

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Consolidated Grain & Barge Co.,¹

Respondent.

OSHRC Docket No. 10-0756

Appearances:

Aaron J. Rittmaster, Esquire, Office of the Solicitor, U.S. Department of Labor
Kansas City, Missouri
For the Complainant

Bradford T. Hammock, Esquire, Jackson Lewis
Reston, Virginia
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Consolidated Grain & Barge Co. (CGB), handles and stores grains and other agricultural products and operates grain bins. Occupational Safety and Health Administration (OSHA) Compliance Officer Kevin Kolesa conducted an inspection of CGB's Cape Girardeau, Missouri, facility on March 16, 2010. As a result of Kolesa's inspection, on March 22, 2010, OSHA issued to CGB a Citation and Notification of Penalty alleging two serious violations, and one other-than-serious violation of the Occupational Safety and Health Act of 1970 (Act). CGB denies that it violated any of the cited standards and contests the citation and all proposed penalties. Thereafter, this case was designated for Simplified Proceedings under Subpart M, § 220.203(a) of the Commission's Rules. The Secretary of Labor filed a Motion to Discontinue

¹ Pursuant to the Corporate Disclosure Statement filed May 5, 2010, the correct name of the company is Consolidated Grain and Barge Co. The case caption is amended to reflect the correct company name.

Simplified Proceedings, stating therein that the parties were in agreement that the case should continue under Conventional Proceedings. After due consideration, by Order dated June 23, 2010, the undersigned removed the case from Simplified Proceedings and the case proceeded under the Commission's Conventional Proceedings.

A hearing was held before the undersigned on October 21, 2010, in St. Louis, Missouri. The Secretary and CGB entered into stipulations of fact which were read into the record during the hearing.

For the reasons that follow, Citation 1, Items 1 and 2 are vacated; and Citation 2, Item 1 is affirmed as an other-than-serious violation with no penalties assessed.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to §10(c) of the Act. The parties also stipulated that at all times relevant to this action, CGB was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 11).

Stipulation of Facts

Set forth below are the parties' Stipulation of Facts entered into the Record during the hearing:

Stipulations

The parties agree that the following are not in dispute:

- a. Bin 4 is approximately 42 feet in diameter.
- b. The circumference of a 42-foot-diameter circular grain bin is approximately 130 feet.
- c. Ray Grider, an employee of CGB, was in Bin 4 on January 20, 2010, while a bin sweep auger was energized.
- d. Mr. Grider followed the CGB procedures related to bin entry while in Bin 4 on January 20, 2010.
- e. CGB followed its procedures for grain bin entry before and during the bin entry of Mr. Grider on January 20, 2010.
- f. There is an on/off switch that controls power to the bin sweep auger outside of Bin 4 at the south portal of the bin.

- g. Lyle McCoy, the site supervisor, was stationed at the on/off switch outside of Bin 4 during the bin entry on January 20, 2010.
- h. Lyle McCoy who was stationed at the on/off switch during the bin entry, stayed in visual and verbal contact with Ray Grider during the bin entry on January 20, 2010.
- i. The bin sweep auger that was energized while Mr. Grider was in Bin 4 was guarded with a metal shield/covering on the top, sides and back.
- j. During the bin entry that occurred in Bin 4 on January 20, 2010, there were no engulfment, atmospheric, asphyxiation or entrapment hazards in the bin.
- k. There was no visibility or communication impairment in Bin 4 during the bin entry that occurred in Bin 4 on January 20, 2010.
- l. CGB has performed the following over the last three years:
 - 1. Provided for worker involvement in safety and health programs;
 - 2. Performed a comprehensive safety and health evaluation;
 - 3. Corrected hazards identified during safety and health evaluation;
 - 4. Identified trends of how employees are injured; and
 - 5. Conducted safety and health training as necessary.
- m. The compliance officer during the inspection presented a letter of Interpretation dated December 24, 2009, to a representative of CGB during the inspection.
- n. The December 24, 2009, letter responds to a question regarding portable unguarded screw augers.
- o. The December 24, 2009, letter appeared on OSHA's website up until at least August 8, 2010, as a letter dated November 9, 2009.
- p. The number of working days between January 20, 2010, and December 24, 2009, is 16.
- q. Respondent CGB is an employer under the Occupational Safety and Health Act of 1970.

- r. The Occupational Safety and Health Review Commission has jurisdiction over this matter.
- s. Respondent CGB has never sought a variance from compliance with any standards cited in this matter from OSHA.
- t. Respondent CGB operates grain bins at a location in Scott City, Missouri, that utilizes the same employees as the Cape Girardeau facility that was the subject of this inspection.
- u. At the conclusion of the inspection, procedures at the Cape Girardeau facility were altered to prohibit employees from entering grain bins while a bin sweep auger is operating. NOTE: This stipulation is not an admission that the previous policy was in violation of any standard. It is merely a statement of fact of the work rules implemented at the conclusion of the inspection.
- v. No employees at the Cape Girardeau, Missouri, facility were disciplined for violating Company policy with respect to grain bin entry subsequent to the issuance of the citations in this matter.
- w. No management employees other than management employees participating in the grain bin entry procedures monitored compliance with grain bin entry procedures during the bin entry that occurred on January 20, 2010.

(Tr. 8-12).

Inspection

On March 16, 2010, pursuant to OSHA's grain handling local emphasis program, Compliance Officer Kolesa conducted an inspection of CGB at its Cape Girardeau facility (Tr. 24). While at the jobsite, Kolesa provided CGB with a copy of a December 24, 2009, Letter of Interpretation from OSHA, which addresses the question "[c]an an unguarded sweep auger be in operation (energized) in a grain storage bin while a worker is inside the bin?" (Tr. 30; Exh. J-1).

CGB stores grain in bins which are called flat bottom bins (Tr. 104). Employees of CGB enter the grain bins once or twice per year to clean out the bin, or to change commodities from one grain to another (Tr. 104-105). The grain bin at issue in this matter was identified as Bin 4, and measured 42 feet in diameter and 130 feet in circumference (Stips. "a" and "b"). Inside the bin, an auger is positioned to facilitate grain removal from the bin (Tr. 136). The auger in Bin 4 was guarded with a metal shield on the top, sides and back (Stip. "i"). The front side of the

auger was not guarded and according to Kolesa exposed employees to in-running nip points of the rotating auger (Tr. 42).

During his inspection, Kolesa reviewed CGB's grain handling permits, which revealed CGB employees entered the bins while the equipment was operating (Tr. 27). Kolesa's review of the permits revealed that on January 20, 2010, employee Ray Grider entered Bin 4 while the equipment was operating, and all mechanical hazards inside the grain bin had not been locked out as required by the standard (Tr. 27-28; Stip. "c"). Although the permit reviewed by Kolesa reflected only one employee had entered the bin, Lyle McCoy, Operations Manager for CGB, testified four people entered the bin on January 20, 2010 (Tr. 122). On January 20, 2010, McCoy was required to attend the on/off station outside of Bin 4 for the entire duration employees were in the bin, in the event his assistance was needed (Tr. 110). CGB's long auger was used in Bin 4 on January 20, 2010 (Tr. 113). McCoy estimated it took 4 to 4½ hours for the long auger to make one sweep around the bin. There was only one sweep rotation around the bin on January 20, 2010 (Tr. 113-114). Because an employee entered the bin on January 20, 2010, while the auger was operating, Kolesa recommended issuance of a citation for a violation of § 1910.272(g)(1)(ii).

During the inspection walk around of the job site, Kolesa observed two grates on the ground outside of Bin 4. Kolesa testified that interviews with employees revealed these grates were used inside of Bin 4 to cover the drag conveyor openings when the bin was almost empty. Kolesa measured the grates' openings and determined one had openings of roughly 2½ inches and the other had openings of over 3½ inches (Tr. 28-29). Kolesa determined the 3½-inch grate openings were too wide and when the grate was in place above the conveyor, an employee could come in contact with a hazard under the floor of the drag conveyor (Tr. 29). Accordingly, he recommended a citation for a violation of § 1910.23(a)(5).

Also during the inspection, Kolesa reviewed CGB's OSHA 300 forms, which revealed CGB had combined information from the Cape Girardeau and Scott City locations on the log, in violation of OSHA's recordkeeping standards (Tr. 33). Therefore, Kolesa recommended a citation for a violation of § 1904.30(a).

As a result of Kolesa's inspection, the Secretary issued the citations which gave rise to the instant case.

The Citations

The Secretary alleges CGB violated OSHA's standards regarding walking-working surfaces, grain handling facilities and recordkeeping. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or constructive knowledge of those conditions. *Southwestern Bell Telephone Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000).

Citation 1, Item 1: Alleged Serious Violation of § 1910.23(a)(5)

The Secretary charges CGB with violating § 1910.23(a)(5) of the standard, which provides:

Every pit and trapdoor floor opening, infrequently used, shall be guarded by a floor opening cover of standard strength and construction. While the cover is not in place, the pit or trap opening shall be constantly attended by someone or shall be protected on all exposed sides by removable standard railings.

The citation alleges:

At the time of the inspection, it was determined that trap floor openings inside grain bin #4 were not adequately covered while employees entered bin for cleaning. Temporary grate was installed that left openings of greater than 3 ½ inches exposing employees to moving parts of the drag conveyor.

(Citation and Notification of Penalty). CGB contends there was no violation of the standard because it did not use the grate with the 3½-inch openings on January 20, 2010, as alleged by the Secretary (CGB's Brief, pp. 8-10). The grate at issue was utilized to cover a trapdoor opening in Bin 4 which allowed grain to fall through the openings and accumulate below. When in place, the grate provides a working walking surface for employees engaged in the bin cleaning process. The standard is applicable.

The cited standard does not provide guidance on the "standard size and construction" of grates and grate openings used as floor covers in grain bins. That guidance is set forth in the grain handling facilities standard found at § 1910.272(k) which provides "[t]he width of openings in the grates shall be a maximum of 2½ inches (6.35 cm)."

During his inspection on March 16, 2010, Kolesa observed two grates located outside of Bin 4. One had openings of roughly 2½ inches and the other had openings of over 3½ inches (Tr. 28-29). The citation was based on Kolesa's determination that the 3½-inch grate was used

during the bin entry on January 20, 2010. Although Kolesa testified on direct examination that employees he interviewed stated the grates he observed outside of the bin were used on January 20, 2010, on cross examination Kolesa testified he did not know whether the grates he saw outside of the bin were used in the bin (Tr. 55). Further, no interview statements were offered into evidence. McCoy was the only CGB employee who testified regarding the use of the grates. McCoy testified a grate with a 2¼-inch opening was used on January 20, 2010, and the 3-inch grate had not been used in the bin for more than two years (Tr. 113).² Compliance Officer Kolesa was not on the jobsite during the bin sweep process on January 20, 2010. Therefore, he did not see the grates in place on that date (Tr. 55). The undersigned finds McCoy's testimony credible, as he was the only eye witness to the bin sweep on January 20, 2010, to testify at the hearing. A preponderance of the evidence supports a finding that the grate used in the bin on January 20, 2010, was of standard size and therefore was in compliance with § 1910.23(a)(5). The Secretary has failed to establish noncompliance with the terms of the cited standard and, therefore, has not met her burden. Item 1 of Citation 1 is vacated.

Citation 1, Item 2: Alleged Serious Violation of § 1910.272(g)(1)(ii)

The Secretary charges CGB with violating § 1910.272(g)(1)(ii) of the standard, which provides:

(1) The following actions shall be taken before employees enter bins, silos, or tanks: (ii) All mechanical, electrical, hydraulic, and pneumatic equipment *which presents a danger to employees* inside grain storage structures shall be deenergized and shall be disconnected, locked-out and tagged, blocked-off, or otherwise prevented from operating by other equally effective means or methods. (emphasis added)

The citation alleges “[a]t the time of the inspection, it was determined that during the bin entry on 1-20-10 the bin sweep auger was operating while employees were in the bin.” (Citation and Notification of Penalty). CGB contends there was no violation of the standard asserting the sweep auger did not present a danger to employees, and employees were not exposed to a hazardous condition (CBG's Brief, pp. 11-17).

Applicability of the Standard

CGB handles and stores grains and other agricultural products and operates grain bins. As such, CGB is a grain handling facility. At CGB's Cape Girardeau facility, employees entered

² Although the measurements differ, the evidence reveals these were the same grates identified and measured by Kolesa during the inspection as having 2½- inch openings and 3½-inch openings.

the grain bins in order to clean the bins. Accordingly, the Secretary has established applicability of the standard found at § 1910.272(g)(1)(ii).

Noncompliance with the Terms of the Standard

A determination of whether § 1910.272(g)(1)(ii) was violated requires an assessment of whether the mechanical, electrical, hydraulic and pneumatic equipment “presents a danger to employees inside the grain storage structure” before employees enter the bin, silo or tanks (§ 1910.272(g)(1)(ii)). The hazard is not presumed. Pursuant to the terms of the standard equipment which *presents a danger to employees* must be de-energized or otherwise prevented from operating by other equally effective means or methods. CGB does not dispute that employees entered Bin 4 on January 20, 2010, while the mechanical equipment was energized. CGB contends, however, no danger or hazard to employees who worked in Bin 4 was present, as it provided other equally effective means or methods of protecting the employees. For the reasons set forth below, the undersigned disagrees.

Bin 4 is a large cylinder which stores grain, and is called a flat bottom bin by CGB (Tr. 104). It is 42 feet in diameter and has a circumference of 130 feet (Stips. “a” and “b”). Grain runs out of the center draw of the bin through a funnel by gravitational force, leaving 10,000 to 12,000 bushels of grain in the bin (Tr. 104, 108). Additional draws are conducted to remove any additional small amounts of grain, after which the bottom conveyor is locked out (Tr. 104, 108). CGB cleans the bins approximately twice a year, either at the end of the season, or when changing commodities (Tr. 104-105).

At CGB’s Cape Girardeau facility, the cleaning process (sweep) requires employees to enter the bin to ensure all grain is removed from the bin (Tr. 106-108; Stip. “c”; Exhs. J-5 and J-7).³ Employees must be inside the bin to “control the action of the sweep auger inside the bin to control the depth of the auger otherwise the auger would choke” (Exh. J-7). The sweep process begins with locking out the bottom conveyor and the flop gate on the top of the bin, after which grates are put in place and the sweeps (augers) are brought in (Tr. 108). Employees then enter the bin. A short auger is used for the first sweep and then a long auger is used for the final sweep (Tr. 108).⁴ On January 20, 2010, the long auger completed one sweep around Bin 4,

³ Employees at the Scott City, Missouri, facility are not required to enter the bins during the sweep process. That facility uses a hydraulic system to control the auger, which does not necessitate the use of employees (Exh. J-7).

⁴ The testimony was unclear as to whether employees were allowed in the bin at the time the short sweep was conducted.

which took approximately 4 to 4½ hours, rotating approximately 6 inches per minute (Tr. 113-114, 162-163). The auger traveled at a very slow rate of speed (Tr. 143). The long sweep auger was positioned inside of Bin 4 and was used to remove the remaining grain from the bin (Tr. 108, 113). It moves clockwise around the floor of the bin causing grain to be swept into the auger, after which, its rotation moves the grain up its length to the pivot point of the auger, at the center of the bin, where the grain is discharged below (Tr. 140-142). At the time the long auger was placed in Bin 4, most of the grain had already been removed from the bin and employees stood in an area where the grain was 2 to 3 inches high (Tr.153-154). The auger in Bin 4 was guarded with a metal shield on the top, sides and back; the front side of the auger was not guarded (Exh. J-4). The mechanical components and in-running nip points were accessible from the front side of the auger (Tr. 42; Stip. “i”).

An auger is a mechanized piece of equipment which if unguarded could pose a hazard of employees being caught in the nip points of the rotating equipment while the equipment is operating (Tr. 42-43). Augers are specifically mentioned in the comments to the 1996 amendments to the standard, as initially proposed, as the type of equipment which could pose a hazard to employees. *See*, 60 FR 54047-01. Augers are the type of equipment for which the standard is designed to prevent employees from coming into contact with if they are to work inside a grain bin while an auger is energized.

CGB documents completed prior to employees entering the bin on January 20, 2010, show that GCB recognized there were hazards which could present a danger to employees working in the bin. First, CGB’s Confined Space Permit for January 20, 2010, reflects there were “mechanical hazards: drives, conveyors, legs, pumps, etc.” present in the bin (Exh. J-8). Second, prior to allowing employees to enter a bin in which energized equipment will be operating, CGB conducts a task hazard analysis where they discuss the typical hazards regarding bin entry (Tr. 105). McCoy testified that prior to employees entering Bin 4 on January 20, 2010, the required task hazard analysis was completed (Tr. 109).⁵ The undersigned finds that CGB made the required assessment as to equipment inside the bin which could present a danger to employees in Bin 4 on January 20, 2010. However, the undersigned also finds CGB’s determination that the auger did not present a danger to employees *because the employees were*

⁵ The parties stipulated that “[d]uring the bin entry that occurred in Bin 4 on January 20, 2010, there were no engulfment, atmospheric, asphyxiation or entrapment hazards in the bin.” (Stip. “j”).

positioned behind the rotating auger was in error. An energized auger, as previously stated, is hazardous and CGB recognizes it as such in its pre bin entry policies and procedures. According to the standard and OSHA's interpretation of the standard, equipment, like augers, which present a danger to employees, must be de-energized, locked out, tagged, blocked-off or otherwise prevented from operating by other equally effective means or methods. Although CGB admits the auger was energized on January 20, 2010, when employees entered Bin 4, and that the front side of the auger where the in-running nip points were located was not guarded, CGB contends it utilized other equally effective means or methods to protect its employees. Therefore, it must be determined whether the purported means or methods used by CGB were equally effective means or methods of protecting employees, as required by the standard. The undersigned concludes they were not.

At the time of the inspection, CGB's method of protecting employees who entered the bin while the auger was operating was to place guards on the top, sides and back of the auger, instruct employees to remain a "safe distance" from the auger and always behind the auger, and to station a look-out person on the outside of the bin (Exh. J-5). CGC's written policy was in place and provided instructions to employees required to work inside of the bin while the auger is operating (Tr. 40-41). Employees also were trained regarding working inside of bins (Tr. 109). Kolesa testified that the aforementioned methods utilized by CGB to protect its employees while they were in the bin with energized and unguarded equipment were administrative controls and were inadequate to protect the employees (Tr. 41, 48, 72). In assessing whether the methods utilized by CGB to protect its employees constituted "equally effective means or methods," OSHA's letters of interpretation are instructive.

OSHA Letters of Interpretation

OSHA's letters of interpretation provide guidance to employers regarding compliance with regulations. Two OSHA Letters of Interpretation were admitted into evidence in this case. One is dated September 29, 2008, and the other is dated December 24, 2009 (Exhs. J-1 and J-3). Both letters were in response to questions raised by Rick Smithpeter of Cooperative Mutual Insurance Company, and address the issue of employees entering bins with energized equipment operating. Because of their relevance to the issue, the undersigned quotes the Letters of Interpretation at length.

The September 29, 2008 Letter of Interpretation provides in relevant part:

Question 2: Can employees operate the sweep auger if the sump is not being protected by a grating or other similar protection? Does Section 1910.23(a)(5) mean that, as long as the employer assures that the pit or sump is “constantly attended by someone” while the employee is in the grain bin running the sweep auger, the sweep auger need not have a cover or removable standard railings (which would make it impossible to run)?

Response 2: As noted above, OSHA’s standard at 29 CFR 1910.272(g)(1)(ii) provides that, before employees enter grain storage structures, equipment which presents a danger to employees must be deenergized, and “disconnected, locked-out and tagged, blocked-off, or otherwise prevented from operating by equally effective means or measures.” The standard is not intended to be a prohibition against employee entering grain storage structures while machinery is running. Instead, employees may enter such facilities while machinery is running if the employer can demonstrate that appropriate protection has been provided to prevent employees from being exposed to the hazards/dangers of the moving machinery.

An obvious example of an effective method in protecting employees from the hazards associated with machinery inside grain storage structures would be machine guarding. Another example of an effective method might include a rope positioning system, based on the length of rope tied to an employee and installed inside the storage bin, which would prevent the employee from being exposed to the hazards presented by the moving machinery of a sweep auger. On the other hand, because they may not protect employees from the hazards associated with mechanized sweep augers, use of boatswain chair would not be considered an “equally effective means or method” under Section 1910.272(g)(1)(ii). Additionally, please keep in mind that regardless of whether an employer does or does not implement “other equally effective means or methods,” Section 1910.272(e)(2) requires employers to provide employees entering grain storage structures with training on mechanical hazards and how to avoid them.

The procedures for sweep augers enclosed in your letter would not be considered by OSHA as “other equally effective means or methods” as set forth in 1910.272(g)(1)(ii). First, because of the possibility for uneven or moving grain inside grain storage structures, there is a potential for employees to slip and fall on partially-guarded or unguarded moving machinery parts (such as a sweep auger). Second, because of possible poor visibility (e.g., from poor lighting) inside grain storage facilities, employees may have difficulty estimating distances from, or not seeing at all, moving machinery parts. As such, OSHA does not consider maintaining a distance of six feet from partially-guarded or unguarded energized equipment in grain storage structures as an “otherwise equally effective means or method” provided by the standard. Lastly, the reliance on an observer with control of an on/off switch for energized equipment creates a potential for human error and is not a positive method of protecting employees from exposure to hazards in grain storage structures. As indicated in the example above, an

equally effective method might include a rope positioning system, which would physically prevent the employee from entering the area where they could be exposed to the hazards associated by moving machinery of a sweep auger.

(Exh. J-3).

The December 24, 2009, Letter of Interpretation, in response to further inquiry from Smithpeter on October 15, 2008, provides in relevant part:

Background: You state in your letter that a sweep auger is a portable unguarded screw auger attached to a pivot that circles the perimeter of the storage bin and conveys grain into a center sumps) located in the bin floor. In order for the sweep auger to work properly, the operator must regularly make adjustments to the device inside the bin. You also state that by design, a sweep auger cannot be guarded, and that there is no room between the bin wall and the end of the sweep auger that would allow a worker to be positioned, so that he or she is not in the path of the auger. You contend that the use of a rope positioning system, which would prevent a worker from being exposed to the hazards presented by the moving machinery of the sweep auger, would be extremely dangerous.

...

Question 1: Can an unguarded sweep auger be in operation (energized) in a grain storage bin while a worker is inside the bin?

Response: No. OSHA's standard at 29 CFR 1910.272(g)(1)(ii) states:

“All mechanical, electrical, hydraulic, and pneumatic equipment which present a danger to workers shall be deenergized and shall be disconnected, locked-out and tagged, blocked-off, or otherwise prevented from operating by other equally effective means or measures.” [emphasis added]. (emphasis in original)

...

OSHA's standards clearly provide that if a danger to a worker exists, all equipment inside grain storage facilities must be disconnected, locked-out and tagged, blocked-off or prevented from operating by other means or methods. The standards do provide some flexibility to employers for ensuring that equipment is not operating and does not present a danger to workers inside the storage structure. However, based on the additional information provided in your October 15th letter, OSHA is not aware of any effective means or method that would protect a worker from the danger presented by an unguarded sweep auger operating inside a grain storage structure. Accordingly, unless the employer can eliminate all hazards presented by an energized unguarded sweep auger, operating such a device with workers inside a grain storage structure would be in violation of Section 1910.272(g)(1)(ii) or Section 1910.272(h)(2)(i). (emphasis in original)

(Exh. J-1).

Although the December 24, 2009, Letter of Interpretation was issued prior to the alleged

violative conditions which occurred here on January 20, 2010, Kolesa testified that the Letter of Interpretation dated September 29, 2008, was the basis for the citation issued to Respondent (Tr. 39; Exh. J-3). During his inspection, Kolesa provided CGB with the new Letter of Interpretation dated December 24, 2009. Kolesa testified that both letters of interpretation preclude employees from entering bins while equipment inside the bin is energized and that the administrative controls used by CGB are not permissible according to the interpretation letters (Tr. 58-61, 72). William McDonald, OSHA's St. Louis, Missouri, Area Director also testified regarding the 2008 and 2009 Letters of Interpretation. McDonald's testimony regarding the two letters suggests employees may enter bins while equipment is energized *in certain circumstances*. On direct examination McDonald testified as follows:

Q. Mr. McDonald, I'm going to ask you to do something fairly difficult. Completely disregarding the December 2009 compliance assistance letter, considering only the letters of interpretation and the standard itself prior to that December 2009 letter of interpretation, based only on that information and what you know about these policies, based on what you have read in the inspection file you reviewed, is it appropriate to issue a citation under 29 C.F.R Section 1910.272 based on those things?

A. Yes, I believe so.

Q. Why is that?

A. I don't believe—I'm learning that I don't believe that the policy or of the letter of December 2009 actually clarifies anything other than what had already been clarified in the letter of 2008. It's a reiteration of the same position. So, the 2008 letter pretty much states that we have to have some kind of a means before anybody can enter into a grain bin with moving machinery. It has to be guarded or it has to be locked out. There's got to be some positive mechanism. So, the condition in 2008 and 2009 to me are essentially the same.

Q. You said "positive means." What do you mean "positive means"?

A. Guarding the machine, shutting it down, keeping the employee out of potentially harm's way in a positive manner, and what I mean by a "positive manner," that accidents cannot occur.

(Tr. 83-84).

CGB contends that the December 24, 2009, Letter of Interpretation reflects a change in OSHA policy in that the newest interpretation letter absolutely prohibits employees from entering into grain silos while a sweep auger is energized . CBG also argues that it had no notice

of this purported change (CGB's Brief, pp. 24-30). As set forth above, both Kolesa and McDonald understood the interpretation letters to require some "positive" action be implemented to protect employees from the hazards of the energized equipment. McDonald testified that the December 2009 letter reiterated the same position set forth in the 2008 letter (Tr. 83-84). Kolesa has been a Compliance Officer with OSHA for 23 years. McDonald has been an Area Director with OSHA since 2001, and testified he is familiar with OSHA's practice of issuing letters of interpretation, and with the interpretive guidance regarding § 1910.272. The undersigned finds Kolesa and McDonald credible and reliable as to the meaning of these letters of interpretation. Further, the undersigned finds the interpretation letters here provide an understanding of the standard and are reasonable and are consistent with the language of the standard, and as such are entitled to deference. An agency's letter of interpretation is entitled to deference when it is reasonable and consistent with the language of the standard. *See, Martin v. OSHRC (C.F. & I Steel)*, 499 U.S. 144 (1991). No change in position is reflected in the December 24, 2009, Letter of Interpretation. Since the letter of interpretation does not reflect a change in enforcement of the standard at issue, CGB's notice argument fails.

It should be noted that the letters of interpretation are not what employers must comply with. They only provide guidance as to methods an employer may or may not use to comply with a standard. The standard here is clear on its face regarding an employer's duty to protect its employees by ensuring that equipment which presents a danger to employees is prevented from operating. An employer who fails to abide with these terms is in violation, regardless of the interpretative guidance. The interpretative guidance is not necessary to clarify this requirement, and CGB has been on notice since the standard was finalized.

Equally Effective Means or Methods

The interpretation letters referenced above provide guidance regarding methods of protecting employees which are very similar to the methods used by CGB.⁶ In the Smithpeter letters, the methods used included procedures requiring employees to stay 6 feet behind any partially-guarded or unguarded energized equipment in gain storage areas; lock-out/tag out, if the employee must work closer than 6 feet; and an observer located at the on/off switch, required to

⁶ The letters sent to OSHA from Smithpeter were not offered at the hearing. The undersigned extrapolates the factors OSHA considered from the questions and background presented in the interpretation letters, in responding to Smithpeter. The undersigned regards those to be the only facts considered by OSHA in issuing its interpretation letters.

maintain direct visual contact of employees in the bin at all times while equipment is operating (Exh. J-3). OSHA considered these procedures and determined they would not be regarded by OSHA as “other equally effective means or methods” as set forth in 1910.272(g)(1)(ii) (Exh. J-3). The additional facts considered by OSHA as a result of Smithpeter’s October 15, 2008, letter to OSHA included the operator being required to regularly make adjustments to the device inside the bin; the sweep auger being unguarded; and the lack of room between the bin wall and the end of the sweep auger which would permit the worker to be outside of the path of the auger (Exh. J-1). In consideration of this, OSHA responded that employees could not be in a grain storage bin while an unguarded sweep auger was in operation (energized) (Exh. J-1).

The only difference between the facts considered by OSHA in the Smithpeter letters and the instant case, is, here, CGB provides instruction to employees on how to work inside a grain bin; employees must remain a “safe distance” behind the auger at all times; and the look-out must have good visibility and constant communication with the employees inside the bin (Tr. 108-109; Exh. J-5). In addition, on January 20, 2010, there was clear visibility and no slipping hazards for employees during the bin entry.

In analyzing the methods in place during the bin entry on January 20, 2010, the undersigned notes that a safe distance is not defined by CGB’s policy and there was no testimony adduced at the hearing regarding what a safe distance is or whether employees were further than 6 feet from the auger. Because it is not defined in CGB’s policy, “a safe distance” could mean anything. This requirement sets forth no clear guidance to employees. The September 29, 2008, Letter of Interpretation definitively provides that 6 feet behind the auger is not an equally effective means or method of protecting employees. The undersigned finds CGB’s policy for employees to stay “a safe distance” behind the auger is vague, and for this reason alone, is not an equally effective means, despite the clear visibility and lack of slipping hazards.

Regarding CGB’s policy requiring look-outs, the September 29, 2008, Letter of Interpretation from OSHA addresses utilizing a look-out and provides “a potential for human error exists and use of an observer is not a positive means of protecting employees.” (Exh. J-3).

OSHA’s interpretive letters also provide guidance as to CGB’s use of training to protect employees. As to training, OSHA states “[R]egardless of whether an employer does or does not implement ‘other equally effective means or methods,’ Section 1910.272(e)(2) requires employers to provide employees entering grain storage structures with training on mechanical

hazards and how to avoid them.” (Exh. J-3). CGB is to be commended for training its employees. The interpretative guidance, however, suggests that training is separate from any purported equally effective means implemented by an employer.

The undersigned finds CGB’s methods to be less protective than the methods considered by OSHA in the Smithpeter letters. The undersigned defers to OSHA’s interpretation of equally effective means and finds CGB’s methods did not constitute equally effective means or methods as required by the standard, when equipment which presented a danger to employees was not de-energized, locked-out, tagged or blocked-off while employees were working inside grain Bin 4 on January 20, 2010. Accordingly, the Secretary has established CGB failed to comply with the terms of the standard.

Employee Exposure

As an element of the Secretary’s burden of proof, the record must show that employees were exposed or had access to the violative condition. *Walker Towing Corp.*, 14 BNA OSHC 2072 (No. 87-1359, 1991). The Commission’s test for determining access to a violative condition includes a requirement that such access be “reasonably predictable.” This requirement entails a demonstration that employees will be, are, or have been in a “zone of danger.” *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). To demonstrate employee exposure, the Secretary must show either that the employees were actually exposed to the violative condition or that it is reasonably predictable by operational necessity or otherwise (including inadvertence) that employees have been, are, or will be in the zone of danger. *Fabricated Metal Products, Inc., id.*

The Secretary contends “Respondent’s stipulation and admission that employees entered the bin while the bin sweep auger was operating constitutes an admission that Respondent’s employees were exposed to the zone of danger of the rotating bin sweep auger.” The undersigned disagrees. The “zone of danger” is determined by the hazard presented by the violative condition, and is normally the area surrounding the violative condition presenting the danger to employees that the standard is intended to prevent. *Sanderson Farms, Inc.*, 22 BNA OSHC 1400, 1404 (No. 07-1623, 2008), *petition for review denied* 22 BNA OSHC 1889 (2009); *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

Here, the zone of danger is the area in front of the rotating auger where employees could be exposed to the in-running nip points of the auger. The standard requires the employer to de-

energize the auger, guard it, or prevent it from operating by some other equally effective means or methods. The auger placed in Bin 4 extended out to the wall of the bin and, while operating, moved around the 130 foot circumference of the 42-foot diameter bin. Only the top, back and sides of the auger were guarded (Stip. "i"). Pursuant to CGB policy, employees are required to stay behind the rotating auger (Exh. J-5). McCoy, eyewitness to the bin entry on January 20, 2010, testified the employees were not close to the nip points of the auger (Tr. 117). McCoy's testimony on this point was not contradicted. Although what McCoy meant by "not close," was not described or otherwise explained, no other evidence was adduced at the hearing as to the proximity of the employees to the rotating auger. Further, although the purpose for employees being inside the auger is to control the action of the sweep auger and its depth, there was absolutely no testimony or other evidence regarding how this was accomplished. There was nothing to dispute McCoy's testimony that employees were not close to the nip points of the auger while working. Accordingly, there is insufficient evidence for the undersigned to conclude that employees were in the zone of danger.

Nor has the Secretary established that it was reasonably predictable that the employees would be in the zone of danger. Reasonable predictability requires more than a hypothetical possibility of exposure, though less than a certainty. *A. E. Staley Manufacturing, Co.*, 19 BNA OSHC 1199, 1207 (Nos. 91-0637, 91-0638, 2000). Here, the auger rotated very slowly, no more than 6 inches per minute. There were no slipping or visibility problems in the bin, and employees worked a "safe distance" *behind* the unguarded nip points of the auger. Even Kolesa testified that although there was potential exposure for an employee on the front side of the auger, the possibility and probability of exposure were low (Tr. 42). It is not impossible that an employee could come in contact with the in-running nip points of the auger; however, that is not the standard. In *Rockwell Intl. Corp.*, the Commission held: "The mere fact that it was not impossible for an employee to insert his hands under the ram of a machine does not itself prove that the point of operation exposes him to injury." *Rockwell Intl. Corp.*, 9 BNA OSHC 1092, 1097-1098. (No. 12470, 1980).

The burden is on the Secretary to establish exposure. The mere presence of employees in a bin with an energized auger is insufficient to establish exposure. The Secretary has failed to establish that CGB's employees had access to the zone of danger of the rotating auger.

Accordingly, the Secretary has failed to establish a *prima facie* violation of the cited standard. Item 2 of Citation 1 is vacated.

Citation 2, Item 1: Alleged Other-Than-Serious Violation of § 1904.30(a)

The Secretary alleges CGB violated § 1904.30(a) of the standard, which provides:

You must keep a separate OSHA 300 Log for each establishment that is expected to be in operation for one year or longer.

The citation alleges “[a]t the time of the inspection, the 300A summary for 2009 included employees from the Scott City and Cape Girardeau elevators” (Citation and Notification of Penalty).⁷ CGB has two facilities in Missouri, the Girardeau facility (inspection site) and the Scott City facility. Employees of CGB float between the facilities, working at the location where they are needed (Tr. 44, 117). The two facilities are located approximately 10 miles apart (Tr. 117). The Scott City facility is larger, with a much higher volume bushel-wise, and is a year round facility (Tr. 117). The Cape Girardeau facility is not a full-time facility, and generally operates 4 to 5 months a year (Tr. 101). McCoy is the Operations Manager or Superintendent for both facilities and supervises all of the operations employees (Tr. 101-102). CGB contends there was no violation of the standard asserting that the Cape Girardeau and Scott City locations constitute one establishment pursuant to the definition at § 1904.46(2) (CGB’s Brief, p. 31).

The standard at § 1904.46(2) provides:

(2) *Can an establishment include more than one physical location?* Yes, but only under certain conditions. An employer may combine two or more physical locations into a single establishment **only when:**

- (i) The employer operates the locations as a single business operation under common management;
- (ii) The locations are all located in close proximity to each other; and
- (iii) The employer keeps one set of business records for the locations, such as records on the number of employees, their wages and salaries, sales or receipts, and other kinds of business information. For example, one manufacturing establishment might include the main plant, a warehouse a few blocks away, and an administrative services building across the street. (emphasis added)

Insufficient evidence was adduced at trial to support CBG’s assertion that the Cape Girardeau and Scott City locations constitute a single establishment as defined by the standard.

⁷ Pursuant to Section 1904.29(a), the OSHA 300 form is called the Log of Work-Related Injuries and Illnesses and the OSHA 300-A form is a Summary of Work-Related Injuries and Illnesses. Section 1904.29(b) provides that the OSHA 300-A form is to summarize at the end of the year the recordable injury and illness data recorded on the OSHA 300 form.

The only evidence at the hearing regarding the status of the establishments as a single entity was testimony that employees work where they are needed at either location, and one manager, McCoy, supervises employees at both locations. The undersigned finds this insufficient to find the employer operates as a single business operation under common management as required by subpart (i). Subpart (ii) requires that the entities be in close proximity to each other. The testimony reveals that the facilities were approximately 10 to 15 minutes from each other, only 10 miles apart (Tr. 117). This establishes close proximity. However, no evidence was presented as to whether one set of business records relating to wages, salaries, sales receipts, etc. were kept as required by subpart (iii). The only common documents adduced at trial were the OSHA 300 logs. This falls short of establishing one set of business records for the two facilities. The undersigned finds that CGB has failed to establish the Cape Girardeau and Scott City facilities constitute a single establishment for purposes of combining information required for the OSHA 300 logs. Therefore, the undersigned finds that CGB committed an other-than-serious violation of 29 C.F.R. § 1904.32(a). Item 1 of Citation 2 is affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors. The Commission has held that recordkeeping violations are generally of low gravity because such violations touch in only the most tangential way the factors that go to gravity. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178 (No. 87-922, 1993). Kolesa calculated the penalty by giving a 15% reduction for good faith because the company had a good safety and health program in place, and a 10% reduction for history because they had no previous serious violations in the last three years (Tr. 35). The company had five employees at the Cape Girardeau location, but the total size of the employer was 800 employees, so no reduction for size was given since the company exceeded 250 employees (Tr. 36-37).

Here, the evidence establishes that CGB, in an effort to comply with the standard, improperly combined the Scott City and Cape Girardeau locations on the OSHA 300-A log. As this is a record keeping violation, the gravity of the violation is found to be low. As to the other penalty assessment factors, CGB's cooperation during the inspection was not disputed, and it was

conscientious in effecting corrections after the inspection. These good faith factors weigh against a large penalty. Although the size factor weighs in favor of a high penalty, CGB's lack of a citation history with OSHA prior to the current investigation weighs in favor of a low penalty. Considering these facts and the statutory elements, no penalty assessment for this item is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Citation 1, Item 1, alleging a violation of § 1910.23(a)(5), is vacated;
2. Citation 1, Item 2, alleging a violation of § 1910.272(g)(1)(ii), is vacated; and
3. Citation 2, Item 1, alleging a violation of § 1904.30(a), is affirmed, and a penalty of \$0 is assessed.

/s/ Sharon D. Calhoun

SHARON D. CALHOUN

Judge

Date: September 20, 2011
Atlanta, Georgia