United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. CAGLE'S, INC. Respondent.	OSHRC Docket No. 98-0485

APPEARANCES:

Orlando J. Pannocchia, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Donald G. Shalhoub, Deputy Associate Solicitor; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

J. Larry Stine, Esq., and Elizabeth K. Dorminey, Esq.; Wimberly, Lawson, Steckel, Nelson & Schneider; Atlanta, Georgia
For the Respondent

REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

This case is before the Commission on remand from the United States Court of Appeals for the Eleventh Circuit. *Chao v. Occupational Safety & Health Review Comm'n*, 21 BNA OSHC 2121 (11th Cir. 2007). On appeal, the court reviewed the decision by the Commission to vacate a citation alleging a violation of 29 C.F.R. § 1910.146(c)(2)—a provision of the permit-required confined space standard. *Cagle's Inc.*, 21 BNA OSHC 1738, 2006 CCH OSHD ¶ 52,842 (No. 98-0485, 2006). In an unpublished opinion dated August 3, 2007, the court vacated the Commission's holding

and remanded for further proceedings consistent with its opinion. *Chao*, 21 BNA OSHC at 2122.

By mandate, the court has remanded the case to the Commission. We, in turn, remand this case to the judge for further proceedings consistent with the court's opinion. SO ORDERED.

/s/
Horace A. Thompson III
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: September 28, 2007

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For the Complainant

J. Larry Stine, Esq.; Elizabeth K. Dorminey, Esq.; Wimberly, Lawson, Steckel, Nelson & Schneider, Atlanta, Georgia
For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

On September 13, 1997, two employees were found dead at a chicken processing plant Cagle's operates in Collinsville, Alabama. Following an inspection of the worksite, the Occupational Safety and Health Administration (OSHA) issued Cagle's three citations alleging a number of serious, repeated and other-than-serious violations of the Occupational Safety and Health Act, 29 U.S.C. 651 et seq. ("the Act"). OSHA proposed penalties totaling $185,000. Cagle's contested the citations.

Following a hearing, Commission Administrative Law Judge Ken S. Welsch issued a decision in which he vacated 11 items and affirmed 3 items. Four of the items the judge vacated are before the Commission on review. They include one item alleging a serious violation of the confined space standard at § 1910.146(c)(2), and three items alleging violations of the hazard communications (HazCom) standard at § 1910.1200. The judge vacated the first of these items based on his finding that the waste breading trailer was not a confined space. He vacated the second and third items based on his finding that Cagle's qualified for an exemption to the cited

standards. Lastly, he vacated the final item because he concluded that employees in the Collinsville plant were aware of the CO2 there. We affirm his vacation of the confined space item and the final HazCom item. We find that Cagle's did not make out the exemption to the HazCom standards and affirm, in part, and vacate, in part, the two items the judge found were exempt. We assess a penalty of $5,000.

Background

At Cagle's, chickens are coated with marinated raw breading ("MRB"). CO2 is then applied to the chickens as they are moved on conveyors through three freezers. During this process, some of the breading falls off and is collected in either totes, which are 40 inches long and wide and 36 inches deep, or cardboard boxes, which are 24 inches long and wide and 16 inches deep. The waste breading may still be partially frozen or mixed with dry ice, which releases CO2 as the breading thaws and the ice melts. In its solid or liquid state, CO2 can cause tissue freezing or frostbite and cryogenic "burns." As a gas, CO2 can cause headaches, nausea, vomiting, and, in sufficiently high concentrations, rapid circulatory insufficiency leading to coma and death.

When the totes and boxes are full, Cagle's employees take them to the trash dock for dumping into a waste breading trailer. The trailer, which is 40 feet long, 7 and a half feet wide, and 7 and a half feet high from floor to roof, is periodically hauled away by another company, which uses the breading to make animal feed. At the time of the accident, employees James Williams and John Pruitt had full-time responsibility for dumping waste breading into the trailer. Marvin Knott, a purchasing agent and maintenance manager, supervised the waste breading operations in 1996 and 1997.

Until a few months before the 1997 accident, the boxes of waste breading were brought into the trailer through the rear doors and dumped by employees. In response to concerns that entry of the trailer to dump the totes exposed employees to carbon dioxide vapors, the employer curtailed the rear entry dumping procedure, pinned the trailer's rear doors closed, and trained employees to follow a new dumping procedure. The new procedure used a forklift to dump plastic totes full of breading through one of three 5 x 5-foot openings in the trailer's roof. When the breading reached a certain level, the opening was covered and dumping began at the next opening.

Employees also manually dumped breading from the roof of the trailer. They used a

ladder to climb to the roof and then dumped the breading by cutting out a side of the box and letting the material flow into the trailer. Michael Mattox, a wastewater superintendent and Jeremy Higginbotham's supervisor, testified he first saw employees, among them James Williams, use this method of dumping breading three or four months before the accident. Wade Hankinson, formerly a Cagle's maintenance manager, also testified that in the year prior to the accident he had seen employees dumping breading from the roof of the trailer.

On September 13, 1997, Jeremy Higginbotham and James Williams were assigned to dump breading in the trailer. At approximately 7:30 a.m., both men were found dead inside the trailer. No one saw Higginbotham and Williams working that morning nor witnessed the accident. When both employees were discovered, a ladder was leaning against the side of the trailer and two of the trailer's three roof openings were uncovered. The rear doors were closed. Inside the trailer, a mound of breading reached approximately four feet from the ceiling. Cagle's has stipulated that both employees died as a result of "asphyxiation/environmental suffocation . . . due to an oxygen deficient atmosphere present inside the waste breading trailer which was caused by the accumulation of carbon dioxide."

Citation 1, Item 2 – Information Regarding Permit-Required Confined Space.

The Secretary alleges that Cagle's violated 29 C.F.R. § 1910.146(c)(2)[1] by failing to provide employees information regarding the waste breading trailer. As a threshold matter, we first consider whether the Secretary has shown that the standard applies, the first element of her prima facie case.[2] In determining the applicability of a standard, we consider the standard's text and structure. *See Unarco Comm. Prod. Inc.*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, p. 41,731 (No. 89-1555, 1993). If the meaning of the language is unambiguous,

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[1] Section 1910.146(c)(2) states:

> If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.
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> NOTE: A sign reading "DANGER–PERMIT-REQUIRED CONFINED SPACE, DO NOT ENTER" or using similar language would satisfy the requirement for a sign.

[2] To make a prima facie showing of a violation of a standard, the Secretary must establish the applicability of the standard, noncompliance with its terms, employee access or exposure to the violative condition, and employer knowledge. *Access Equip. Systems Inc.*, 18 BNA OSHC 1718, 1720, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999).

the inquiry ends there. *Unarco*, 16 BNA OSHC at 1503, 1993-95 CCH OSHD at p. 41,732. Because the cited standard applies to permit-required confined spaces, we must first determine whether the trailer is a confined space. Section 1910.146(b) defines a confined space as a space that:

> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
> (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
> (3) Is not designed for continuous employee occupancy.

The judge concluded the waste breading trailer was not a confined space and therefore vacated this item. He found that the breading trailer did not meet part (1) of the definition in § 1910.146(b) because employees were not required to enter the trailer to perform assigned work. We agree with the judge that the standard does not apply here, but for different reasons.

In her argument, the Secretary inexplicably ignores the first, threshold sentence of the definition of a confined space. The plain unambiguous language of that sentence indicates that the standard does not apply unless the evidence shows that employees "*can* bodily enter [the space] *and* perform assigned work." *See Reich v. GMC*, 89 F.3d 313, 315-16 (6th Cir. 1996) (emphasis added). In the context of this standard, use of the word "can" connotes "made possible … by [the] circumstances." *Webster's Third New Int'l Dictionary* (1986).

Thus to satisfy the definition of a confined space, it must be possible under the circumstances for an employee to both "bodily enter" the space and "perform assigned work." Once the assigned work was changed from a process requiring dumping on the trailer floor after entry through the trailer's rear doors, to a process requiring dumping through openings in the trailer roof, nothing in the record indicates that it was possible under the circumstances for an employee to perform assigned work inside the trailer.

To the contrary, the record discloses that given the current configuration of the trailer, there are only two possible ways for an employee to perform the assigned work of dumping waste breading[3]: (1) Use a forklift to dump the totes into the trailer, or (2) Use a ladder to access

[3] Our dissenting Colleague suggests that an employee could retrieve a dropped knife from inside the trailer. She maintains that such an action could be work incidental to the assigned work of slitting and dumping totes through the roof openings. Such a detour from the work assigned, however, is not encompassed within the plain meaning of the term "assigned work."

Moreover, we do not see how an employee would be "physically able," as our dissenting Colleague suggests, to carry the tote down a ladder set on a shifting pile of breading and dump the

the trailer's roof, cut open the boxes and let the contents spill into the trailer through the holes in the roof. Neither method involves a possible entry of the trailer to perform the assigned work. It was not possible under the circumstances for an employee to enter the trailer through the rear doors to dump the totes because pins secured the rear doors of the trailer. To enter the trailer through the roof openings to dump the totes would have required an employee to jump or lower himself seven and a half feet from the roof of the trailer to the floor, possibly through a white fog arising from the breading, onto a loose pile of waste breading, holding a large cardboard box of marinated breading, and then after dumping the tote, somehow raise himself seven and a half feet to the roof with the empty box in hand. Performing the work of dumping the totes and removing the box under those circumstances is simply not possible. [4]

In the absence of evidence that there was a method possible under the circumstances to bodily enter the trailer and perform the assigned work of emptying totes, or some other assigned work, we conclude that the Secretary has failed to establish that the trailer satisfied the requirement of a confined space that employees "*can* bodily enter [the space] *and* perform assigned work". [5] Accordingly, we hold that the standard does not apply and vacate Citation 1,

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tote within the trailer, instead of dumping it through the roof opening. In any event, the record is devoid of evidence on any "assigned work" other than the dumping of the breading. Our Colleague's dissent, therefore, is mere conjecture as it speculates on possible permutations not in evidence.

[4] Moreover, for the same reasons discussed above, employees were neither *physically able* nor *permitted* to enter the trailer through the roof and perform assigned work. Consequently, even using our dissenting Colleague's definition of "physically able to" in interpreting the standard, we reach the same result.

[5] Our conclusion is not contrary to Commission precedent. The language the Secretary cites from *Mobile Premix Concr, Inc.*, 18 BNA OSHC 1010, 1012, 1995-97 CCH OSHD ¶ 31,416, p. 44,404 (No. 95-1192, 1997), is the Commission's finding that the space cited there presented the potential for engulfment, a showing that must be made to prove that a confined space is permit-required. *See* 29 C.F.R. § 1910. 146(b). The threshold issue before us was not an issue in *Mobile Premix.*

Our Colleague's dissent maintains that we focus on the "difficulty" rather than "impossibility" of entry and performance of assigned work. Her position, however, is misplaced. We agree that although it may be difficult to gain egress into a space, it may still be possible. That, however, is not the case here. At bar, it is impossible for an employee to gain egress and perform assigned work. *See supra.*

Interestingly, the Secretary has offered no definition of the word "can." The Secretary's interpretation simply reads out of the first part of the standard's conjunctive requirement; that it is possible under the circumstances to enter and perform assigned work. If the Secretary would have

Item 2.[6] In addition, we note that Cagle's was also cited for violating 29 C.F.R. § 1910.22(c) for failing to guard the three openings in the trailer's roof. Cagle's did not petition for review of the judge's affirmance of this item.

Citation 1, Item 7 and Citation 2, Item 5 – Labeling Of Waste Breading Containers

The Secretary alleges that Cagle's failed to post hazard warnings or information on or near containers holding waste breading mixed with CO2. Citation 1, Item 7 alleges that Cagle's violated § 1910.1200(f)(5)(ii) by failing to label, tag, or mark each container in the breading trailer area alerting employees to the health effects of CO2. Citation 2, Item 5 alleges that Cagle's violated § 1910.1200(f)(5)(i) by failing to label, tag, or mark containers in the waste breading trailer area indicating that they contained CO2.[7] The judge vacated the items. He found that Cagle's did not have to comply with the requirements of § 1910.1200(b)(5) because the waste breading came within the language of § 1910.1200(b)(5)(iii), which exempts from labeling:

> Any food, food additive, color additive, drug, cosmetic, or medical or veterinary device or product, including materials intended for use as ingredients in such products (*e.g.*, flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*) or the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151 *et seq.*), and regulations issued under those Acts,

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suggested any assigned work (other than dumping the totes) that could have been carried out inside the trailer, she may have met her burden. She did not.

[6] Our colleague's dissent relies on an interpretative letter, *October 23, 1995 Interpretive Letter to Mark Arriens*, which states that tractor trailers with locked doors could be considered confined spaces, but the letter does not address methods whereby it is possible under the circumstances for an employee to enter and perform assigned work inside the locked trailers, an explicit requirement of the standard in determining whether a trailer or any other space is a confined space. Moreover, even if the requirement were not explicit, nothing in the legislative history of the standard supports a different outcome.

[7] Section 1910.1200(f)(5) states:

> Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:
> (i) Identity of the hazardous chemical(s) contained therein; and,
> (ii) Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

> when they are subject to the labeling requirements under those Acts by either the Food and Drug Administration or the Department of Agriculture.

29 C.F.R. § 1910.1200(b)(5)(iii). The judge concluded that the waste breading, which was transported to another facility and processed into animal feed, fell within the Food, Drug, and Cosmetic Act's definition of "food" at 21 U.S.C. § 301 and that the breading trailer and totes and boxes were labeled "inedible" pursuant to USDA regulations. He also noted that the USDA regulated the entire production process at the Cagle's plant. We do not agree.

Section 1910.1200(b)(5)(iii) provides for an exception when any food is subject to the labeling requirements of the Federal Food, Drug, and Cosmetic Act or the Virus-Serum-Toxin Act, 21 U.S.C. 151 *et seq.* Although we agree that Cagle's waste breading is "food" under the definition at 21 U.S.C. § 301, Cagle's points to no USDA or Food and Drug Administration ("FDA") regulation, and we have found none, that requires these containers to be labeled. The poultry product labeling requirements at 9 C.F.R. § 381.115, the most directly applicable USDA standard, apply to "inspected and passed poultry products . . .," yet Cagle's makes no argument that its waste breading falls under this definition. Cagle's points to the "inedible" labels it affixed to the containers at the request of USDA inspectors but fails to provide any regulatory basis for the inspectors' orders or to point to any regulation that requires such labeling. Because Cagle's has the burden of establishing that it comes within the exception and has failed to carry that burden here, we conclude that the standards apply. *See Westvaco Corp.*, 16 BNA OSHC 1374, 1377, 1993-95 CCH OSHD ¶ 30,201, p. 41,567 (No. 90-1341, 1993).

We next turn to the question of whether the cited substances are hazardous chemicals within the meaning of § 1910.1200(f)(5). Cagle's argued that the Secretary has failed to show that the substances are hazardous because she has failed to conduct any tests of the concentrations of CO2 in the trailers, the boxes, or the totes, and accordingly the standard does not apply. Cagle's has a point, but not with regard to the trailer. Cagle's stipulated that the employees who perished in the trailer were exposed "to an oxygen deficient atmosphere . . . which was caused by the accumulation of carbon dioxide." This stipulation establishes that the trailer contained a hazardous chemical. The totes and boxes are another matter. We have found nothing in the record that permits us to assess the effect of CO2 released into the ambient air by the thawing breading in these containers. How quickly the CO2 dissipates is a matter of conjecture. The only testimony regarding breathing difficulties on the part of employees in the waste breading trailer area related to the trailer itself, not to the totes or boxes, and the record revealed no evidence that employees encountered other health risks when handling the totes and boxes. We conclude that §§ 1910.1200(f)(5)(i) and (ii) apply to the waste breading trailers, but not to the totes and boxes.

We also find that the Secretary has established that Cagle's violated these standards.

Cagle's concession that the only label, tag, or mark displayed in the waste breading trailer area was the "inedible" label requested by the USDA inspectors, establishes that Cagle's failed to comply with the terms of the cited standards, which require labeling, tagging, or marking identifying the CO2 and describing the hazards it presents. We also conclude that Cagle's had knowledge of the violations because supervisors knew CO2 was a hazardous chemical and because the trailer, parked in plain view in back of the processing building, obviously did not display a CO2 label or warning. Knott, the supervisor of the waste breading trailer at the time of the accident, testified that he thought the CO2 in the trailer was "bad" because it could cause breathing difficulties.

We therefore affirm Citation 1, Item 7 and Citation 2, Item 5 with regard to the waste breading trailer but vacate the parts of those items regarding the totes and boxes used to carry waste breading to the trailer.

Citation 2, Item 6 – Employee Information and Training

The Secretary alleged that Cagle's violated paragraphs (h)(1) and (h)(2) of § 1910.1200[8] because employees working at the waste breading trailer were not provided information and training regarding the hazards of carbon dioxide. The judge vacated this item because he found that there were signs posted in the plant advising employees of the presence of CO2, as well as employee testimony that they were aware of CO2 in the facility, and referred to waste breading as "carbon dioxide breading."

We first address the threshold question of whether the HazCom standard requires that the provision of information and training be chemical-specific. The Secretary takes the position that the standard requires an employer to provide information and training addressing the specific hazards of the specific chemicals to which its employees are exposed. We find that it does not. We conclude that under § 1910.1200(h)'s plain language, an employer complies with the HazCom standard's requirements by informing employees of the dangers posed by chemicals falling into the relevant "categories of hazards," identifying their location in the plant or the process in which they are used and training employees on those hazard categories. Requiring employers to inform employees about particular chemicals would require employers to cover all the chemicals in their workplaces during training. This would effectively rewrite the second sentence of § 1910.1200(h)(1), "Information . . . may be designed to cover categories of hazards

[8] The cited standards at 29 C.F.R. § 1910.1200 require the following:

> (h) *Employee information and training*.
> (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.
> (2) *Information*. Employees shall be informed of:
> (i) The requirements of this section;
> (ii) Any operations in their work area where hazardous chemicals are present; and,
> (iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

. . . or specific chemicals," to read, "Information *must* cover specific chemicals."[9]

Because the standard's plain language makes clear that it does not contemplate chemical-specific information and training, there is no need to look at its legislative history. *Unarco,* 16 BNA OSHC at 1502-3, 1993-95 CCH OSHD at p. 41,732. We note, however, that apart from the 1998 version of the HazCom compliance directive, the regulatory history of the HazCom standard is consistent with the plain language of the standard. When the HazCom standard was adopted, in 1983, it permitted training "on the hazards of the process or operation, rather than specific chemicals." 48 Fed. Reg. 53,280 (Nov. 25, 1983). In 1987, when the Secretary proposed expanding the HazCom standard to cover the construction industry she reiterated her position that employers could train either on specific chemicals or by hazard category. 52 Fed. Reg. 31,852, 31,866 (Aug. 24, 1987). The Secretary issued similar statements in 1988, 53 Fed. Reg. 29,822, 29,845 col. 1 (1988), and 1990, 55 Fed. Reg. 20,580, 20,584 col. 1 (1990). In 1994 the Secretary changed the text of the standard by adding what are now the last two sentences in paragraph (h)(1): "Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets." 59 Fed. Reg. at 6176 (Feb. 9, 1994). The 1998 version of the HazCom compliance directive, upon which the Secretary bases her interpretation, represents a change in position from the 1990 directive and other OSHA policy statements; it does not, however, include any explanation allowing us to assess the reasons for the change. *See Greater Boston Television Corp. v. FCC,* 444 F.2d 841. 852 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971) (citations omitted) (courts do not accept revision in administrative interpretation when it flatly contradicts agency's previous position).

[9] In view of the result we reach here, we find it unnecessary to consider the deposition submitted by Cagle's in its Motion to Re-Open Record and Conditional Motion for Reconsideration. The motion is denied.

We also find no support for the Secretary's chemical-specific approach in case law. Neither *Well Solutions Inc.*, 17 BNA OSHC 1211, 1215, 1993-95 CCH OSHD ¶ 30,750, p. 42,720 (No. 91-340, 1995), nor *Safeway Store No. 914*, 16 BNA OSHC 1504, 1513-14, 1993-95 CCH OSHD ¶ 30,300, p. 41,746 (No. 91-373, 1993), relied on by the Secretary, provide support for her position here. In both cases, the Commission affirmed a violation based on the employer's failure to provide employees information or training regarding the hazards of chemicals with which they worked, but the Commission made no reference to chemical-specific information or training by hazard category.

Remaining before us is the question of whether Cagle's violated § 1910.1200(h) by failing to provide employees information and training regarding the hazard categories CO2 falls within. The judge vacated this item based on his finding that employees were aware of CO2 in the Collinsville plant and in the waste breading trailer area. As set forth below, we agree with the judge's disposition of this issue and find that the Secretary has not established a violation.

We first consider the requirements of the information provisions of § 1910.1200(h)(2). We conclude that the testimony shows that employees were informed CO2 was present in the breading trailer area. As the judge noted, employees testified they knew waste breading contained CO2. They referred to the totes used to carry breading to the trailer as "CO2 vats," and the trailer itself as the "CO2 trailer." Employees also testified that they understood that the white clouds escaping from the trailer consisted of CO2. Employees also knew that CO2 was a hazardous chemical. David Camp testified that CO2 "takes your breath . . . [i]t takes the oxygen out of the air," and stated that employees under his supervision were informed of this hazard. According to Industrial Hygienist Etterer, the employees understood "by virtue of having worked with the CO2 and having been able to see the dense cloud, that ... most people wouldn't just jump into a white, dense cloud." It was also undisputed that Cagle's made the MSDS for CO2 available to employees.

We conclude that the Secretary has failed to show that Cagle's training did not cover all the hazards presented by CO2. Hubbard, Cagle's Corporate Health Safety and Environmental Manager, testified that Cagle's HazCom video addressed all hazards described in § 1910.1200. He testified the video was shown to employees during orientation and annually thereafter. Wester, Cagle's safety coordinator, confirmed that the video met all HazCom training requirements. Wester testified the video provided information on chemical hazards, routes of

exposure, and means of protection. Etterer testified that she was aware of Cagle's HazCom video, but did not view it.

Finally, we find that a preponderance of the evidence shows that Cagle's employees received HazCom training. Knott, the supervisor of the waste breading trailer area at the time of the accident, testified that all employees under his supervision received HazCom training. Wester, the safety coordinator, and Hubbard, Cagle's Health Safety and Environmental Manager, both testified that all employees at the Collinsville plant received general hazard training. Even if the Secretary is correct and not all employees saw the video, she has not shown that the employees were not trained. The Secretary points to testimony by Etterer that suggest deficiencies in training, but that testimony merely suggests that some employees did not see the video and that some did not receive specific training on CO2.

We also find unpersuasive Etterer's account of her interview with Camp. Camp's statement that neither he nor Higginbotham nor any other employee working at the trailer received HazCom training is contradicted by Michael Mattox's testimony that Higginbotham, who was under his direct supervision, received HazCom instruction as part of Cagle's standard orientation training. This training addressed the storage and handling of chemicals, as well as the labeling and the hazards of chemicals. Camp's statement is also inconsistent with the testimony of Knott, Wester, and Hubbard, three of Cagle's supervisors.

Accordingly, we vacate Citation 2, Item 6.

Characterization

The Secretary cited Citation 2, Item 5 as repeated. The Secretary based the characterization on a citation issued to Cagle's Macon, Georgia plant in April 1996. That citation included an item alleging a violation of the same standard involved in the present case, § 1910.1200(f)(5)(i), for failing to label containers holding sodium hydroxide (caustic soda), sodium hypochlorite (liquid bleach), hydraulic fluid, and other hazardous chemicals. The 1996 citation was resolved informally and became a final order of the Commission. Because the judge vacated Citation 2, Item 5, he did not address the repeat characterization of that item.

A violation is repeated under section 17(a) of the Act, 29 U.S.C. § 666(a), if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28, 171 (No. 16183, 1979). "The principal factor in determining whether a

violation is repeated is whether the two violations resulted in substantially similar hazards." *Amerisig Southeast, Inc.*, 17 BNA OSHC 1659, 1661, 1995-97 CCH OSHD ¶ 31,081, p. 43,364 (No. 93-1429, 1996). The Commission has also held that there is no basis for a repeat characterization "unless the employer has previously been made aware that [its] safety precautions are inadequate. . . ." *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,826 (No. 91-1807, 1994) (internal quotation marks omitted) (citing *George Hyman Constr. Co.* v. OSAHRC, 582 F.2d 834, 841 (4th Cir. 1978)).

Cagle's prior violation involved the same standard cited in the present case. The Secretary argues that the hazards at the Collinsville and Macon plants were substantially similar because employees at both plants were ignorant of potentially fatal safety and health risks associated with asphyxiant and caustic chemicals. Cagle's responds by arguing that its prior container labeling violation involved cleaning and sanitation chemicals, not chemicals mixed with food or used in food production.

We hold that the Secretary has not established that Cagle's 1996 violation for failing to label containers of cleaning solution placed the company on notice it was required to label containers holding waste breading mixed with CO2. The only real evidence regarding the 1996 violations is the 1996 citation itself, which does not explain in any detail how the chemicals described were used at the Macon plant. In the absence of any evidence on this point, we find nothing in the prior citations that would have made Cagle's "particularly alert for the condition that brought about the second citation." *Caterpillar, Inc. v. Herman, 154* F.3d 400, 403 (7th Cir. 1998). We therefore find the prior violation insufficient to place Cagle's on notice that it needed to label containers holding only temporarily a food/chemical mixture of CO2 gas. For these reasons, we find the container labeling violation cannot be characterized as repeated.[10]

Although the Citation 2, Item 5 was not cited as serious, the record establishes the seriousness of failures to provide warning signs and labels indicating the presence of CO2 with regard to this item as well as with regard to Citation 1, Item 7, which was cited as serious. *See E. L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2052, 1993-95 CCH OSHD ¶ 30,580, p. 42,342 (No. 92-35, 1994). Accordingly, we find that violation to be serious.

Penalty

[10] The result we reach here would be the same if we applied the repeated test of the Eleventh Circuit, in which the Cagle's plants are located. *See D & S Grading Co. v Secretary of Labor*, 899 F.2d 1145, 1147-48 (11th Cir. 1990).

Under section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission must give due consideration to the following criteria when assessing penalties: the size of the employer's business; the gravity of the violation; good faith; and the employer's history of violations. Generally, the gravity of the violation is the primary element in the penalty assessment. The gravity of a particular violation depends on: (1) the number of employees exposed; (2) the duration of the exposure; (3) whether any precautions were taken against injury; and (4) the probability that an accident would occur. *Caterpillar Inc.*, 15 BNA OSHC 2153, 2178, 1993 CCH OSHD ¶ 29,962, p. 41,012 (No. 87-0922, 1993).

Cagle's is a large employer, with approximately 900 employees at its Collinsville, Alabama plant. Cagle's has a history of violations at its Macon, Georgia plant. Cagle's does not argue for a good faith reduction in penalty amounts, and the gravity of the labeling violation is moderately high. Accordingly, we assess a combined penalty of $5,000 for Citation 2, Item 5 and Citation 1, Item 7.

Order

We affirm Citation 2, Item 5 and Citation 1, Item 7, as serious violations with regard to the waste breading trailer; and vacate Citation 1, Item 2, and Item 6. We assess a penalty of $5,000.

SO ORDERED.

/s/
W. Scott Railton
Chairman

/s/
Horace A. Thompson, III
Commissioner

Dated: September 29, 2006

ROGERS, Commissioner, concurring in part and dissenting in part:

Both my colleagues and the judge have determined, for different reasons, that the waste breading trailer was not a confined space. In so doing, they have construed the definition of confined space in a manner contrary to its plain and unambiguous meaning, contrary to the reasonable interpretation of the Secretary, contrary to common understanding about the meaning of "can," and contrary to the clear intent and prophylactic nature of the standard, thus vitiating this comprehensive scheme to protect workers. My colleagues take a view of the scope of this standard that is fundamentally different from that reasonably taken by the Secretary, and to which I subscribe. In so doing, my colleagues impermissibly substitute their policy preferences for that of the Secretary. *Martin v. OSHRC (CF&I)*, 499 U.S. 144 (1991). Consequently, I must respectfully dissent with respect to Citation 1, Item 2. Otherwise, I concur with the results reached by my colleagues, albeit on somewhat narrower grounds for certain items.

I. Definition of Confined Space – Citation 1, Item 2.

Citation 1, Item 2, the permit space information item, alleges that Cagle's violated 29 CFR § 1910.146(c)(2) by failing to provide employees information regarding the waste breading trailer.[11] In vacating this item, both the judge and my colleagues concluded that the cited standard was not applicable because the waste breading trailer was not a confined space.[12]

Section 1910.146(b) defines a confined space as a space that:

> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
> (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
> (3) Is not designed for continuous employee occupancy.

[11] Section 1910.146(c)(2) states:

> If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.
>
> NOTE: A sign reading "DANGER–PERMIT-REQUIRED CONFINED SPACE, DO NOT ENTER" or using similar language would satisfy the requirement for a sign.

[12] A confined space has to meet additional requirements to be "permit-required." *See* 29 C.F.R. § 1910.146(b).

A. The Judge's Decision

The judge would interpret part (1) of the definition to require that employees have assigned work in the trailer before a space can be considered "confined." This reading has no support in the language of the standard, its structure, or its legislative history. Based on this erroneous reading, the judge then concludes the standard does not apply because "[t]here is no evidence that employees were assigned work inside the trailer."

In contrast, based on the language and structure of the standard, I would find that employees need not be assigned work in a space for the space to be considered "confined."[13] Under the plain language of section 1910.146(b)(1), a space will be considered confined if employees "*can* bodily enter and perform assigned work." (Emphasis added, with "can" modifying both "enter" and "perform.")[14] As the judge concedes, an employee "might physically be able to pass through the openings." Once inside, the employees could have dumped breading or performed other work.[15]

In construing the standard to require that employees be required to enter the space, the judge ignores the plain and most common meaning of "can" – "be physically or mentally able to" or "to be able to." *Webster's Third New Int'l Dictionary* 323 (1986); *Random House Unabridged Dictionary* 302 (2d ed. 1993). Construing the standard to examine the physical ability of an employee to enter a space is consistent with the discussion in the preamble, which focuses on the physical dimensions of a particular space. 58 Fed. Reg. 4462, 4477 (Jan. 14, 1993) (to qualify as a "confined space," an enclosure must be "large enough for the entire body

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[13] In *Mobile Premix Concrete Inc.*, 18 BNA OSHC 1010, 1012 n.4, 1995-97 CCH OSHD ¶ 31,416, p. 44,404 n.4 (No. 95-1192, 1997), the Commission found that hoppers containing moving piles of sand and gravel were confined spaces even though employees did not necessarily have to enter the hoppers to perform assigned work. The Commission reasoned that because employees worked near the hoppers, they "have access to the hazardous condition that exists when a hopper contains material and the gate is open." *Id.* In the present case, employees dumping breading from the top of Cagle's trailer had access to the hazardous condition of CO2 gas in the trailer regardless of whether they entered that space. Although employees made authorized entries into the empty hoppers, *Mobile Premix* suggests that a space can be considered a confined space regardless of whether entry actually takes place. Furthermore, *Mobile Premix* makes clear that access or exposure to the hazardous condition is still a prerequisite for a violation. *See Atlantic Battery Co.*, 16 BNA OSHRC 2131, 2138 (No. 90-1747, 1994) (the Secretary has the burden of proving employee access to establish a violation).

[14] Perhaps the judge's interpretation views "can" as only modifying the phrase "bodily enter" and not the phrase "perform assigned work." But if that were the case, the standard would have to read "*performs* assigned work" so as to have the verb agree in number with "employee." *See* William Strunk Jr., *The Elements of Style* 9 (4th ed. 2000); William A. Sabin, *The Gregg Reference Manual* 233, 246-49 (9th ed. 2001).

[15] I will address my colleagues' arguments on this point, *infra.*

of an employee to enter.") And, as I discuss next, this construction is also consistent with the structure of the standard, while the judge's construction clearly is not.

The judge's interpretation of section 1910.146(b) as requiring that assigned work be performed within a space for it to be considered "confined" conflicts with paragraph 1910.146(c)(3), which by its terms envisions situations where an "employer decides that its employees will not enter permit spaces."[16] In those situations, an employer must take effective measures to prevent employee entry. If an employer determines that employees "will not enter" a permit-required space, it logically implies that employees have no reason to perform assigned work therein. That, in turn, under the judge's analysis, would render the space no longer a "confined space," thus obviating application of section 1910.146 altogether. The judge's interpretation leads to a self-defeating result and would render significant aspects of the standard superfluous. *See Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 848 & n.11 (1988) and cases cited therein. *Accord, Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."). In contrast, reading the standard as the Secretary proposes gives meaning to paragraph (c)(3).

Furthermore, while the standard is primarily concerned with employees who must perform "work" in a permit-required confined space, it is also undeniably concerned with preventing accidental entry. Noting that commenter's suggested that "the proposal should also address the hazards of accidental entry," OSHA, in the preamble, indicated agreement:

> Paragraphs (c)(3) and (d)(1) require the employer to take steps to prevent unauthorized entry into permit-required confined spaces. . . . In order to ensure that employees are adequately protected against *falling into* or otherwise inadvertently entering a permit space, the Agency has revised the language in the proposed definition to include unintentional as well as intentional entry.
>
> 58 Fed. Reg. 4472. (emphasis added)

And as subsection (c)(3) clearly shows, the standard is designed to prevent accidental entry into a permit-required confined space regardless of whether assigned work is ever performed in a space. *See* 58 Fed. Reg. 4484 (measures to comply with subsection (c)(3) "could include permanently closing the space and barriers. . . the final rule will protect employees in workplaces where permit space entry is prohibited"). *See also* 58 Fed. Reg. 4481 (in addressing the need for an initial workplace survey of confined spaces, OSHA states that such a survey "is essential because, at the very least, it alerts the employer to the need for measures to prevent unauthorized entry").

B. My Colleagues' Decision

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[16] Section 1910.146(c)(3) states:

> If the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to prevent its employees from entering the permit spaces and shall comply with paragraphs (c)(1), (c)(2), (c)(6), and (c)(8) of this section.

My colleagues likewise have concluded the trailer was not a confined space, for somewhat different, but equally unpersuasive, reasons. They apparently concede that employees are physically able to "bodily enter" the trailer, but then assert that it was not "possible under the circumstances" for an employee to "perform assigned work" there. In reaching that conclusion, they ignore the plain meaning of the word "can" ("physically able to") and rely instead on contrived and overly limited factual scenarios that bear no relationship to the practical realities of the workplace (or the actual facts of this case, for that matter) in order to vitiate the clear intent and broad prophylactic nature of the standard.[17]

In determining what is a "confined space," the standard focuses on the physical configuration of the space, not the nature of a particular work assignment. By its terms, that

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[17] It is true that "can" has a variant of the alternative definition preferred by my colleagues. *See Webster's Third New Int'l Dictionary* 323 (1986) ("be made possible or probable by circumstances") and *Random House Unabridged Dictionary* 302 (2d ed. 1993) ("to have the possibility"). However, those alternative meanings are listed later than the definition related to physical ability and, at least as far as the *Random House Unabridged Dictionary* goes, "the most frequently encountered meanings generally come before less common ones." *Id.* at xxxii. Indeed, "possible" and "probable" have rather different meanings, with "probable" in particular tension with the standard's use of "can." Thus it is instructive that my colleagues have dropped the words "or probable" from their chosen definition. This indicates that they are not only picking and choosing among alternative definitions, but are also picking and choosing *within* definitions. My colleagues' confusion on what this standard really means reflects the fact that their view is really a result in search of a rationale.

The Supreme Court has noted that the existence of alternative definitions of a word, "each making some sense under the statute" indicates that a statute is open to interpretation. *Natl. R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). While I do not believe my colleagues' construction makes sense given the structure of this standard, even assuming *arguendo* that alternative definitions of "can" are equally permissible here, there is no reason why the Secretary does not deserve deference for her proffered interpretation, which is clearly reasonable. *Martin v. OSHRC (CF&I)*, 499 U.S. 144 (1991); *Beverly Healthcare-Hillview*, Nos. 04-1091 & 04-1092 (Sept. 18, 2006) (standard found ambiguous where word has alternative usages, but in that case, Commission defers to Secretary's reasonable interpretation). *See also* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21986 (October 23, 1995 Standards Interpretation Letter, in which OSHA states that a "typical tractor/trailer configuration...40 ft. length x 8 ft. Width x 8 ft. Height [that] is equipped with two doors at the rear of the unit" would be considered a confined space when its doors are locked from the outside.) This letter is consistent with the Secretary's current interpretation. My colleagues suggest this example is flawed because the letter "does not address methods whereby it is possible under the circumstances for an employee to enter and perform assigned work inside the locked trailers. . ." But the letter also discusses a "rectangular open-topped body" roll-off container, "typically used for storage of waste, . . .," either with or without end doors. The letter notes that such an open-top dumpster-type container would be considered a confined space when there is limited entry and exit (that is, without doors or when the doors are closed). Particularly in the case of a container without doors, it is reasonable to infer that employees could only physically enter and perform assigned work inside the container from the open top. In that sense, the dumpster example in the interpretation letter is quite similar to the trailer here. Yet my colleagues prefer to ignore the Secretary's reasonable interpretation.

standard looks at whether a space is "large enough and so configured that an employee *can* . . . perform assigned work." (emphasis added). The legislative history reiterates this point. Thus the preamble notes that a "confined space" is a space that has "adequate size and configuration for employee entry. . ." 58 Fed. Reg. 4471. Later, the preamble notes that all confined spaces have "mobility-limiting size and configuration," among other features. 58 Fed. Reg. 4476. Thus the standard looks generically and objectively at the physical configuration of the space and whether assigned work *can* be performed there – rather than a subjective tailored list of "assigned" tasks that might be difficult (but not impossible) to perform in a particular space.[18]

In reality, my colleagues have effectively redefined the operative word "can" from "physically able to" to "easily able to." They also deemphasize the physical configuration of the space and have chosen to emphasize limited particular tasks that are difficult (but not necessarily impossible) to perform precisely because of the "mobility-limiting" nature of the space. Under my colleagues' subjective, result-oriented approach, a space could be "confined" for some purposes but not for others, depending on the tailored list of tasks an employer decides it would "assign" (instead of looking at whether *any* "assigned work" is physically possible). Furthermore, they have emphasized those characteristics of the space that limit or restrict entry or exit – precisely those characteristics that are *necessary* for a space to be confined – and argue that *because* of those characteristics, it would be difficult to perform their limited list of tasks. In so doing, they turn the standard on its head – and defeat its very purpose.[19]

For example, they discuss the physical factors that might make it difficult for an employee to dump waste breading by jumping or lowering himself into the space, including the difficulty of exiting the space, as a rationale for why it is not a "confined space."[20] However, they have ignored other possible or even foreseeable types of "assigned work" that an employee could perform.[21]

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[18] One can hypothesize a space that is so configured such that bodily entry may be possible, but in which *no* assigned work can possibly be performed, such as a very narrow silo. Presumably such a space would not meet the definition in the standard. However, the trailer at issue here is not such a space.

[19] My colleagues appear to read the standard as if it said "large enough and so configured that an employee can . . . perform *the* assigned work," with the definite article "the" added. Of course, despite my colleagues' continued reference to "the" assigned work, the standard simply does not read that way. My colleagues are not free to rewrite the Secretary's standards to satisfy their policy preferences.

[20] Under my colleagues' logic, the fact that an employee would find it difficult to perform *any* assigned work in the space because of the likelihood of being overcome by CO2 would prevent the space from being "confined," even though it is the atmospheric hazard that makes it "permit-required."

[21] My colleagues seem to think it necessary that employees find it relatively easy to perform the limited specific tasks assigned by the employer for a space to be confined. Yet they ignore the fact that a space can be "confined" even when no entry, and *no* assigned work, is contemplated. *See* 29 C.F.R. § 1910.146(c)(3) and discussion *supra*. And even assuming *arguendo* that the standard is ambiguous, they offer no reason why the Secretary's reasonable interpretation of the standard - focusing on the physical configuration of the space and whether assigned work *can* be performed

As one example, it is possible and, indeed, foreseeable, that an employee dumping breading from the roof of the trailer could drop a knife or other tool in the trailer and seek to retrieve it, perhaps using the ladder that is available by the side of the trailer.[22] While an employee who makes such an attempt could well be overcome by the CO2 and thereby rendered unable to complete the task, surely that unfortunate occurrence would not be a basis for holding that the standard does not apply.

Alternatively, as apparently happened here, an employee could fall into the space and be overcome by the CO2. The accident here establishes actual exposure to the fall hazard. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079, 1993-95 CCH OSHC ¶30,699, p. 42,603 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996) (fact that employee fell through skylight establishes actual exposure to fall hazard). As long as employees have access to the hazardous condition, *see* n.3 *supra*, such a fall is foreseeable. And, as I discussed earlier, the standard is intended to protect against accidental falls into a confined space.

My colleagues may also have some concern about the possible application here of both the guarding standard, 29 C.F.R. § 1910.22(c), and the confined space standard. But the standards address different hazards and thus there is nothing unusual about Cagle's being cited both for lack of fall protection and for a violation of the confined space standard. *See McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1880, 1993-95 CCH OSHC ¶30,506 p. 42,165-3 (No. 90-2337, 1994), *aff'd*, 71 F.3d 208 (6th Cir. 1995) (one standard doesn't preempt another unless both address same hazard).

Thus, in my view, Cagle's waste breading trailer met both parts (1) and (2) of the confined space definition.[23] Because there is no dispute the breading trailer also met part (3) of

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(as opposed to the ease of accomplishing specific hypothetical assigned tasks) - does not deserve deference. *See CF&I*, 499 U.S. 144. Rather, my colleagues simply prefer their own interpretation of the standard as a matter of policy – but that preference is of no legal moment. *Id.*

Indeed, my colleagues even suggest that the premises that entry was not permitted through the roof, nor assigned work allowed in the trailer, are dispositive of the fact that the space was not "confined." But as I have discussed earlier, that myopic view reads subsection (c)(3) out of the standard. It goes without saying that if an employer decides that its employees will not enter such spaces pursuant to subsection (c)(3) of the standard, then employees are also not permitted to perform assigned work there.

[22] My colleagues suggest that such a foreseeable incident in the workplace would be a "detour." Yet, the standard is intended to protect against accidental and unauthorized entry into such spaces.

[23] The judge further found the trailer did not meet part (2) of the confined space definition because its roof openings were not designed for employee entry, concluding, "A limited or restricted means of entry must be designed as one through which a person has to enter or be 'forced to enter' and not a space that an employee can merely fall into." The judge cited a technical amendment to the permit-required confined space rule's preamble in support of his conclusion.

In my view, the judge's interpretation of part (2) of the confined space definition as requiring employees be "forced to enter" a space for it to be considered "confined" rests on a misreading of the technical amendment to the confined space rule's preamble. The technical amendment does not limit a "confined space" to a space that employees are forced to enter or exit. Rather, it states that

the definition in that it was not designed for continuous occupancy, I would conclude that the trailer was a confined space.

Since the release of CO2 in the trailer created a hazardous atmosphere, and Cagle's does not argue otherwise, I would find the trailer meets the requirements of section 1910.146(b)(1) and is thus permit-required. I would also find the Cagle's violated the standard at 1910.146(c)(2) by failing to "inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit space[]." Cagle's concedes it did not post danger signs informing employees the waste breading trailer was a permit-required confined space.[24] Based on the record, I would find that Cagle's also failed to inform employees of the existence, location and danger of the breading trailer by other equally effective means.

II. Disposition of Other Items on Review

I turn first to the two container labeling items. I agree with my colleagues that Cagle's has not shown it comes within the exception (29 C.F.R. § 1910.1200(b)(5)(iii)) to the labeling requirements. I also agree that the Secretary has shown a violation of the two cited labeling standards with respect to the waste breading trailer, because the CO2 gas in the trailer was clearly hazardous, as reflected in Cagle's stipulation. With respect to the totes and boxes, I would vacate the two items because the Secretary has not shown that the CO2 concentration in the totes and boxes presented a health risk pursuant to 29 C.F.R. § 1910.1200 (d)(5)(iv).

With respect to the employee training item, I agree that the plain language of the standard, as amended in 1994 ("[i]nformation and training may be designed to cover categories of hazards . . . *or* specific chemicals") (emphasis added), precludes an interpretation that the standard broadly *requires* chemical-specific training. To the extent the Secretary bases her interpretation on the 1998 HazCom compliance directive (CPL 2-2.38D), which more narrowly requires that employers "must make employees specifically aware which hazard category . . . the [chemical] falls within," I would note that the directive was issued March 20, 1998 and post-dates both the citation (March 2, 1998) and the conduct in this case. As such, Cagle's had no

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a confined space is one employees would be forced to enter or exit "in a posture that might slow self-rescue." The judge's interpretation erroneously excludes from the definition of "confined space" those spaces which employees have the ability to enter, but from which they would be forced to exit in a posture that might slow or prohibit self-rescue.

[24] Cagle's had posted such signs elsewhere, namely on the outside of the spiral freezers and on an ice house door.

notice of it. Thus it would be premature to assess the reasonableness of the interpretation contained in the directive.

With respect to characterization, I agree that Citation 2, Item 5 is not repeated. However, I would base my conclusion solely on the governing Circuit precedent, which assigns the burden of proof of showing substantial similarity of the violations to the Secretary, regardless of whether both violations are of the same standard. *D & S Grading Co., Inc.*, 899 F.2d 1145, 1147-48 (11th Cir. 1990). I would conclude the Secretary has not met that burden here. I also agree with my colleagues that this item, along with Citation 1, Item 7, is serious.

/s/

Thomasina V. Rogers
Commissioner

Dated: September 29, 2006

Secretary of Labor,
Complainant,
v.

Cagle's, Inc.,
Respondent.

OSHRC Docket No. **98-485**

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Cagle's Inc. (Cagle's), operates a chicken processing plant in Collinsville, Alabama. On September 13, 1997, two employees, while dumping waste breading into a trailer, died of asphyxiation caused by an accumulation of carbon dioxide (CO_2). The Occupational Safety and Health Administration (OSHA) investigated the fatalities and issued Cagle's three citations on March 2, 1998.

Citation No. 1 alleges serious violations of § 1910.22(c) (item 1) for failing to guard three openings in the roof of the waste breading trailer; § 1910.146(c)(2) (item 2) for failing to inform employees that the waste breading trailer was a permit-required confined space; § 1910.146(c)(5)(i)(C) (item 3)[25] for failing to record the air monitoring results for each entry into the spiral freezers; § 1910.146(c)(5)(ii)(C) (item 4) for failing to test oxygen levels before entering the spiral freezers; § 1910.146(k)(1)(i) (item 5)[26] for failing to train the rescue team in the use of personal protective and rescue equipment; § 1910.305(b)(1) (item 6) for failing to cover unused openings in a cable tray; § 1910.1200(f)(5)(ii) (item 7) for failing to post the waste

[25] At the hearing, the Secretary grouped serious Item 3 and Item 4 with a proposed penalty of $5,000 (Court Exh. 1).

[26] In the alternative, the Secretary alleges a violation of § 1910.146(d)(9) for failing to develop permit space rescue procedures for the waste breading trailer.

breading trailer and tunnel freezer areas with carbon dioxide warning signs; and § 1910.1200(h)(3)(iii) (item 8) for failing to train employees on the hazards of carbon dioxide. The serious citation proposes a total penalty of $40,000.

Citation No. 2 alleges repeat violations of § 1910.151(c) (item 1) for failing to provide suitable eye/body wash facilities in the ammonia receiving area; § 1910.212(a)(1) (item 2) for failing to guard the rotating parts of the augers in the offhaul department; § 1910.219(e)(3)(i) (item 3)[27] for failing to guard the belts and pulleys on the exhaust blowers; § 1910.303(g)(2)(i) (item 4) for failing to cover the 220-volt electrical box in the offhaul department; § 1910.1200(f)(5)(i) (item 5) for failing to identify the totes and waste breading trailer as containing carbon dioxide; and § 1910.1200(h) (item 6) for failing to inform employees working at the waste breading trailer of the carbon dioxide hazard. The repeat citation proposes a total penalty of $145,000.

Citation No. 3 alleges an "other" than serious violation of § 1910.23(c)(1) for failing to guard the end of the loading ramp to the waste breading trailer. No penalty is proposed.

Cagle's disputes each alleged violation and argues that the waste breading trailer and spiral freezers are not confined spaces. For the reasons discussed, the court agrees and the related violations are vacated.

The hearing was held in nine days during September and October, 1998, in Gadsden, Alabama. The parties stipulated jurisdiction and coverage and filed post-hearing briefs (Tr. 6).

Background

Cagle's processes two million pounds of chicken each week at five plants in Georgia and Alabama. Cagle's Collinsville, Alabama, plant processes 198,000 chickens a day (Tr. 28, 239-240, 646). The Collinsville plant, located on 600 acres in rural Alabama, consists of a large processing building and waste water ponds. The plant operates three shifts, five days a week with a half a day on Saturday, and employs approximately 897 employees (Tr. 238-239, 647). The first and second shifts process the chickens. The third shift (midnight to 7:00 a.m.) performs most of the plant's clean up and maintenance work (Tr. 326, 1536-1537). The U. S. Department of Agriculture (USDA) monitors daily the chicken processing (Tr. 206).

[27] The Secretary withdrew repeat Item 3 at the hearing (Court Exh. 1).

After the chickens are slaughtered and de-feathered, they pass through the plant on a system of conveyors. In the marinated raw breading (MRB) room, the cut-up chickens are processed and prepared for shipping. The MRB room is approximately 80 feet by 140 feet and employs 100 employees each shift (Tr. 156, 162-163, 325, 335). The MRB room has three breading lines, a cut up line and several smaller operations (Exh. C-1; Tr. 156-157, 243-245). The chickens are processed as fried or non-fried and coated with marinated raw breading (Tr. 245-246, 248, 264). After the breading is applied, the chickens are conveyed through one of three freezers (Tr. 247-248). Once inside the freezers, the breaded chickens are quickly frozen by use of carbon dioxide (Tr. 187, 249, 261-262). Freezing takes less than 25 minutes (Tr. 212, 250).

The tunnel freezer is approximately 35 feet long and made of stainless steel. A series of conveyors pass through the freezer. Carbon dioxide in the form of dry ice is applied directly on the chickens (Tr. 261-262, 330).

The two spiral freezers are approximately 20 feet wide and 20 feet long (Tr. 199, 276). One spiral freezer is approximately 8 feet high and the other is 11 feet high (Tr. 1230). Each spiral freezer has two doors (38 inches wide by 94 inches high) on either side which are used to access the freezer, if necessary (Tr. 217, 278, 1230). A narrow passageway and a large spiral conveyor are inside each freezer (Exh. R-3; Tr. 200, 276). Two openings allow the conveyor system to carry the breaded chickens into and out of the freezer (Tr. 278). The temperature inside the spiral freezers remains at approximately 65 degrees below zero (Tr. 225). Carbon dioxide gas is sprayed through “horns” into the freezer and fans circulate the carbon dioxide around the chickens as they pass on the spiral conveyor (Tr. 215-216, 1239).

After freezing, the chickens are conveyed to packaging (Tr. 246). As the chickens move on the conveyer, some of the marinated breading falls off and is collected in containers as waste (Exhs. C-12, C-14; Tr. 250-254, 262-263). Carbon dioxide is sublimed in the breading and pockets of dry ice may form (Tr. 266-267).

The waste breading, collected in boxes in the MRB room, is dumped into totes, 40 inches long, 40 inches wide, and 36 inches deep (Exhs. C-2, C-12; Tr. 181, 216, 788). At the time of the accident, if totes were not available, cardboard boxes were used to collect the waste breading (Tr. 788). The cardboard boxes, 24 inches long, 24 inches wide, and 16 inches deep, were designed to hold 70 pounds of chicken (Tr. 41, 109).

When full, the totes or boxes were transported from the MRB room to the trash dock for dumping into the waste breading trailer (Tr. 36, 790-791, 1426). The waste breading trailer, located outside approximately 200 feet from the plant, was provided by Bakery Feeds, Inc. (Exhs. C-2, C-19; Tr. 38, 110, 793). The trailer, such as the one on-site on September 13, 1997, was 40 feet long, 90 inches wide, and 90 inches high from the floor of the trailer to the roof (Tr. 732-733). After the trailer was filled, the trailer's cab was attached and the trailer was driven to the Bakery Feeds, Inc., who used the waste breading as high protein animal feed (Exh. C-19; Tr. 102, 114, 288, 1197).

James Williams and John Pruitt were assigned the full-time responsibility of dumping the waste breading into the trailer (Tr. 33-34, 780). Other employees, including Jeremy Higginbotham, assisted in the job when necessary (Tr. 33-35, 42).

Prior to the accident in September, 1997, the procedure for dumping the waste breading into the trailer was changed from placing 70-pound cardboard boxes through the trailer's back doors to dumping the waste breading through openings cut in the roof of the trailer (Tr. 41-42, 92, 110). The waste breading was collected in plastic totes which fitted on the forklift. The forklift dumped the totes through three, 5-feet by 5-feet, openings cut in the trailer's roof (Tr. 44-45, 47, 110-111, 733). A ramp in excess of 4 feet high was constructed perpendicular to the trailer's location to allow the forklift sufficient height to lift the totes above the trailer's roof (Exh. C-2; Tr. 45, 98-99, 725-726). The trailer's rear doors were kept closed and could not be opened from the inside (Tr. 293, 739-741). A blue tarp covered the openings when transporting the waste breading to Bakery Feeds, Inc. (Exh. C-4; Tr. 52, 794).

Although totes were generally used, there were occasions when cardboard boxes[28] were used (Tr. 128, 302, 789). To dump the cardboard boxes, an employee "set the box on top of the trailer, cut the side out of the box and let the material free flow into the trailer" (Tr. 49-50, 67). A ladder was placed on the ramp to access the trailer's roof (Tr. 50).

On September 13, 1997, Jeremy Higginbotham and James Williams were dumping the waste breading. They started work at approximately 6:00 a.m. and by 7:30 a.m. were found dead inside the trailer (Tr. 83, 85, 285). No one apparently saw the employees working or witnessed the accident. The back doors to the trailer were closed. A ladder was placed on the ramp against

[28] Cardboard boxes were also referred to as combo boxes.

the trailer (Exh. C-2). Two openings in the trailer's roof were uncovered (Exh. C-5). The mound of waste breading inside the trailer was approximately 4 feet from the ceiling (Tr. 106).

Cagle's stipulates that Jeremy Higginbotham and James Williams were employees and that they died as a result of "asphyxiation/environmental suffocation inside the waste breading trailer on September 13, 1997, due to an oxygen deficient atmosphere present inside the waste breading trailer which was caused by the accumulation of carbon dioxide" (Tr. 6-7).

Industrial hygienist Judith Etterer of OSHA arrived at the plant on September 13, 1997, at approximately 4:00 p.m. She investigated the accident and plant. Based on her investigation, three citations were issued on March 2, 1998 (Tr. 623, 625).

Discussion

The Secretary has the burden of proving a violation.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

SERIOUS CITATION NO. 1

Item 1 - Alleged Violation of § 1910.22(c)

The citation alleges that a guardrail or cover was not provided for the three openings in the waste breading trailer's roof to prevent employees from falling into the trailer. Section 1910.22(c) provides that "covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches etc."

There is no dispute that the three, 5-feet by 5-feet, openings cut in the roof of the waste breading trailer were not covered or guarded by standard guardrails (Exh. C-4; Tr. 47, 110-111, 335, 733). The inside height of the trailer was in excess of 7 feet (Tr. 732). Also, there is no dispute that two employees died inside the trailer of asphyxiation caused by the accumulation of

carbon dioxide (Tr. 6-7). The blue tarp, used to cover the openings during transportation, covered one opening. Cagle's does not argue, nor was it shown, that the blue tarp was an adequate cover to protect employees from falling through the openings (Tr. 762-763).

Cagle's argues that the roof of the trailer was not a working surface. An elevated flat surface does not become a working space merely because an employee occasionally works on it. *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993) (PVC pipes were not a platform within the meaning of § 1910.23(c)(3)). Cagle's argues that the employees were not required to work on the roof to perform the dumping operation (Tr. 33, 780).

The record shows that the roof was a working surface. A trailer was continually at Cagle's plant. After one trailer was filled with waste breading, it was moved and another trailer was placed at the same location. It took approximately three days to fill a trailer (Tr. 793). Despite normally using the forklift, it was also common for employees to be on the roof dumping the waste breading from the cardboard boxes (Tr. 49, 70, 112). Michael Mattox, wastewater superintendent, testified that he had observed on several occasions employees (Camp, Higginbotham and Williams) on the roof dumping the cardboard boxes into the trailer (Tr. 49-51). CO Etterer testified that Leonard Camp, who was deceased at the time of the hearing, had stated that he, Joey Poe and Jeremy Higginbotham "would get on top of the trailer and manipulate the boxes and cut them open and let the material fall in" (Tr. 819, 1059, 1820-1821). Wade Hankinson, former maintenance supervisor, also testified that he had observed employees on the trailer's roof dumping the boxes (Tr. 294-296). Hankinson was even concerned about a possible fall (Tr. 334). Also, there were no evidence that Cagle's prohibited employees from accessing the roof (Tr. 113, 758, 808).

A cover or guardrail is required to protect employees against possible fall hazards, a fall in excess of 7 feet. Also, Cagle's was aware that the waste breading contained carbon dioxide, even after being dumped into the trailer (Tr. 44, 109, 127, 182). Employees referred to it as the "CO_2 trailer" (Tr. 808).

Cagle's argues that the Secretary failed to show employees' exposure within six months prior to the issuance of the citation. Hankinson did not know when he saw employees on the trailer's roof (Tr. 294-295). Mattox observed the employees approximately three months prior to OSHA's inspection (Tr. 68-69). With regard to Camp's statement to CO Etterer, Cagle's argues

that the statement is inadmissable hearsay because it was not shown to be within the scope of Camp's job as required by § 801(d)(2), Federal Rules of Evidence.

In considering the 6-month statute of limitations, the instance of noncompliance and employees' access to an unsafe condition must occur within six months of the issuance of the citation. *Central of Georgia*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977). The Secretary must show that employees have access to the violative condition by either actual or reasonably predictable exposure. *Phoenix Roofing,Inc*., 17 BNA OSHC 1076, 1079 (No 90-2148, 1995), *aff'd* 17 BNA OSHC 1628 (5th Cir. 1995).

Cagle's statute of limitation argument is rejected. The accident occurred on September 13, 1997. The citations were issued on March 2, 1998. There is no dispute that the two employees were found inside the trailer. Their job was dumping the waste breading. The openings in the trailer's roof were the only means by which the employees could have accessed the inside of the trailer. When found, the doors were closed (unable to be unlocked from the inside) and a ladder was sitting on the ramp against the side of the trailer. A cardboard box used to carry the waste breading was found inside the trailer (Exh. C-5). It is reasonable to assume that the employees were on the trailer's roof and exposed to the unprotected openings. Employees' exposure within the six months is established.

Cagle's has not asserted nor shown unpreventable employee misconduct. The previous incidents of employees on the trailer's roof establishes employer knowledge and foreseeable employee exposure. The record shows that it was a common practice for employees to be on the roof emptying the cardboard boxes.

A violation of § 1910.22(c) is affirmed as serious. Cagle's knew of the unprotected openings in the roof of the waste bread trailer and was aware that employees periodically were on the roof. The employees were exposed to falls in excess of 7 feet into an enclosed area with an oxygen deficient atmosphere which could cause death, such as occurred on September 17, 1997.

Item 2 - Alleged Violation of § 1910.146(c)(2)

The citation alleges that employees were not informed the waste breading trailer was a permit-required confined space. Section 1910.146(c)(2) provides that:

> If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other

> equally effective means of the existence and location of and the danger posed by the permit spaces.

There is no dispute that danger signs were not posted advising employees to consider the waste breading trailer as a permit-required confined space. Also, Cagle's does not dispute that carbon dioxide was present inside the trailer and that the trailer was not designed for continuous employee occupancy. Carbon dioxide is a dangerous chemical which potentially reduces the oxygen concentrations inside an enclosed space to below 19.5 percent. *See* § 1910.146(b). The material safety data sheet (MSDS) for carbon dioxide states that it "is the most powerful cerebral vasodilator known. Inhaling large concentrations causes rapid circulatory insufficiency leading to coma and death" (Exh. C-16; Tr. 376). Carbon dioxide is odorless, tasteless, and heavier than air (Tr. 372, 374-375). Carbon dioxide sublimes from a solid to a gas form (Tr. 373).

Cagle's argues that the waste breading trailer is not a permit-required confined space. A confined space is defined at § 1910.146(b) as a space that:

> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
> (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
> (3) Is not designed for continuous employee occupancy.

A permit-required space is defined at § 1910.146(b) as a confined space that has one or more characteristics, including a potentially hazardous atmosphere. A space cannot be permit-required unless it first qualifies as a confined space. *See* § 1910.146(b), Appendix A. The amount of hazardous atmosphere is immaterial to the determination of a confined space.

Daniel Schrimsher, the Secretary's expert in confined spaces, considers the waste breading trailer a confined space because entry inside the trailer could only be made by climbing through the openings in the roof or by manipulating the back doors, which were secured by two pin locks (Exh. C-37; Tr. 409, 444-445, 1096-1097). If locked, the doors could not be opened from the inside (Tr. 293).

The definition of confined space, however, also requires a space "so configured that an employee can enter and perform some assigned work." CO Etterer agreed that the three openings in the roof were not designed as an employee's entrance, but for dumping waste breading (Tr. 1818). There is no evidence that employees were assigned work inside the trailer

(Tr. 122, 1510-1511, 1964). The dumping process was performed by the forklift or by standing on the trailer's roof. Employees were not required to enter inside the trailer to perform any work (Tr. 1818). There was no showing that any Cagle's employees ever went inside the trailer for any reason except to remove the two deceased employees. The record indicates that employees understood they were not to go inside the trailer (Tr. 979-980, 1962).

A limited or restricted means of entry must be designed as one through which a person has to enter or be "forced to enter" and not a space that an employee can merely fall into. 59 Fed. Reg. 55208-55209 (Nov. 4, 1994). The openings were not used or contemplated as a means of entry or exit. The openings were designed only to facilitate the waste dumping process. Although a person might physically be able to pass through the openings, the openings were not intended for such a purpose. The employee is protected from such falls by covers or guardrails, as the Secretary cited in item 1. Employees understood that the openings were not for entry into the trailer. It was not shown that employees had any reason to enter through the openings in the roof or, in fact, even entered the trailer through the rear doors (Tr. 122, 979-980, 1510-1511, 1818, 1962, 1964). The records fails to establish that the waste breading trailer was a confined space. The alleged violation of § 1910.146(c)(2) is vacated.

Items 3 and 4 - Alleged Violations of
§ 1910.146(c)(5)(i)(C) and § 1910.146(c)(5)(ii)(C)[29]

The citation (item 3) alleges that Cagle's failed to record the monitoring results for each entry into the spiral freezers. Section 1910.146(c)(5)(i)(C) provides that an employer does not need to comply with a permit-required confined space program if:

> The employer develops monitoring and inspection data that supports the demonstrations required by paragraphs (c)(5)(i)(A) and (c)(5)(i)(B) of this section.

Subsections (A) and (B) require a demonstration that a hazardous atmosphere is the only hazard posed and that continuous forced air ventilation alone is sufficient to safely maintain the space for entry.

[29] The secretary grouped Items 3 and 4 (Court Exh. 1).

The citation (item 4) also alleges that employees failed to test the oxygen level prior to entering the spiral freezers. Section 1910.146(c)(5)(ii)(C) provides that:

> Before an employee enters the space, the internal atmosphere shall be tested, with a calibrated direct-reading instrument, for the following conditions in the order given:

The conditions, in the order to be tested, are oxygen content, flammable gases and vapors, and potential toxic air contaminants.

Cagle's does not permit employees to enter the spiral freezers while in operation. The freezers' doors are not locked, and occasionally employees open the doors to check for malfunctions (Tr. 279-280). If there is a malfunction, the spiral freezers are turned off and the carbon dioxide is quickly evacuated by a special ventilation system before employees enter (Tr. 271-273, 505-508). During the third shift, when the spiral freezers are not operating, employees regularly enter to clean and sanitize the interior (Tr. 270-271).

Cagle's records show that it regularly performs air monitoring in the freezers (Exh. C-6, C-40). The monitoring records show the date and time of entry, the identity of the freezer entered (fryline or CMC) and the employee's name who performed the air monitoring. The Secretary argues that Cagle's records fail to show the numerical reading obtained from the air monitoring. The record only indicates that the level was "OK."

In order to require testing and monitoring data, it must first be shown that the spiral freezers are confined spaces under § 1910.146(b). As discussed, a confined space must have "limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry)."

Cagle's posted the spiral freezers with warning signs identifying them as non-permitted confined spaces (Exhs. C-7, C-8). Cagle's operating procedure for entering the spiral freezers also designated the freezers as non-permitted confined space (Exhs. C-6). David Camp, further processing supervisor, testified that the spiral freezers were identified as confined spaces during training by Terry Wester, safety director (Tr. 143, 164, 166). Wester had told employees that the spiral freezers had a potentially dangerous atmosphere with high levels of carbon dioxide (Tr. 171-172).

Despite posting warning signs, Cagle's argues that the spiral freezers are not confined spaces (Cagle's Brief, p. 19-20). Cagle's is not bound by its warning signs. The Secretary has the burden of proof and must show that the freezers are confined spaces as defined by OSHA.

Even if Cagle's believed the freezers were confined spaces, the Secretary is not relieved of establishing the application of the standard.

There is no dispute that the spiral freezers are not designed for continuous employee occupancy (Tr. 225, 281). During the freezing process, the spiral freezers maintain high concentrations of carbon dioxide and temperatures at approximately 65 degrees below zero (Tr. 225). There is no evidence that employees enter the freezers while in operation. However, employees are regularly assigned work inside the freezers, including repairing malfunctions, maintenance and cleaning (Tr. 271-272, 507-508).

However, to be a confined space, it must be shown that there is a limited or restricted means for entry or exit. The entry or exit for the spiral freezers is not limited or restricted. Each freezer has two large doors, 38 inches wide and 94 inches high, on opposite sides of the freezer. Although kept closed, the doors to the freezers were unobstructed and easily opened (Exhs. C-9, C-10; Tr 217, 1230). The doors have handles on each side for opening at any time from inside and outside the freezer (Exh. R-3; Tr. 320, 982). Also, an unobstructed walkway passes through the inside of each freezer (Exh. R-3). No employee operated the freezers or was inside during the freezing process. The freezers were not configured to limit access (Tr. 1230, 1496).

The preamble states that "doorways and other portals through which a person can walk are not to be considered limited means of entry and exit." 58 Fed. Reg. 4462, 4477-4478 (January 14, 1993). The preamble instructs that "OSHA realizes that an employee may still be injured or killed as a result of some atmospheric hazard within such an enclosed area; however, this standard is not intended to address all locations that pose atmospheric hazards." 58 Fed. Reg. at 4462. In 1994, OSHA modified its statement regarding doorways by stating that it "was intended to limit the application of the definition of confined spaces to those areas where an employee would be forced to enter or exit in a posture that might slow self-rescue or make rescue more difficult." 59 Fed. Reg. 55208-55209 (November 4, 1994). OSHA's modification further states that:

> For example, even if the door or portal of a space is of sufficient size, obstruction could make entry into or exit from the space difficult. The Agency intended that spaces which otherwise meet the definition of confined spaces, and which have obstructed entry or exits even though the portal is a standard size doorway, be classified as confined spaces. *Id.*

The two standard doorways were regular means of entry or exit. The doors were easily opened and were not designed or configured to restrict access. The Secretary has failed to show that there was some obstruction, other than the easily accessible doors, which limited or restricted an employees entrance or exit. The employee was not forced to enter the freezer in "a position that might slow self recovery or rescue." 59 Fed. Reg. 55209. A video showing the inside of the spiral freezer fails to show any obstruction, such as a blocked passageway or a wet, slippery floor (Exh. R-3). Gary Hubbard, corporate health safety and environmental manager, testified that he had no difficulty walking through the spiral freezers. He could exit quickly, and the floor was not slippery (Tr. 1230-1231). One door was partially impeded by the conveyor; however, the door still opened approximately 17 inches, which was sufficient for an employee to easily walk through (Tr. 1231). CO Etterer's testimony regarding possible wet or icy floor conditions is speculative and not supported by the record. She did not enter the freezers. Also, no basis for her speculations was identified or described. Employees who had worked inside the freezers did not testify to any problems or obstructions. There is no evidence that anyone had difficulty exiting a spiral freezer for any reason. The spiral freezers were not shown to be confined spaces designed or configured with a "limited or restricted means for entry or exit." The violations of §§ 1910.146(c)(5)(i)(C) and 1910.146(c)(5)(ii)(C) are vacated.

Item 5 - Alleged Violations of § 1910.146(k)(1)(i), or in the Alternative § 1910.146(d)(9)

The citation alleges that a self-contained breathing apparatus (SCBA) or re-entry testing was not used or performed prior to entering the waste breading trailer for rescue. If an employer has employees who enter permit-required confined spaces to perform rescue services, § 1910.146(k)(1)(i) provides that:

> The employer shall ensure that each member of the rescue service is provided with, and is trained to use properly, the personal protective equipment and rescue equipment necessary for making rescues from permit spaces.

In the alternative, the citation alleges that no permit space rescue procedures were developed. Section 1910.146(d)(9) requires an employer to:

> Develop and implement procedures for summoning rescue and emergency services, for rescuing entrants from permit spaces, for

> providing necessary emergency services to rescued employees, and for preventing unauthorized personnel from attempting a rescue.

As stated, the Secretary has failed to show that the waste breading trailer was a confined space. Therefore, a violation of § 1910.146(k)(1)(i), or in the alternative, § 1910.146(d)(9) is vacated.

Item 6 - Alleged Violation of § 1910.305(b)(1)

The citation alleges that the metal cable tray outside the offhaul room was rusted, which created large holes in the box. Section 1910.305(b)(1) provides that:

> Conductors entering boxes, cabinets, or fittings shall also be protected from abrasion, and openings through which conductors enter shall be effectively closed. Unused openings in cabinets, boxes, and fittings shall be effectively closed.

A metal cable tray in the offhaul department held insulated cables running to various outlets (Tr. 1302). The cable tray was approximately 15 feet long and was rusted, with large holes or openings along the bottom (Tr. 1723). One control box attached to the cable tray was loose and dangling below the tray. The control box started the pump (Exhs. C-25, C-33). Gary Hubbard, corporate safety, health and environmental manager, described the control box as held by loose wires which ran through the rusted metal cable tray (Tr. 1303). He agreed that the rust could have caused the box to come loose (Tr. 1303-1304). Hubbard testified that the box put tension on the wires, which could come undone from the connection points (Tr. 1304-1305). Other conductors inside the cable tray energized the augers and barrel screens (Tr. 1306). The cable tray was located in an area which was frequently washed down by an employee with a water hose.

The standard applies to "conductors entering boxes, cabinets or fittings." CO Etterer refers to it as a cable tray box (Tr. 1923). A cable tray is a "unit or assembly of units or sections and associated fittings, made of metal or other noncombustible materials forming a rigid structural system used to support cables." *See* definitions at 1910.399. It is similar in purpose and design as a box or cabinet. The standard applies to cable trays.

There is no dispute that the openings caused by the rust were not covered. However, Cagle's argues that there was no hazard because the wiring was insulated. CO Etterer did not look inside the cable tray or test it to see if it was unsafe (Tr. 1920-1921). There were no

observable breaks in wiring (Tr. 1923). Waldrop replaced the cable tray the night after the inspection (Tr. 572). He testified that he did not have to replace any wiring (Tr. 573). He found no problems with the insulation and electrical parts. He described the rust as only at the bottom of the tray (Tr. 572-573).

Although there is no evidence that there was any actual deterioration or cuts in the insulation or wires, the standard requires that unused openings in the cable tray be covered. The rusted openings were not "effectively closed." The standard presumes a hazard. CO Etterer testified that a break in the wiring could cause the box or tray to become energized (Tr. 1727). In fact, one control box was hanging loose from the cable tray, putting tension on the wires holding the box. Also, CO Etterer observed possible vibration from vehicles and the augers in the area (Tr. 1729). A walkway 36 inches wide, used by employees, passed within a foot of the cable tray (Tr. 1728).

The violation of § 1910.305(b)(1) is affirmed as serious. The cable tray was easily observable and the rust indicates the condition has lasted for a prolonged period of time. If the cable tray became energized, serious injury or death is the expected result.

Item 7 - Alleged Violation of § 1910.1200(f)(5)(ii)

The citation alleges that there were no hazard warnings to alert employees of the health effects of carbon dioxide in the waste breading trailer area and the tunnel freezer area. Section 1910.1200(f)(5)(ii) requires an employer to label, tag or mark each container of a hazardous chemical with the:

> Appropriate hazard warnings, alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemicals.

An employer is required to ensure that each hazardous container is appropriately labeled, tagged or marked. A hazardous chemical is defined as "any chemical which is a physical hazard or a health hazard." As discussed, carbon dioxide is a hazardous chemical (Exh. C-16; also *see* § 1910.1200(d)(3)(i) and § 1910.1200, Table Z-1). Although no air monitoring was performed to determine the concentration of the carbon dioxide, there is no dispute that carbon dioxide was

present in the tunnel freezer and the waste breading trailer. Also, Cagle's does not dispute that no warning labels were posted on either the freezer or the trailer areas.

Cagle's asserts that it is not required to comply with the labeling requirement, pursuant to § 1910.1200(b)(5)(iii), which excepts from labeling:

> [A]ny food, food additive, color additive, drug cosmetic, or medical or veterinary device or product, including materials intended for use as ingredients in such products (*e.g.*, flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), and regulations issued under those Acts, when they are subject to the labeling requirements under those Acts by either the Food and Drug Administration or the Department of Agriculture.

Section 321(f) of the Federal Food Drug and Cosmetic Act (FFDCA), 21 U.S.C. 301, defines "food" as (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article." The waste breading collected at Cagle's was transported to Bakery Feeds, Inc., for high protein feed for animals. The waste breading is food under FFDCA's broad definition. The breading trailer and totes were labeled as "inedible," pursuant to the Department of Agriculture (USDA), which regulates the entire Cagle's production process, including the use of the waste breading. Title 9, C.F.R. § 381. Cagle's waste breading is excepted from the labeling requirements of the hazard communication standards.

Any carbon dioxide is entrained in the waste breading. The carbon dioxide is used in the freezing process of the poultry. The breading which did not remain on the chickens became waste and was removed after the freezing process. The breading was allowed to thaw and the carbon dioxide was allowed to sublime and dissipate into the atmosphere. The waste breading was placed in open cardboard boxes and totes. The carbon dioxide was not shown to remain a component or otherwise affect the characteristics of the waste breading.

Also, the Secretary failed to show the level of carbon dioxide in the tunnel freezer, totes or cardboard boxes, or the trailer. It is undisputed that CO Etterer performed no time-weighted average analysis of the concentrations of carbon dioxide. The Secretary failed to show that there was sufficient concentrations of carbon dioxide for labeling purposes. There is no evidence that any waste breading contained one percent by volume of carbon dioxide, as required by § 1910.1200(d)(5)(ii), which provides that:

> If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture.

Further, the issue is whether the tunnel freezer or trailer were containers. Section 1910.1200(c) defines a container as "any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical." The definition of a container excludes pipes and pipe systems.

Tunnel Freezer

The tunnel freezer, located in the MRB room, is approximately 35 feet long and made of stainless steel, through which breaded chickens pass on a series of conveyors for quick freezing (Tr. 260-261, 330). Carbon dioxide is used to freeze the chickens as they pass through. Cagle's does not dispute that there were no signs warning of carbon dioxide posted on the freezer.

The tunnel freezer, however, is not a container. CO Etterer agreed that the tunnel freezer was not designed for storage to hold or contain carbon dioxide, but was a piece of equipment used to quickly freeze the poultry (Tr. 998). It was not shown that employees emptied, filled or poured carbon dioxide into or removed it from the tunnel freezer. The carbon dioxide was piped[30] into the freezer from large storage in the receiving area outside (Exh. C-15; Tr. 188, 268-270).

Also, at least seven signs warning employees of the presence of carbon dioxide were placed throughout the MRB room where the tunnel freezer was located (Exh. R-11; Tr. 997, 1253). The signs advised "Caution; CO_2 in Use" (Exh. R-11). Additionally, four signs were posted on the doors of the spiral freezers warning employees of the health hazards of carbon dioxide (Exh. R-12; Tr. 1254-1255, 1406). The signs warned that carbon dioxide could cause "suffocation without warning" (Exh. R-12). Furthermore, the MSDS for carbon dioxide was accessible to employees (Exh. C-16; Tr. 1512). Thus, the MRB room was adequately posted with warnings of carbon dioxide.

Waste Breading Trailer and Totes

[30] The Secretary's argument that the piping systems needed labeling is rejected (Exhs. R-8, R-9, R-10; Tr. 866). Section 1910.1200(c) excludes piping systems from the labeling requirements. The carbon dioxide storage tank was labeled (Exh. C-21).

There is no dispute that the trailer was used to store waste breading until it was shipped to Bakery Feeds, Inc., owner of the trailer. The trailer was 40 feet long, 90 inches wide, and 90 inches high (Exh. C-2). Cagle's stipulates that two employees died inside the trailer because of the concentration of carbon dioxide.

The totes (vats) and cardboard boxes (combos) were used to hold the waste breading until it was dumped into the trailer. The totes and boxes were open. Carbon dioxide, used in the freezing process, was allowed to dissipate.

The trailer and totes were containers within the meaning of § 1910.1200(b). They held waste breading and any entrained carbon dioxide. Pursuant to the requirements of the USDA, the totes and trailer were labeled as "inedible" (Tr. 73-74, 96, 107, 206, 764, 1578). The waste breading was processed into animal feed by Bakery Feeds, Inc. (Tr. 1226, 1445). The carbon dioxide remaining in the waste breading was not suitable or intended for further processes by Cagle's or any other employer.

The violation of § 1910.1200(f)(5)(ii) is vacated.

Item 8 - Alleged Violation of § 1910.1200(h)(3)(iii)

The citation alleges that Cagle's failed to fully address the carbon dioxide hazards in the MRB room, which could result in an emergency. Section 1910.1200(h)(3)(iii) provides that an employer's training include:

> The measure employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures and personal protective equipment to be used.

There is no dispute that carbon dioxide was used in Cagle's freezing process and was present in the MRB room. Employees were periodically exposed to the release of carbon dioxide (Tr. 174-175, 307-308, 867-868). Employees had complained about breathing difficulties. When an employee complained, he was taken off the line (Tr. 174-175, 307-308). Based on Cagle's air monitoring, if the concentration of carbon dioxide exceeded 2.0 percent, the MRB room operation was immediately shut down until the level of carbon dioxide was reduced (Exh. C-43; Tr. 1585, 1620-1621). Cagle's monitored the MRB room for carbon dioxide once an hour in five or six locations (Tr. 204, 325, 862, 1581-1582). CO Etterer did not

interview Jim McReynolds, supervisor of quality control, or other employees who performed the air monitoring (Tr. 1061-1062).

On at least two occasions, CO Etterer performed air monitoring for carbon dioxide levels in the MRB room. Her readings showed a level of approximately 5000 p.p.m. (Tr. 927, 1004-1005). CO Etterer did not perform an 8-hour TWA analysis (Tr. 923-924, 1005, 1116, 1142).

The Secretary does not dispute that Cagle's provides employees' training and has training programs, including hazardous communication training (Tr. 1023-1024). The issue, however, is whether employees were trained specifically on the hazards of carbon dioxide. The Secretary alleges that employees were not specifically trained on carbon dioxide (Tr. 1025-1026).

Joey Poe stated to CO Etterer that he had not received training on carbon dioxide, although he was involved in dumping the waste breading (Tr. 744, 752). John Pruitt and Henry Camp also told CO Etterer that they had received no carbon dioxide training, although they had assisted in the dumping operation (Tr. 813-814, 818-820). CO Etterer requested, but was not given, any training records by Cagle's (Tr. 654).

Cagle's training includes a video on hazardous communication. According to Cagle's, the video describes the hazards associated with chemical use (Tr. 1290-1291). CO Etterer did not view the video (Tr. 1007, 1291). Cagle's acknowledges, however, that the video does not specifically address carbon dioxide and associated hazards (Tr. 1448-1449). Also, Cagle's provided annual training since 1993 (Tr. 1449-1450).

The lack of employees' training, argues the Secretary, is shown by Cagle's failure to perform oxygen testing; its failure to use a calibrated instrument for air monitoring; the location of the spiral freezer #1's safety relief devices inside the MRB room; the location of exhaust vents in low areas; and the failure to identify the carbon dioxide exhaust lines in the plant (Secretary's Brief, p. 44).

Cagle's argues that it is not required to train on specific hazards for specific chemicals. Hubbard testified that employees were trained on the hazards associated with general chemical exposure (Tr. 1288-1289). He interpreted the standard as not requiring chemical-specific hazard training (Tr. 1481).

Section 1910.1200(h)(3)(iii) requires an employer to train employees on the measures employees can use to protect themselves from chemical hazards. The training must include the

measures implemented by the employer to protect employees, including work practices, emergency procedures, and personal protective equipment. The conditions cited by the Secretary fail to show whether Cagle's trained its employees on measures to protect themselves from carbon dioxide hazards. Improper safety devices, exhaust lines and monitoring equipment are not evidence of a lack of training. These conditions involve inadequate engineering controls, for which Cagle's was not cited. The Secretary cannot establish a violation of a training standard by alleging some other violative condition as proof of a lack of training. *S & J Haas Construction, Inc.*, 18 BNA OSHC 1467, 1468 (No. 97-0640, 1997). The Secretary does not identify problems or deficiencies in Cagle's training.

The record does not support a finding of inadequate training. Employees who testified were aware of the carbon dioxide in the facility. Signs were posted in the room advising that carbon dioxide was used. The employees testified of their awareness of the presence of carbon dioxide, and several employees referred to the waste breading as carbon dioxide breading. Even if the items identified by the Secretary did exist at the plant, there is no showing that Cagle's was required to have the items or that the employees were not trained. A violation of § 1910.1200(h)(3)(iii) is vacated.

REPEAT CITATION NO. 2

Item 1 - Alleged Violation of § 1910.151(c)

The citation alleges that an emergency shower/eye flush facility was not installed in the ammonia receiving area. Section 1910.151(c) provides that:

> 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 shall be provided within the work area for immediate emergency use.

The Secretary's burden of proof "depends on the 'totality' of the relevant "circumstances," including the nature, strength and amounts of the corrosive material or materials that its employees are exposed to; the configuration of the work area; and the distance between the area where the corrosive chemicals are used and the washing facilities." *Atlantic Battery Company, Inc.*, 16 BNA OSHC 2131, 2167-2168 (No. 90-1747, 1994).

Ammonia (NH_3) is used in Cagle's cooling system (Exh. C-20; Tr. 31, 303-304). Exposure to ammonia can cause severe inhalation, skin, eye and ingestive problems (Exh. C-20). The parties do not dispute that ammonia is a corrosive material. Cagle's ammonia storage tank

is located behind the plant (Exhs. C-1, C-39; Tr. 31, 304). The ammonia is circulated from the receiving tank through the cooling system (Tr. 30, 305-306). It is a closed tank and piping system (Exhs. R-2, C-39; Tr. 322-323). Employees do not handle or use ammonia.

The area immediately around the ammonia tank is not an employee workstation, and employees are not assigned regular work in the area (Tr. 707, 1514). CO Etterer observed the ammonia tank for 30 minutes and did not see any employees (1158). However, Hankinson agreed that employees were in the area (Tr. 304-305). They walked past the tank every morning and periodically policed the area for trash (Tr. 98, 124-125, 1514). Hubbard agreed that if there was an ammonia leak, employees would potentially be exposed (Tr. 1432). However, there is no evidence that Cagle's ammonia tank or piping system has ever failed or released ammonia (Secretary's Brief, p. 46; Tr. 1010). Waldrop testified that during his 15 years at the plant, there have been no breaks or leaks in the system (Tr. 574).

Prior to OSHA's inspection, Cagle's did have an emergency shower in the area of the ammonia tank (Tr. 1431). According to Cagle's, the shower was removed when the battery recharging station used to maintain the lift trucks was moved from the area. The shower was not for the ammonia receiving tank (Tr. 1474-1475).

The ammonia receiving tank and piping is a completely enclosed system (Tr. 573-574). The ammonia is re-circulated throughout the plant (Tr. 30, 304). Ammonia has not been added to the tank for at least two years. It was added by another contractor (Tr. 305). Cagle's employees do not handle the ammonia (Tr. 1266-1267). Wester testified that the receiving tank is inspected regularly (Tr. 1514-1515). CO Etterer acknowledges that a leak would be "unlikely" (Tr. 1008-1009).

The record does not show that Cagle's employees were in a zone of danger or that exposure was reasonably predictable. A violation of § 1910.151(c) cannot be based on a potential hazard. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1142 (No. 88-1250, 1993). It was not shown that Cagle's employees were potentially exposed to an ammonia release from the tank. CO Etterer's testimony concerning possible leaks due to the pressure is speculative and not supported by the record (Tr. 1127). CO Etterer did not know what the pressure was in the ammonia receiver, when ammonia was last added, how it was added, or who did the adding (Tr. 1156-1157). Cagle's was not shown to engage in any work on the ammonia tank or system. The Secretary's exposure is based on a remote possibility. There is no history of leaks or a

release. Also, if there was a leak, removal from the area may be the more appropriate response, not a shower. The MSDS for ammonia directs that if there is an accidental release, "stop leak if feasible. Avoid breathing ammonia. Evacuate personnel not equipped with protective clothing and equipment" (Exh. C-20). The Secretary failed to show that a shower at the ammonia receiver tank was required or the proper location. A violation of § 1910.151(c) is vacated.

Item 2 - Alleged Violation of § 1910.212(a)(1)

The citation alleges that three augers were unguarded in the offhaul department. Section 1910.212(a)(1) provides that:

> 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 augers at Cagle's are long screw-like shafts that turn slowly in troughs or chutes. As they turn, the augers move contaminated meat, scraps, or feathers through the troughs into waste trailers for off-site disposal (Exh. R-3; Tr. 114). Two augers are located in the separator room, and one auger is located outside of the offhaul department. During her inspection, an employee complained to CO Etterer about unguarded augers (Tr. 661, 683).

Augers in Separator Room

In the separator room, one auger is used to remove bad chicken meat from the plant and the other auger is used to remove feathers (Exhs. C-1, C-28, C-29, C-30). The separator room is 15 feet by 12 feet (Tr. 1271). Employees enter and leave the room on an elevated grated catwalk which spans one side of the room (Tr. 1271, 1483). The elevated catwalk is 4 feet above the floor (Tr. 566, 1014). Doors are at both ends of the catwalk (Tr. 1271). From the elevated catwalk, a small set of stairs access the floor (Exh. C-30). The two augers are on the floor of the separator room and stand 10 inches above the floor (Tr. 670). The feather auger is approximately 10 feet from the catwalk and approximately 4 feet from the meat auger (Tr. 567, 1203). The meat auger is located perpendicular to the elevated catwalk with a portion directly below the catwalk (Tr. 666, 669-670). It is 32 inches below the catwalk (Tr. 670-671). The visible portion of the meat auger is approximately 5 feet long and 10 inches in diameter (Tr. 678,

680-681, 1272). The trough is open and the auger is exposed (Tr. 680-682). The exposed portion of the feather auger is approximately 3 feet in length and is also unguarded (Exh. C-29; Tr. 675-676, 680).

CO Etterer described the elevated catwalk and floor as wet and greasy (Tr. 677, 679-680). During production, the floor is covered with 3 to 6 inches of water (Tr. 1206). Employees did not regularly work in the separator room, and no one operated the augers (Tr. 102, 532-533, 1483).

Employees enter the separator room only to dump meat scraps or to perform maintenance. The contaminated chicken meat is dumped into the meat auger from the catwalk through the guardrail. The employee remains on the catwalk (Tr. 1271- 1272). The feathers carried through the feather auger are automatically delivered from another part of the plant (Tr. 568). A standard guardrail is along the catwalk (Tr. 1273-1274). The guardrail has a 42-inch top rail, a 25-inch midrail and a 5-inch toe board (Tr. 1200, 1213, 1275, 1353).

During OSHA's inspection, the guardrail along the catwalk had two openings. One opening was used for dumping contaminated meat into the meat auger and the other opening was for the steps to the floor of the separator room (Tr. 669, 1213). The opening above the meat auger was a 22-inch gap in the midrail. The top rail and toeboard remained. If meat was not being dumped, a sliding metal gate covered the midrail opening (Tr. 1274). To dump the contaminated meat through the opening, employees used a 30-gallon garbage can (Tr. 567, 671, 1201, 1483).

The second opening to the stairs was used to access the floor of the separator room. Hubbard testified that employees did not access the floor while the augers were running (Tr. 1271). If maintenance was necessary, Waldrop and Hubbard testified that the augers were locked out (Tr. 563, 567-568, 1272). CO Etterer testified that Theodore Bugby, an employee, told her that he had worked near the feather auger to clear feathers within six months of the inspection (Tr. 676).

Auger in Offhaul

The third auger, located underground outside the offhaul area, had a 10-inch opening. The opening was surrounded by a standard guardrail, 42-inch high top rail and 25-inch midrail (Exh. C-31; Tr. 628, 684, 1010, 1275). It was referred to as a pit auger and was used to screen out smaller waste particles from the water before it was treated (Tr. 571). The trough in which

the auger turned was completely covered on top, except for a small opening approximately 6 inches by 10 inches (Tr. 684-685, 694). The opening was approximately 10 inches from the guardrail (Tr. 684-686). When debris clogged the opening, an employee used a stick or broom handle to unclog it (Tr. 571, 690-692, 1010-1011, 1276). Also, the opening was regularly hosed down to clean away product debris (Tr. 689). There is no evidence that an employee went inside the guardrail (Tr. 1275).

Discussion

There is no dispute that portions of the three augers were uncovered. However, the guardrails on the catwalk and around the pit auger prevented employees' exposure. CO Etterer acknowledges that a guardrail can constitute proper machine guarding.

The possibility that someone may come in contact with an open auger "does not prove that the point of operation exposes him to injury." *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). Machine guarding is only required where employees are predicably exposed to points of operation, either by operational necessity or otherwise. *Id.* CO Etterer described all exposures as possible (Tr. 669, 680, 683, 686). However, it was not shown that exposure was reasonably predictable. Employees were not required to work in the zone of danger, and the employees' predictable behavior did not include reaching or falling through the guard rail. *Evergreen Technologies, Inc.*, 18 BNA OSHC 1528, 1529 (No. 98-348, 1998). Hubbard testified that an employee could not accidentally touch the meat auger (Tr. 1273).

CO Etterer's testimony regarding Theodore Bugby's statement to her is given little weight. Bugby did not testify at the hearing. His normal duties were not shown to involve work in the separator room, as required by Rule 801(d)(2), Federal Rules of Evidence. Also, Etterer speculated about what Bugby told her. She did not remember the details of her conversation and agreed that Bugby had told her the incident occurred approximately six months prior to OSHA's inspection (Tr. 909-910, 912, 1011). CO Etterer also conceded that there was no evidence Cagle's even knew Bugby went onto the floor (Tr. 1011). He was the only employee who told her of working on the feather auger while it was running.

Similarly, employees' exposure was not shown at the meat auger or the pit auger. There was a guardrail along the catwalk. The 22-inch gap above the meat auger was protected with a metal gate which was removed only for dumping the contaminated meat from a 30-gallon

garbage can. When removed, the top rail and toe board remained. The 30-gallon garbage can used for the dumping also kept the employee away from the opening.

With regard to the pit auger, there is no dispute that a standard guardrail was around the opening in the ground. The opening was approximately 10 inches from the guardrail. There is no evidence that employees were ever inside the guardrail. To unclog the auger, an employee used a 4-foot stick and remained outside the guardrail. The employee was not shown to be exposed to nip points, rotating parts, flying chips and sparks while unclogging the pit auger.

A violation of § 1910.212(a)(1) is vacated.

Item 3 - Alleged Violation of § 1910.219(e)(3)(i)

The Secretary withdrew Item 3 (Court Exh. 1).

Item 4 - Alleged Violation of § 1910.303(g)(2)(i)

The citation alleges that the 220-volt box for the pump was uncovered in the offhaul department. Section 1910.303(g)(2)(i) provides in part that:

> Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means
>
> A. By location in a room, vault or similar enclosure that is accessible only to qualified persons.

There is no dispute that the 220-volt box in the offhaul department was uncovered (Exh. C-32). The electrical box, located on a back wall, was used to operate the pump which was running during the inspection (Tr. 711). The box was partially blocked on the sides by two insulated vertical poles (Exh. R-16;[31] Tr. 1208, 1293, 1439). The box was 59 inches above the floor and 102 inches from the feather auger (Tr. 1208, 1282, 1285, 1438-1439). The covered auger trough divided the bay across its width.

An employee periodically cleaned the area with a high pressure water hose (Tr. 712). The employee was not observed closer to the electrical box than the far side of the auger, approximately 102 inches away (Tr. 714, 1020-1021). No other employee was seen within 8 feet

[31] The photograph was taken after the inspection and shows the box covered.

of the box (Tr. 1910). There is no evidence when the cover was removed, but the box was immediately re-covered during the inspection (Exh. R-16; Tr. 1524, 1911, 1914).

Cagle's argues that there was no employee's exposure, and it lacked knowledge of the uncovered box. Cagle's noted that employees did not regularly work in the area of the 220-volt box. The box was not near a walkway. Terry Wester testified that the last time he had inspected the area, the box was covered (Tr. 1522). However, Wester did not state when he last inspected the area.

An employer has a duty to inspect his work area for hazards, and an employer can have constructive knowledge of conditions that could be detected through an inspection. An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A. L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1998 (No. 92-1022, 1994).

The 220-volt box was plainly observable within the room. A regular inspection by Cagle's should have detected the lack of a cover. Cagle's had constructive knowledge and employees were exposed. Although CO Etterer described the electrical hazard as "very small" and the employee might not even feel it, an employee was observed within 102 inches using a water hose to wash the area, including the box. Cagle's does not dispute that the box needed to be covered.

A violation of § 1910.303(g)(2)(i) is affirmed..

Item 5 - Alleged Violation of § 1910.1200(f)(5)(i)

The citation alleges that the waste breading trailer area, including the trailer, totes and boxes, was not marked as containing carbon dioxide. Section 1910.1200(f)(5)(i) requires an employer to ensure that each container of hazardous chemicals is labeled, tagged, or marked with the "[i]dentity of the hazardous chemicals(s) contained therein."

There is no dispute that the trailer or totes were not labeled, tagged or marked as containing carbon dioxide. For the reasons discussed in item 7 of serious Citation No. 1 and incorporated herein, the violation of § 1910.1200(f)(5)(i) is vacated.

Item 6 - Alleged Violation of § 1910.1200(h)

The citation alleges that the employees working at the waste breading trailer were not informed of the hazards of carbon dioxide. Section 1910.1200(h) provides that:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

There is no dispute that carbon dioxide was entrained with the waste breading and was dumped into the trailer. Cagle's stipulates that two employees died of asphyxiation due to the concentration of carbon dioxide. Carbon dioxide is a hazardous chemical.

For the reasons discussed in item 8 of serious Citation No. 1 and incorporated herein, a violation of § 1910.1200(h) is vacated.

Repeat Classification of Citation No 2

A violation is a repeated violation under Section 17(a) of the Act if, at the time of the alleged repeated violation, there was a final order against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary establishes substantial similarity by showing that both violations are of the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594 (No. 91-1807, 1994). The principal factor is whether the two violations result in substantially similar hazards. *Stone Container Corp.*, 14 BNA OSHC 1757, 1762 (No. 88-310, 1990).

For repeated purposes, the Secretary relies on citations issued to Cagle's Macon, Georgia, processing plant on April 22, 1996, which involves the battery charging station (Exh. C-35). The 1996 citation was informally resolved with OSHA (Tr. 650). Cagle's stipulates that the 1996 citation has become a final order with regard to the facts alleged, standards cited and the characteristics of the violations (Tr. 649).

Cagle's argument that the citations do not show similar conditions is rejected. In the 1996 citation, the violation of § 1910.303(g)(2)(i) (item 5) involved uncovered electrical circuit breaker panels at nine locations (Exh. C-35, p. C-366). The failure to cover a breaker panel and an electrical box, such as in this case, exposes employees to substantially similar electrical hazards. *Stone Container Corp., supra.* A repeat violation is established.

OTHER THAN SERIOUS CITATION NO. 3

Item 1 - Alleged Violation of § 1910.23(c)(1)

The citation alleges that the end of the loading ramp, used to dump waste breading into the trailer, was not guarded. Section 1910.23(c)(1) provides:

> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is an entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides.

CO Etterer measured the end of the ramp next to the trailer at 56 inches high (Tr. 726). On September 13, 1997, there was a 13-inch gap between the end of the ramp and the trailer (Exhs. C-2, C-3; Tr. 726, 1035). There was no guardrail (Tr. 46). The Secretary recommends something to cover the gap (Tr. 1035). The ramp was primarily used by the forklift to carry totes of waste breading to dump into the trailer (Tr. 1036, 1526). The Secretary does not allege a danger to the forklift operator.

Although the sides were also unguarded, the citation does not allege an unsafe condition along the sides. Employees' exposure is based on employees walking on the ramp (Tr. 1036). CO Etterer, however, did not observe an employee walking on the ramp (Tr. 1526). Cagle's argues that the ramp is similar to a loading dock, which does not require guardrails.

There is no evidence that employees walked on the ramp. Mattox testified that he never saw an employee walk on the ramp (Tr. 99). At the time of the accident, there is evidence that a ladder was placed at the end of the ramp (Exh. C-2; Tr. 1826). However, there is no showing that a guardrail would protect employees on a ladder. The standard requires a guardrail and not a cover as recommended by the Secretary. Also, the ramp was used to load the trailer. The Secretary fails to establish employees' exposure.

A violation of § 1910.23(c)(1) is vacated.

PENALTY CONSIDERATION FOR CITATIONS NOS. 1 AND 2

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Cagle's is a large employer with 895 employees at its Collinsville plant. Cagle's owns and operates four other chicken processing plants in Alabama and Georgia. There is no evidence that the Collinsville plant had been inspected previously by OSHA. However, Cagle's Macon, Georgia, plant had received a serious citation on April 22, 1996. The OSHA inspection of the Collinsville plant was the result of two fatalities in the waste breading trailer. There is no evidence that Cagle's was uncooperative.

A penalty of $5,000 is reasonable for serious violation of § 1910.22(c) (item 1 of Citation No. 1). Two employees dumping waste breading on top of the trailer's roof were exposed to a fall hazard of approximately 7 feet. However, a more significant hazard was the potential concentration of carbon dioxide inside the trailer. The doors were unable to be unlocked from the inside. Two employees died.

A penalty of $5,000 is reasonable for serious violation of § 1910.305(b)(1) (item 6 of Citation No. 1). Employees in the offhaul room were exposed to possible electrical hazards caused by a rusted cable tray and a loose control box. A walkway was within 36 inches of the cable tray.

A penalty of $5,000 is reasonable for the repeat violation of § 1910.303(g)(2)(i) (item 4 of Citation No. 2). The 220-volt electrical box was uncovered. It was a wet and damp area. An employee worked within 102 inches of the uncovered box. The gravity was low.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

SERIOUS CITATION NO 1.

1. Item 1, alleging violation of § 1910.22(c), is affirmed and a penalty of $5,000 is assessed.
2. Item 2, alleging violation of § 1910.146(c)(2), is vacated.
3. Item 3, alleging violation of § 1910.146(c)(5)(i)(C), is vacated.
4. Item 4, alleging violation of § 1910.146(c)(5)(ii)(C), is vacated.

5. Item 5, alleging violation of § 1910.146(k)(1)(i), is vacated.
6. Item 6, alleging violation of § 1910.305(b)(1), is affirmed and a penalty of $5,000 is assessed.
7. Item 7, alleging violation of § 1910.1200(f)(5)(ii), is vacated.
8. Item 8, alleging violation of § 1910.1200(h)(3)(iii), is vacated.

REPEAT CITATION NO 2.

1. Item 1, alleging violation of § 1910.151(c), is vacated.
2. Item 2, alleging violation of § 1910.212(a)(1), is vacated.
3. Item 3, alleging violation of § 1910.219(e)(3)(i), is withdrawn by the Secretary.
4. Item 4, alleging violation of § 1910.303(g)(2)(i), is affirmed and a penalty of $5,000 is assessed.
5. Item 5, alleging violation of § 1910.1200(f)(5)(i), is vacated.
6. Item 6, alleging violation of § 1910.1200(h), is vacated.

OTHER THAN SERIOUS CITATION NO. 3.

1. Item 1, alleging violation of § 1910.23(c)(1), is vacated.

/s/
KEN S. WELSCH
Judge

Date: September 2, 1999