Farms.[3] Thus, actual knowledge of the hazardous condition is not proved.

The Secretary can prove constructive knowledge by showing that with the exercise of reasonable diligence Respondent could have known of the hazardous condition. *AEDC,* 23 BNA OSHC at 2095. According to the Commission, "[r]easonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training

[3] The Secretary provided no evidence of the supervisory structure at SRS nor who directly supervised [redacted] or Mr. Breese.

programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations." *Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003). The obligation to inspect (i.e., adequate supervision) for hazards "requires a careful and critical examination, and is not satisfied by a mere opportunity to view equipment." *Burford's Tree, Inc.,* 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010).

The Secretary asserts that Respondent did not exercise reasonable diligence because it did not have a safety program with work rules or training materials to instruct employees on how to work safely when faced with the hazard of unguarded equipment at a customer's location. (S. Br. 9-10; S. Resp. Br. 6). The Secretary also asserts that Respondent made no effort to adequately supervise or anticipate hazards at the client's worksite. (S. Reply Br. 3-6).

Respondent asserts that its work rules and employee training on machine guarding safety were adequate. (R. Br. 3, 5, 9).

Respondent's Work Rules

A work rule must adequately address the cited hazard, be clear, and cannot be too general. *See Superior Custom Cabinet Co*., 18 BNA OSHC 1019, 1021 (No. 94-200, 1997) (*Superior*); *see also, Pressure Concrete Construction Co*., 15 BNA OSHC 2011, 1992 WL 381670, at *6 (No. 90-2668, 1992) (employer's general policy to not work in tunnel while it was raining was not specific enough and was insufficient instruction for employees). A rule that "gives employees too much discretion in identifying unsafe conditions" is too general to be effective. *Superior,* 18 BNA OSHC at 1021.

Respondent's 2018-2019 safety training materials consisted of 33 pages of toolbox safety talks on the subjects of hand tools, saws, portable extinguishers, safe lifting practices, lockout-

tagout of machinery, forklifts, PPE usage, shortcuts, overconfidence, and examples of preventable accidents. (JSH ¶ 23; Ex. J-H). There were no work rules about the requirement to guard a machine's moving parts. In the lockout-tagout and preventable accidents sections, there were two general references to the hazard of moving parts. The first, in the lockout-tagout guidelines, stated "Never reach into moving equipment. In even the blink of an eye you could have a life changing injury." (Ex. J-H #PURVIS000014). The second mention was an example of a preventable accident in which an employee lost his balance and placed his hand into the equipment's moving parts while squatting nearby. (Ex. J-H #PURVIS000013). Other than the general statement not to reach into moving equipment, Respondent had no work rule for employees to follow when they encountered the hazard of unguarded moving parts, including ingoing nip points.

This work rule was too general and did not provide specific instructions to employees on how to prevent exposure to moving parts. Respondent did not have an effective work rule for the cited hazard.

Respondent's Training

Respondent asserts that both Mr. Breese and [redacted] were adequately trained. (R. Br. 3, 5, 9). However, Respondent did not know when [redacted] or Mr. Breese were trained on pinch points and unguarded equipment. (Ex. J-J ¶ 3). [redacted] had taken neither the OSHA 10-hour general industry safety course nor the MSHA Part 46 training. (JSF ¶ 5). The only evidence of training for Mr. Breese was a "working safely with table saws" session on April 25, 2019. (Ex. J-H #PURVIS 000039). This was the only documentation of employee training that occurred prior to the accident at KK Farms. *Id.*

[redacted] averred in his written declaration that he knew there was an unguarded area on the potato truck's conveyor belt and that he knew from previous training that he should not place his hand near the roller of the conveyor belt. (Ex. J-G ¶ 6). [redacted] did not disclose when he had received this previous training or whether SRS had provided it. Despite his awareness of the unguarded nip point, he placed his hand into the ingoing nip point of the conveyor's roller when he reached out to steady himself while rising from the ground. (Ex. J-G ¶ 6). Respondent cannot rely on a vague notion of [redacted]'s prior training or experience to meet its duty to train employees on the hazards of unguarded equipment. *See Par Elec. Contractors, Inc.,* 20 BNA OSHC 1624, 1628 (No. 99-1520, 2004) (citations omitted) (Employers "cannot count on employees' common sense, experience, and training by former employers or a union to preclude the need for specific instructions").

Respondent's safety training program provided no guidance on a guarding method or other measures an employee could utilize to prevent contact with unguarded moving parts; instead, it provided a general, minimal instruction to not place a hand near "moving equipment." (Ex. J-H #PURVIS000014).

Duty to Anticipate and Prevent Occurrence of Hazard

In addition to not having a work rule, Respondent made no attempt to anticipate hazards, supervise the work or provide specific instructions for the work at KK Farms. "The Commission has long held that an employer must inspect the area to determine what hazards exist or may arise during the work before permitting employees to work in an area, and the employer must then give specific and appropriate instructions to prevent exposure to unsafe conditions." *Altor, Inc.*, 23 BNA OSHC 1458, 2011 WL 1682629, *18 (No. 99-0958, 2011) (citation omitted); *see also, Greenleaf Motor Express, Inc*., 21 OSHC 1872, 1874-75 (No. 03-1305, 2007) (even where

there had been no similar prior incidents, the Commission found there was a lack of reasonable diligence because there was no inquiry about or inspection of the work area); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) (employer required to "inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence") (citation omitted)*; Automatic Sprinkler Corp.,* 8 BNA OSHC 1384, 1387-88 (No. 76-5089, 1980) (inspection of the work area must be done even when employees are experienced).

Respondent's safety training materials did not provide guidance for evaluating hazards when working at a customer's location or on unguarded equipment. Respondent did not provide supervision for the work at KK Farms. Respondent's safety program had no means for employees to evaluate and prevent exposure to unguarded nip points and rotating parts on equipment.

Respondent's safety program at the time of the accident was not a reasonably diligent effort to provide an adequate work rule, training, supervision or other measures to prevent an employee's contact with unguarded nip points and rotating parts. (*See* Ex. J-H; JSH ¶ 23). The Secretary has demonstrated that Respondent did not exercise reasonable diligence to protect its employees working with unguarded equipment at a customer's location.

Other Arguments

Respondent argues that, because it was not knowledgeable about the potato farming business or that it did not know its employees were going to KK Farms, it cannot have constructive knowledge. However, the work done at KK Farms—the replacement of a conveyor belt on a potato truck—was within the scope of Respondent's usual business as a supplier of conveyor belts to the agricultural industry. (*See* JSF ¶ 2). Respondent has not provided evidence

to show that [redacted] and Mr. Breese were engaged in conduct outside their usual job duties or the usual practice of SRS, such that it would not be the type of work or equipment that was reasonably predictable. Respondent's argument fails.

Respondent argues that *Mountain States Contractors, LLC v. Perez,* 825 F.3d 274, 283 (6th Cir. 2016) supports its position that it cannot have knowledge for safety hazards on a machine that was unknown to them. (R. Br. 8, 12). However, *Mountain States* does not support this assertion. There, the circuit court upheld the ALJ's finding that the cited employer had constructive knowledge because the employer had been lax in its supervision and with reasonable diligence could have known of the equipment's deficiency. *Id.* This argument is not persuasive.

Respondent could have known, with the exercise of reasonable diligence, of the unguarded areas on the potato truck's conveyor belt. Constructive knowledge is proved.

Affirmative Defenses

Respondent directly or indirectly asserts the affirmative defenses of infeasibility, multi-employer worksite, unpreventable employee misconduct, and employee error, inadvertence, accident or mistake. Respondent bears the burden of proof for these defenses. *See Briones Util. Co.*, 26 BNA OSHC 1218, 1220 (No. 10-1372, 2016).

Infeasibility Defense

Respondent asserts that because it did not own or control the potato truck it could not install guards for the moving parts of the conveyor belt. Further, Respondent asserts that it was not feasible to refuse to work on the customer's equipment that was not guarded.

To prove infeasibility, an employer must show that: (1) literal compliance with the terms of the cited standard was infeasible; and (2) an alternative protective measure was used or there

was no feasible alternative measure. *Otis Elevator Co.,* 24 BNA OSHC 1081, 1087 (No. 09-1278, 2013), *aff'd,* 762 F.3d 116 (D.C. Cir. 2014). The Commission expects "employers to exercise some creativity in seeking to achieve compliance." *Gregory & Cook, Inc*., 17 BNA OSHC 1189, 1191 (No. 92-1891, 1995).

The cited standard states that methods other than a physical barrier may be used to protect employees. *See* 29 C.F.R. § 1910.212(a)(1) ("Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc."). There is no evidence that Respondent attempted to implement any means of guarding other than a physical barrier or that no other feasible alternative means of guarding was available.

By contrast, after the accident, Respondent implemented a new policy that required employees to take an OSHA course that included machine guarding safety, to conduct a job safety analysis at the customer's site, advise customers on proper guarding devices (when there were none), to attach individual lockout-tagout devices, to verify equipment was running properly from a distance, and to keep all body parts away from moving equipment parts. (JSF ¶ 19; Ex. J-D, J-I ##PURVIS 000041-45). This new policy by Respondent demonstrates there was a feasible alternative available. The asserted defense of infeasibility fails.

Multi-Employer Worksite Defense

Respondent asserts that because it did not own the potato truck and had no prior knowledge that the conveyor belt's moving parts were unguarded, it had no control over the hazard. Respondent also asserts that it did not have an obligation to inspect the equipment because it did not own or control the truck the conveyor belt was installed on. (Resp. Rep. Br. 4). In essence, Respondent is asserting a multi-employer worksite defense. To establish this defense Respondent must show 1) that it did not create the violative condition, 2) that it did not have

control to abate the condition as the standard required, and 3) that it made reasonable alternative efforts to protect its employees from the hazard or that it did not have, and with reasonable diligence could not have had, notice of the condition. *Capform, Inc.,* 13 OSHC BNA 2219, 2222 (No. 84-556, 1989).

Respondent's obligation to inspect and be aware of the hazards at an employee's work location was not dependent on the ownership of the equipment it was servicing. Respondent did not create the condition of unguarded nip points on the potato truck nor did it have the control to place physical guards on the truck. However, Respondent made no effort to implement alternative methods to protect its employees from the hazard. The multi-employer worksite defense fails.

Unpreventable Employee Misconduct

To establish the defense of unpreventable employee misconduct, the evidence must show that the employer: (1) had a work rule designed to prevent the violative condition, (2) adequately communicated that work rule, (3) took reasonable steps to discover violations of the rule, and (4) effectively enforced the rule when it was violated. *Stark Excavating, Inc.*, 24 BNA OSHC 2218, 2220 (No. 09-0004, 2014) (consol.)

Respondent's assertion that it had a regular safety program and training designed to prevent contact with unguarded machinery is rejected. As discussed above, Respondent had no rule for employees to follow when faced with unguarded equipment, offered no evidence of communicating such a work rule to employees, had no plan to discover violations of employees

working on unguarded equipment, and made no effort to enforce a violation of such a rule.[4] The unpreventable employee misconduct defense fails.

Employee Error, Inadvertence, Accident, or Mistake

Respondent also asserts that [redacted]'s injury was the result of error, inadvertence, accident, or mistake. This assertion misconstrues the purpose of the standard. As the Commission has stated since its earliest days, "[t]he standard was designed to provide against such human weaknesses" as "neglect, distraction, inattention or inadvertence." *Slyter Chair, Inc.*, 4 BNA OSHC 1110, 1112 (No. 1263, 1976); *Akron Brick & Block Co.,* 3 BNA OSHC 1876, 1878 (No. 4859, 1976) ("The plain purposes of the standard are to avoid dependence upon human behavior and to provide a safe environment for employees in the machine area from the hazards created by the machine's operation."); *see also, Dover High Performance Plastics, Inc.,* 2020 WL 5880242, at *3 (employer cannot rely on employee to not make a mistake in timing when operating an unguarded lathe). Thus, any mistake by [redacted] does not absolve Respondent of its duty to comply with the requirements of the standard. Respondent's assertion is rejected.

Conclusion

While the Secretary proved that Respondent had constructive knowledge of the hazardous condition, he did not prove that Respondent was required to guard the ingoing nip points on the conveyor belt because there was no evidence it was reasonably predictable that by necessity or normal practice an employee would be in the zone of danger for the hazardous condition. Thus, the element of noncompliance with the standard was not proved. The Secretary has not met the burden for his *prima facie* case.

[4] With respect to discipline related to all safety violations in the prior three years, Respondent issued a total of three written reprimands—one for not properly securing a load and two for forklift violations. (Ex. J-J ¶ 6).

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Citation 1, Item 1, alleging a Serious violation of 29 C.F.R. § 1910.212(a), is hereby VACATED.

SO ORDERED.

/s/ Christopher D. Helms
Christopher D. Helms
Administrative Law Judge, OSHRC

Dated: January 6, 2021
Denver, Colorado