



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.

VITAKRAFT SUNSEED, INC.,

Respondent.

OSHRC Docket No. 12-1811

Appearances: Paul Spanos, Esquire
U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio
For the Secretary

Renisa A. Dorner, Esquire
Cooper & Kowalski LPA, Toledo, Ohio
For the Respondent

Before: Keith E. Bell
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“OSH Act” or “the Act”). Following an inspection of Respondent’s facility in Weston, Ohio, the Occupational Safety and Health Administration (“OSHA”) issued two citations to Vitakraft Sunseed, Inc. (“Vitakraft” or “Respondent”), alleging violations of OSHA’s general industry standards and one violation of section 5(a)(1) (the “general duty clause”) of the OSH Act. Vitakraft filed a timely notice of contest, bringing this matter before the Commission. A hearing was held in Toledo, Ohio on March 11, 2014. Both parties filed post-hearing briefs

and a joint supplemental brief. For the reasons set forth below, I affirm Citation 1 Item 1, vacate Citation 2 Item 1, and affirm Citation 2 Item 2.

JURISDICTION

Based upon the record, I find that at all relevant times Vitakraft was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. (Answer at ¶¶ I, II, and III.) I conclude that the Commission has jurisdiction over the parties and subject matter in this case.

BACKGROUND

Vitakraft manufactures over 600 small animal products, including bird food, but not dog and cat food, which are sold in small and large chain pet stores. (Ex. R-C at 7-9.)¹ Fifty to 60 Vitakraft employees work in its 120,000 square foot production facility and warehouse in Weston, Ohio. (Ex. R-C at 8.) Part of the facility, measuring 8,000 to 10,000 square feet, is devoted to assembling small animal products from 2500 types of raw materials, including millet seeds, milo, safflower seeds, sunflower seeds, corn, wheat, oats, papaya, pineapple, flaked peas, raisins, dates, corn flakes, banana chips, flower petals, and poppy seeds. (Ex. R-C at 8, 10, 11, 21, 22.) Adjacent to this assembly room, located on an outside corner of the first floor of the facility, is the “dust room,” which is the focus of this case. (Ex. R-C at 25-28; Tr. at 33; Ex. C-1 at 1-4.) In another part of this facility, located away from the dust room, is the “hay room,” which is devoted to hay-related products. The hay room is about 1500 square feet and was the focus of a previous OSHA inspection in 2008. (Ex. R-C at 11-12.)

The purpose of the dust room is to store all of the dust that is generated during production. (Ex. R-C at 22.) According to Vitakraft’s President and CEO, Brent Weinmann, the company goes to “great lengths” to remove dust from its products due to quality control and concern for the health of the small animal. (Ex. R-C at 17-18.) Vitakraft’s dust collection system consists of augers, vacuums, cyclones, fans, cones, tubes and ductwork, which remove and convey the dust from the product assembly lines to the dust room for storage and eventual removal. (Ex. R-C at 18-22; Tr. at 31.) The dust room measures 10-12 feet wide, 15-20 feet deep, and 12-15 feet tall, and houses a farmer’s grain wagon, also referred to as a trailer, that is slightly smaller than the room itself. (Ex. R-C at 22-23.) The wagon catches the dust that free-

¹ Respondent’s exhibits are numbered by letters. In this citation, “R-C” refers to Respondent’s third exhibit, the deposition of Vitakraft President and CEO Brent Weinmann.

falls from the dust system collection openings located at the top of the room. (Ex. R-C at 23; Tr. at 34.) The falling distance from the top of the room to the bottom of the wagon is approximately 7-8 feet. (Tr. at 35.) Dust also accumulates on the floor and walls of the room. (Ex. R-C at 46; Tr. at 35.) The wagon collects approximately 5,000 pounds of dust over the course of a week, and then the wagon is hitched up to a tractor, removed from the room, taken “around the back of the building,” and then emptied of its contents by a local farmer for cattle fodder. (Tr. at 242; Ex. R-C at 28.) At this time, Vitakraft workers enter the dust room to clean the floor and the walls. (Ex. R-C at 23.) The dust room is cleaned out so as not to attract insects, such as meal moths, and rodents. (Ex. R-C at 23-24.) The only worker entrance to the dust room is from outside the facility through the sliding door that is large enough to remove the trailer. (Ex. R-C at 25.) No worker enters the dust room except during this weekly cleaning. (Ex. R-C at 23.)

2012 OSHA Inspection

In February of 2012, OSHA Compliance Officer (“CO”) Todd Jensen was on a Site Specific Targeting (SST) inspection of Vitakraft. (Tr. at 27.) During this inspection, CO Jensen noticed the dust collection process and self-referred Vitakraft for a new inspection regarding the alleged dust hazards. (Tr. at 27-30.) In the dust room, CO Jensen took pictures, measured the accumulated dust on the floor and the walls, and took a dust sample from the floor. (Tr. at 31, 35-36; Ex. C-1 at 1-4.) According to the CO, 2-3 inches of dust had accumulated on the walls and up to a foot of dust had accumulated on the floor. (Tr. at 36; Ex C-1 at 2, 3.) After gathering the sample of dust, the CO “put a sample seal on the dust sample, filled out [] paperwork, and packaged the sample according to [] packaging policies and sent it to the Salt Lake City Technical Center for analysis.” (Tr. at 37-38; Ex. C-7.) It is undisputed that no safety signs were posted in or around the dust room. (Tr. at 66, 240.)

At one point during the inspection, CO Jensen met with Brent Weinmann (President/CEO), Charlotte Lusk (Safety Manager/Human Resource Manager), Wayne (Maintenance Manager), and Fred (Production/Operations Manager).² (Tr. at 28; 62; Ex. R-C at 12.) He sat with them at the same time, all of them around a table together. (Tr. at 62-63; Ex. R-C at 49.) He took notes of what each of them said, labelled what each said with their first initial,

² CO Jensen could not recall the last names of Wayne (Maintenance Manager) or Fred (Production/Operations Manager). (Tr. at 28, 62.)

passed the piece of paper around the table, had them read the notes and sign the paper if they agreed. (Tr. at 63; Ex. C-9.) During this roundtable conversation, Wayne stated: “We had samples taken of the dust room at the same time as the hay dust, right out of the wagon, by SSOE or Sebench.” (Tr. at 66; Ex. C-9 at 2.) Ms. Lusk then stated: “Everyone had training on combustible dust in 2008. Not aware of any combustible dust signs around the dust rooms.” (Tr. at 66; Ex. C-9 at 3.)

At the Salt Lake City Technical Center (“SLTC”), Steve Anderson, an analytical chemist, analyzed a sample of dust sent from CO Jenson. (Tr. 49, 174, 180; Ex. C-8.) He determined that the sample of dust he analyzed was combustible and explosive. (Tr. at 185-186.) At the hearing, without objection, Mr. Anderson was qualified as an expert witness “in testing of combustible dusts, analysis of those test results, and in determining the combustible and explosive nature of dusts.” (Tr. at 185.) According to Mr. Anderson, the sample arrived at his laboratory from CO Jenson intact and sealed, and “everything appeared to be in good order when [he] started testing the sample.” (Tr. at 202.)

As a result, OSHA issued Vitakraft one serious citation, and one two-item repeat citation. Serious Citation 1 sub-items 1(a) and 1(b) alleged that Vitakraft did not ensure that the horizontal surfaces and the floor of the dust room were kept clear of accumulations of combustible agricultural dust in violation of 29 C.F.R. § 1910.22(a)(1) and 29 C.F.R. § 1910.22(a)(2), and proposed a penalty of \$3,850.³ (Citation at 6-7.) Repeat Citation 2 Item 1 alleged that Vitakraft “did not ensure that employees were protected from combustible agricultural dust explosion or other fire hazards” originating from the dust room in violation of the general duty clause of the OSH Act, and proposed a \$7,700 penalty.⁴ (Citation at 8-9.) Repeat Citation 2 Item 2 alleged that Vitakraft “did not ensure signs warning of the hazards of

³ Section 1910.22(a), *Housekeeping*, provides in pertinent part:

- (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.
- (2) The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition [.]

⁴ Section 5(a)(1) of the OSH Act, the “general duty clause,” requires that each employer “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1).

combustible dust were posted near the [dust room]” in violation of 29 C.F.R. §1910.145(c)(3)⁵, and proposed a penalty of \$154.00.⁶ (Citation at 10.)

2008 OSHA Inspection

The repeat Citation Items were based on the previous OSHA inspection of the Vitakraft facility in 2008. In 2008, CO Jensen inspected Vitakraft’s hay room due to a respiratory complaint. (Tr. at 238.) As a result of that inspection, OSHA cited Vitakraft for dust hazards in the hay room.⁷ (Tr. at 55-58.) At the time, according to CEO Weinmann, the hay room was the dustiest room of all of the production areas of the facility. (Ex. R-C at 36.) The hay room dust collection system was located inside the room where Vitakraft’s employees were working.

To resolve the citation, Vitakraft entered into an informal settlement agreement with OSHA. (Tr. at 100; Ex. C-6.) The pertinent provision from the informal settlement agreement provides:

[Vitakraft] agrees to utilize the services of an outside safety and health consulting service to conduct comprehensive safety and occupational health inspections. Those inspections will be conducted no less than annually for the next three (3) years. [Vitakraft] also agrees to forward to the Toledo OSHA office, within one month of receipt of the consultant’s inspection report, certification that the inspection was completed and corrective action completed for any hazard discovered.

(Ex. C-6 at ¶ 9.) According to CEO Weinmann, Vitakraft “worked with an outside consultant to help [Vitakraft] understand how [the hay room] dust collection system should be set up to make sure [Vitakraft was not] in violation of any safety regulations.” (Ex. R-C at 36.) Subsequently, Vitakraft created “an outside dust collection system that had tubes and pipes running inside that sucked the dust...right off the machine, so it wasn’t airborne in the room.” (Ex. R-C at 36.) In the hay room production room, Vitakraft also:

[i]mplemented additional housekeeping measures to make sure that, you know dust never got to a certain thickness on the walls or on the horizontal surfaces. I think we had to put up some kind of sign, you know, saying,

⁵ Section 1910.145(c)(3), *Safety instruction signs*, provides that “safety instruction signs shall be used where there is a need for general instructions and suggestions relative to safety measures.”

⁶ Upon request for a supplemental briefing of the issue, the parties agreed that the standards at 29 C.F.R. § 1910.272, Grain Handling Facilities, do not apply because Respondent does not engage in the shipment of raw agricultural commodities. (Joint Supp. Br.)

⁷ The hay room is where employees chopped up “big bales” of hay to make “little bales” of hay for rabbit or guinea pig food. (Ex. R-C at 35-36.)

warning, dust, combustible dust in the area. And I think they changed, if I'm not mistaken, they changed the end of the day cleanup procedure, which was to take an air hose and blow machines off and whatnot. And then once the dust settled, sweep that up.

(Ex. R-C at 36-37.)

The outside consultants that Vitakraft contracted with were Sebench Engineering and SSOE, Inc. (Tr. at 251-252.) CEO Weinmann testified:

[Vitakraft] asked [Sebench Engineering] to give us a quote for a full factory or full plant collection system. So that would have been looked at at [sic] that time for a dust collection purpose. But when we learned of the 2 or \$300,000 cost to go for the whole factory, we opted not to and left existing measures, dust collection measures in place. Just to be clear, that was – we looked at that, the whole factory, because we thought we could streamline some of our processes. It wasn't because, gee, we thought we had an explosive dust or combustible dust issues in the grain dust collection room, it was just because we wanted to streamline our whole process, reduce cleaning time and et cetera.

(Ex. R-C at 61.) According to CEO Weinmann, despite his interactions with OSHA and Sebench in 2008 regarding the hay room dust hazards, he never understood or recognized any dust hazard associated with the dust room. (Ex. R-C at 37, 61; Tr. at 213-222.)

As part of its inspection, Sebench contracted with Chilworth Technology, Inc., to test grain samples taken from Vitakraft. (Tr. at 254; Ex. C-10 (Chilworth report addressed to Sebench Engineering, Inc.)) Sebench then provided a report to Vitakraft regarding the results of the testing of the dust, which proved to be combustible, as well as a proposal for a new dust collection system design.⁸ (Tr. at 253-254.)

Safety Manager Lusk then wrote an abatement letter to OSHA.⁹ (Tr. at 264-266.) According to Ms. Lusk, “[Vitakraft] needed to give [OSHA] a proposal of how we were going to abate the citation for the dust collection system. So we contracted with SSOE and Sebench Engineering to design a dust collection system that would satisfy them. So that was – this is

⁸ The Sebench report is not in evidence.

⁹ The abatement letter is also not in evidence; however, much of it was read into evidence, with no objection, during Ms. Lusk's cross-examination. To the extent that Respondent now objects in its post-hearing brief to the use of what was read into evidence during the trial due to a discovery dispute, I find any such objection waived. (Resp't Br. at 20); Fed. R. Evid. 103(a)(1); *MVM Contracting Corp.*, 23 BNA OSHC 1164, 1166 (No. 07-1350, 2010) (holding that objection is waived if not timely made).

their proposal that we implement.” (Tr. at 265.) In the abatement letter to OSHA, Ms. Lusk “cut and pasted” the Sebench proposal with its recommendations “for the design and implementation scheduled for the dust collection system to bring [Vitakraft] in compliance with OSHA and will built [sic.] to meet the NFPA code 61, 68, 69, 654.” (Tr. at 251; 256; 264-266.) According to Ms. Lusk, Sebench reviewed and submitted a proposal addressing not only the dust collection system for the hay room, but also for the entire facility, presumably including the dust room. (Tr. at 252-253.) Ms. Lusk testified, however, that Vitakraft only implemented the hay room aspect of the Sebench proposal due to cost. (Tr. at 268-269.) Ms. Lusk stated that Vitakraft “could only do the part that was – we had to do for OSHA at the time.” (Tr. at 268.) The record is unclear whether Ms. Lusk included in the abatement letter to OSHA that Vitakraft implemented only the part of the Sebench proposal associated with the hay room and not the rest of the facility.

DISCUSSION

I. Did the Secretary establish that the dust room dust was combustible?

A threshold issue in this case is whether the dust room dust was combustible so as to pose a fire or explosion hazard. Without this finding, the Secretary cannot establish that there was a fire or explosion hazard in the Vitakraft dust room. Respondent argues that the Secretary did not establish that the dust room dust was combustible for a variety of reasons relating mainly to the validity of the dust sample CO Jensen took from the dust room, the sample’s documentation, and the SLTC’s sampling test procedures. For the following reasons, I find that the Secretary has established, by the preponderance of the evidence, that the dust room dust was combustible.

First, Respondent claims that Mr. Anderson tested a sample of dust that could not have been from Vitakraft’s dust room. (Resp’t Br. at 8-9.) In support of this claim, Respondent argues that while Mr. Anderson testified that he tested a sample of “black dust” at the SLTC, “Vitakraft’s dust is nothing close to black dust.” (Resp’t Br. at 8-9; Tr. at 190-191; 198-199.) Respondent then points out that CO Jensen testified that he took the dust sample in question from the floor of the dust room, which was covered in “yellowish” dust. (Resp’t Br. at 8; Tr. 128; Ex. C-1 at 3.) Respondent also points to the CO’s testimony that “[t]he dust in the bottle, it wouldn’t degrade in the bottle or change physical characteristics at all” over the course of the month the sample sat on his desk waiting to be shipped to the SLTC. (Resp’t Br. at 8.) This testimony is

enough, according to Respondent, to find that the Secretary did not establish that the dust room dust was combustible.

Respondent, however, does not address the evidence in the record that supports the Secretary's claim that the sample that was tested was taken from Vitakraft's dust room. For example, CO Jensen testified that members of Vitakraft's team observed him sampling the dust in the dust room. (Tr. at 41-42.) He also stated that he filled out a sample sheet when he took the sample. (Tr. at 36; Ex. C-7.) He then testified that he "put a sample seal on the dust sample, filled out my paperwork, and packaged the sample according to our packaging policies and sent it to the [SLTC] for analysis." (Tr. at 37-38.) Mr. Anderson testified that he had no concerns with the chain of custody associated with the sample of dust he received from CO Jensen. (Tr. at 202.) Referring to his raw data worksheet and his final report of analysis, Mr. Anderson stated that "he record[s] things that are not usual or unusual things are what I record. And being there is nothing unusual recorded, then everything appeared to be in good order when I started testing the sample." (Tr. at 189; 202; Ex. C-8, R-B.) He stated that the inspection number, sampling number and "CSHO ID" was the same on both documents.¹⁰ (Tr. at 201.) Similarly, CO Jensen's sample sheet that he sent to the SLTC has the same inspection number, sampling number and "CSHO ID" matching that of Mr. Anderson's raw data worksheet and final report of analysis. (Tr. at 36-37; 49; Ex. C-7, C-8, R-B.)

Despite alleging the color disparity of the dust, Respondent does not dispute any of the chain of custody testimony in the case. Respondent also stretches the CO's testimony regarding the dust's physical characteristics and whether they could change over the course of a month. Not only was the CO not qualified as an expert in that matter at trial, but the CO was not directly addressing that matter; he was instead explaining the reason behind why he thought it was common to delay shipment of dust samples. (Tr. at 48.) Mr. Anderson confirmed that it was not unusual to test a dust sample one month after the sampling was taken. (Tr. at 192.) After weighing this evidence, I find that the record supports a finding that the dust sample Mr. Anderson analyzed and testified about was taken by CO Jensen from Vitakraft's dust room during the subject inspection. *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988) ("[G]aps

¹⁰ CO Jensen testified that the "CSHO ID" was his identification number with OSHA. (Tr. at 49.)

in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.”).

Second, Respondent argues that CO Jensen did not perform any sampling at all due to errors and inconsistencies found on CO Jensen’s OSHA 1 Inspection Report. (Resp’t Br. at 9-10; Ex. R-A.) Respondent claims that CO Jensen associated an incorrect North American Industry Classification System (“NAICS”) code with Vitakraft. Respondent asserts that the proper code is for a “small animal feed manufacturer” and not the improper code for a “cat and dog” feed manufacturer. (Resp’t Br. at 9.) CO Jensen testified, however, that the improper NAICS code he included had no bearing or relevance to the sampling that was done. (Tr. at 127.) Respondent also asserts that CO Jensen marked “no” on the OSHA 1 Inspection Report where it asked whether sampling was performed. (Resp’t Br. at 10; Ex. R-A at 2.) CO Jensen, however, explained he interpreted the “sampling” question as related to “air sampling” and not any other type of sampling, like bulk (dust) sampling. (Tr. at 160.) He testified: “the way we’ve been taught is you mark it yes if you do air sampling and no if you don’t because we do wipe sampling. We do a bunch of different types, and it’s not uncommon to mark it no if you’re just wiping a surface of what have you.” (Tr. at 161.) Respondent also does not dispute CO Jensen’s testimony that members of Vitakraft observed him sampling the dust in the dust room. (Tr. at 41-42.) I find that the record evidence does not support Respondent’s claim that CO Jensen failed to perform sampling.

Third, Respondent argues that, for various reasons, “Exhibit 7, the OSHA lab report for black dust” is unreliable and not trustworthy. (Resp’t Br. at 10-11.) Respondent’s argument is interpreted to include Exhibit 7, the sampling worksheet filled out by CO Jensen requesting the SLTC to perform an analysis (“Form 91-A”), and Exhibit 8, the SLTC final analytical report (“OSHA Report 91-B”). (Tr. at 36; 179-181; Ex. C-7, C-8.) Mr. Anderson testified to OSHA Report 91-B and it was his opinion that the sample he tested proved to be a combustible and explosive dust. (Tr. at 185-186.) Mr. Anderson, with no objection, was qualified as an expert witness “in testing of combustible dusts, analysis of those test results, and in determining the

combustible and explosive nature of dusts.”¹¹ (Tr. at 185.) Respondent introduced no expert witness to counter Mr. Anderson’s testimony.

Respondent initially claims that the report is unreliable and untrustworthy because it is entitled “Air Sampling Report,” when no air sampling was performed. With regard to CO Jensen’s sampling worksheet, Form 91-A, CO Jensen testified that:

OSHA does not have a form for bulk samples. We don’t have a form for wipe samples where we wipe surfaces. We use the air sampling sheet because it has the pertinent information on it that we need to fill out for the lab. So the air sampling sheet is used for a number of different types of samples. We even use them for soil samples in construction when we’re doing trenching investigations. We use an air sampling sheet because the blocks that we have to fill out and the information on the sheet is [sic] pertinent to analyze the samples.

(Tr. at 50.) Mr. Anderson did not testify to the “Air Sampling Report” title of OSHA Report 91-B, but he testified that he personally tested the dust sample, and that he documented and initialed the results in the OSHA Report 91-B. (Tr. at 179-180; Ex. C-8.) Respondent does not dispute that Mr. Anderson documented his testing results in the OSHA Report 91-B. Respondent instead declares that it is surprising that, “despite OSHA’s apparent emphasis regarding combustible dusts, OSHA doesn’t have a specific form to be used for dust samples.” (Resp’t Br. at 10.) That may be true, but this unsupported declaration does not undercut the testimony explaining how Form 91-A and the OSHA Report 91-B were used in this case.

Respondent next argues that the results are an “estimate” and “semi-quantitative,” and so cannot be used to support a violation. (Resp’t Br. at 10-11.) Noting that CO Jensen took a bulk sample, Respondent quotes from OSHA Report 91-B and claims that, “bulk samples are analyzed to provide an estimate of the composition of the materials submitted. The results reported should be considered semi-quantitative only[.]” (Resp’t Br. at 10; Exhibit 8.) No witness addressed this quote from OSHA Report 91-B. Mr. Anderson, however, testified that in his expert opinion, the dust room dust was combustible. (Tr. at 185-186.) Respondent failed to introduce any kind of evidence to explain how the quote from OSHA Report 91-B could undercut Mr. Anderson’s expert opinion. I also note that Respondent’s counsel had the opportunity to question Mr. Anderson about the quoted language, but failed to do so.

¹¹ Mr. Anderson has a Bachelor of Science degree in chemistry and has worked as an analytical chemist or laboratory manager for about 35 years. (Tr. at 176-177.) In the past five years at the SLTC, Mr. Anderson has conducted 20-30 combustible dust tests per month. (Tr. at 176.)

Respondent finally claims that the OSHA report was unreliable because Mr. Anderson did not test the dust room dust in its original state. (Resp't Br. at 10-11.) Respondent alleges that Mr. Anderson increased the dust's explosiveness when he dried out the sample before testing it. (Resp't Br. at 11.) Mr. Anderson, however, testified to the method of which he tested the dust room dust sample. (Tr. at 182-185.) He testified that it was standard protocol to dry a dust sample before testing it. (Tr. at 182.) He explained:

[I]f you understand the way a dust is formed, from a larger particle to a smaller particle, there is no moisture there unless it's added intentionally. So [the] idea is to create a test that determines whether the dust is explosive at a particular time.

(Tr. at 188.) He testified that the testing protocol that he used on Vitakraft's dust sample has been used for "many, many years by many, many people." (Tr. at 184.) He confirmed that the testing verified reliable results, and when questioned whether it has been subject to peer review, answered: "Like I said, it's been used by many people and results have been compared, and it has not been – to my knowledge, had any problems with it." (Tr. at 184.) He stated that the SLTC has been using this testing protocol since 1985, when it "took it over from the Bureau of Mines[.]" and he was not aware of any court of law that had deemed the testing protocol to yield unreliable results. (Tr. at 184-185.)

Expert witness Mr. Anderson had personal knowledge of testing the sample at issue in this case, and he implemented reliable methods when he tested the sample. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) (finding that judge serves as a "gatekeeper" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (extending the court's gatekeeper function to all expert testimony).¹² Respondent has not produced any evidence to undercut Mr. Anderson's qualifications or the methods he used to test the sample.

¹² Fed. R. Evid. 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

I find, therefore, that the Secretary has established that the dust in Vitakraft's dust room was combustible and explosive.

II. Serious Citation 1, Item 1 – Housekeeping

a. Merits

The Secretary claims that Vitakraft violated the housekeeping standards at 29 C.F.R. §§ 1910.22(a)(1) and (2) due to the excessive accumulation of combustible dust on the floors and horizontal surfaces of the walls inside the dust room. 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 a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Respondent argues that the housekeeping standards do not apply to the dust room. (Resp't Br. at 5.) Respondent claims that the dust room is part of a dust collection system, essentially asserting that the dust room is not, as delineated in the cited standards, a "place[] of employment," "passageway," "storeroom," "service room," or "workroom." 29 C.F.R. §§ 1910.22(a)(1) and (2). Respondent points to CO Jensen's testimony that "housekeeping standards do not apply within a dust collection system," and asserts that the dust room was part of "the dust collection system utilized by Vitakraft." (Resp't Br. at 5.) It is undisputed, however that Vitakraft employees enter the dust room weekly to remove the trailer and then to clean. (Ex. R-C at 23.) Under these housekeeping standards, the Commission has held that a "[p]lace of employment" is " '[e]very place, within the scope of this standard, where any person is directly or indirectly employed.' " *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1659 (No. 13401, 1981) (citation omitted). While CEO Weinmann likened the dust room to "the bag of a vacuum cleaner" and Respondent asserts that it should be thought of as part of a dust collection system, the record does not support these claims. (Ex. R-C at 22; Resp't Br. at 5.) Here, Vitakraft's dust room is designed to give access to workers who must, regularly, enter it and work inside it. Under these circumstances, I find that the dust room in this case is a place of employment and a workroom as contemplated by the cited housekeeping standards.

Respondent also claims that OSHA improperly adopted the housekeeping standard and "is prohibited from citing the housekeeping standard with respect to dust accumulations."

(Resp't Br. at 6.) Despite this assertion, courts and the Commission have found that § 1910.22(a) applies to fire and explosion hazards resulting from grain dust accumulation. *Con Agra, Inc.*, 672 F.2d 699 (8th Cir. 1982); *Bunge Corp.*, 638 F.2d 831 (5th Cir. 1981); *Farmers Coop. Grain and Supply Co.*, 10 BNA OSHC 2086 (No. 79-1177, 1982). The record shows that the dust room had combustible grain dust accumulation due to the processing of grains such as corn, wheat and oats. (Ex. R-C at 9-10.) The Secretary has established that the cited standard applies.

With regard to compliance, it is undisputed that CO Jensen found and documented 2-3 inches of dust on the walls and up to a foot of dust on the floor of the dust room. It has been found that the grain dust is combustible. Respondent has not kept the dust room in a clean condition. The Secretary has established non-compliance.

Regarding employee exposure, the Secretary alleges that Vitakraft employees are exposed to a fire and explosion hazard due to the excessive accumulation of combustible grain dust in the dust room. (Sec'y Br. at 7.) It has been held that non-compliance with the housekeeping standard due to excessive combustible grain dust presumes the hazard of fire and explosion. *Bunge Corp.*, 638 F.2d 831, 834 (5th Cir. 1981) ("Unless the general standard incorporates a hazard as a violative element, the proscribed condition or practice is all that the Secretary must show; hazard is presumed and is relevant only to whether the violation constitutes a 'serious' one."). It is undisputed that workers regularly enter the dust room, and also that employees work in rooms adjacent and/or connected to the dust room. I find that Vitakraft employees work in close proximity to the dust room, and are therefore exposed to the fire and explosion hazard arising from non-compliance with the housekeeping standard.

With regard to knowledge, the Secretary alleges that Vitakraft "knew of the significant accumulations of dust in its dust room," which is sufficient to find that Vitakraft had the requisite knowledge to warrant affirming the violation. (Sec'y Br. at 10.) The record establishes that Vitakraft's CEO and Safety Manager were aware that the dust room dust contained grain dust. (Tr. at 230; Ex. R-C at 9-10.) The CEO also was aware that the grain dust accumulated on the walls and floors of the dust room so as to necessitate regular cleaning to avoid attracting insects and rodents. (Ex. R-C at 23-24.) For this Citation Item, it is unnecessary for the Secretary to show that Vitakraft knew of the fire and explosion hazard posed by non-compliance with the cited standards, only that they knew of the accumulations inside the dust room. *Phoenix*

Roofing, Inc., 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995) (“Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation”), *aff’d*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). The CEO’s and Safety Manager’s knowledge is imputed to Respondent. *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999) (“[K]nowledge can be imputed to the cited employer through its supervisory employee.”). The Secretary has established knowledge for this Citation Item. The citation is affirmed.

b. Characterization

The Secretary characterizes this Citation Item as serious. A violation is “serious” if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). CO Jensen testified that fire and explosion due to the excessive grain dust accumulation can cause death to employees. (Tr.at 110-111.) I find that the violation is properly characterized as serious.

III. Repeat Citation 2, Item 1 – General Duty

The Secretary alleges that Vitakraft violated the general duty clause of the OSH Act “when it exposed its employees to fire and explosion hazards in the production area, by failing to separate the dust room from the upstream process.” (Sec’y Br. at 11.) To prove a violation of the general duty clause, the Secretary has the burden to establish that “a condition or activity in the workplace presented a hazard, that the employer or its industry recognized this hazard, that the hazard was likely to cause death or serious physical harm, and that a feasible and effective means existed to eliminate or materially reduce the hazard.” *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) citing *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). I find that the Secretary has not met his burden as explained below.

Nature of the Hazard

“A hazard must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control.” *Arcadian*, 20 BNA OSHC at 2007. The Commission may define the hazard itself when the Secretary’s definition is so broad or generic that it fails to meet the requirements of this definition. *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984).

The Secretary states that “Vitakraft exposed its employees to fire hazards and explosion hazards.” (Sec’y Br. at 12.) In the Citation, the Secretary claimed:

[Vitakraft] employees were exposed to combustible agricultural dust explosion and other fire hazards while working at or near the dust trailer room and associated upstream equipment which were not adequately designed to prevent or minimize employee exposure in the event of an explosion or other uncontrolled fire event.

[Vitakraft] did not ensure that employees were protected from combustible agricultural dust explosion or other fire hazards ... The dust room is not separated from upstream processes by rotary valves, choke seals, or other methods to reduce the likelihood of explosion propagation, upstream dust collection fans/blowers are not constructed of spark resistant materials, and there are no dust controls to minimize the generation of dust after it leaves the air handling system and falls in to the dust trailer.

(Citation at 8.) Respondent argues that the general duty clause as applied here is too vague and overreaching, claiming that CO Jensen conceded that there was a low probability of an explosion hazard and that “other fire hazards” is too vague to support a violation. (Resp’t Br. at 6-7.)

The CO testified that a fire could occur within the dust room if an ignition source were introduced. (Tr. at 107-108.) Mr. Anderson testified that the five items needed for an explosion are oxygen, fuel, ignition source, confinement and dispersion. (Tr. at 193.) All of these items could be present, at the same time, at some point in the dust room. Along with oxygen, the dust room contains potentially more than 5,000 pounds of combustible dust, *i.e.*, fuel, that has free-fallen from the top of the room to the wagon, dispersing dust to the walls and the floor. This dust-collection occurs while the dust room is confined with the door shut. Possible ignition sources include “the hot motor on the tractor or a spark from the exhaust of the tractor” that is used weekly to remove the trailer, and the dust room’s “electric auger motor, hot bearings on the auger motor, hot belts on the auger, and [sparking] fan blades.” (Sec’y Br. at 8.) Mr. Anderson testified that a hot bearing could ignite the dust room dust “in a large room.” (Tr. at 195.) In his opinion, the dust room dust could explode “in real life,” referring to the plant conditions at Vitakraft’s facility. (Tr. at 206.)

In *Kelly Springfield Tire Co.*, 10 BNA OSHC 1970, 1974 (No 78-4555, 1982), *aff’d*, 729 F.2d 317 (5th Cir. 1984), the Commission found that a “dust collection system was not operated or maintained in such a way as to protect employees from the danger of an explosion caused by the combination of oxygen, a combustible dust, and an ignition source in the enclosed space.” Similarly here, Vitakraft’s dust room is a potential source of a fire or explosion hazard due to the conditions inside the room. Therefore, the hazard can be defined as an inadequately designed

room for safely collecting and storing combustible dust as to protect employees from the danger of a fire or an explosion caused by the combination of oxygen, combustible dust, and ignition sources inside.

Recognition of the Hazard

“The question of whether a hazard is recognized goes to the knowledge of the employer, or if he lacks actual knowledge, to the standard of knowledge in the industry - an objective test.” *Cont'l Oil Co. v. OSHRC*, 630 F.2d 446 (6th Cir. 1980). The Secretary claims that Vitakraft had actual recognition of the hazard as evidenced by the 2008 OSHA citation, knowledge of National Fire Protection Association (“NFPA”) 61, and the Chilworth report.¹³ (Sec’y Br. at 14.) The Secretary also claims that Vitakraft’s industry recognized the hazards associated with grain dust through NFPA 61. (Sec’y Br. at 14.) Respondent argues Vitakraft had no actual knowledge of the hazard and neither does its industry. (Resp’t Br. at 15-22.)

I find that the Secretary has not shown actual recognition by Vitakraft of the dust room hazard. No Vitakraft employee testified to being aware of the combustible dust in the dust room. The testimony from CEO Weinmann and Safety Manager Lusk shows that they understood the “big concern” in 2008 to be the location of the dust collection system, not the dust, and that it had to be relocated outside of the room the workers were in. Unlike the 2008 violative hay room dust collection system, the dust room is a room all by itself located away from daily work. CO Jensen testified that Vitakraft resolved the violation by relocating the hay room dust collector outside, not mentioning any deflagration controls. (Tr. at 132.) He further agreed that the 2008 citation did not discuss deflagration controls such as rotary valves, choke seals, or spark resistant fan blades, and that the 2012 citation concerned different equipment, a different process, different ingredients, and a different dust collection system. (*Id.* at 133.)

Additionally, no Vitakraft representative testified to understanding NFPA 61. It is concerning that Vitakraft’s Safety Manager submitted an abatement letter to OSHA in which she “cut and pasted” Sebench’s proposal, that was in accordance with NFPA 61, without understanding any of it. (Tr. at 266.) However, it only shows that Vitakraft’s Safety Manager had no actual recognition of NFPA 61 and its specifications. To the extent that the Secretary

¹³ NFPA 61 is a voluntary consensus standard entitled “Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities.” (Ex. C-2.) It provides specifications on, among many things, construction requirements, explosion prevention, equipment including bearings, and dust control including dust collection systems. (Ex. C-2 at 6.)

points to the Chilworth Report as an attempt to establish actual recognition of the combustibility of the dust room dust, I find that the Secretary has not met his burden. (Sec’y Br. at 15 citing Ex. C-10). The record does not establish that any Vitakraft representative understood the Chilworth Report. (Tr. at 259; Ex. R-C at 54-55.) No expert witness was called to explain this report. The Secretary points to “W”’s statement that CO Jensen recorded at the 2012 round-table interview during the inspection. This statement by “W” is: “We had samples taken [in 2008] of the dust room at the same time as the hay dust, right out of the wagon, by SSOE or Sebench.” (Ex. C-9 at 2.) Neither Ms. Lusk nor CEO Weinmann knew who made that statement, and asserted that they did not make that statement. (Tr. at 258-259; Ex. R-C at 55-56.) The Secretary did not call “W” as a witness to testify at the hearing.

I find, however, that the record shows that Vitakraft’s industry recognizes the hazard. I find this based on the fact that Sebench, the outside consulting company Vitakraft hired, recommended that Vitakraft’s dust collection system follow NFPA 61. It does not matter that NFPA 61 is a voluntary standard and not an OSHA standard as argued by Respondent. (Resp’t Br. at 20-21.) The test here is industry recognition of a hazard. Sebench recommended that Vitakraft design its dust control system in accordance with NFPA 61. It is reasonable to find that Sebench, a company hired by Vitakraft, would recommend design specifications that are generally recognized within Vitakraft’s industry. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1873 (No. 92-2596, 1996) (“[i]ndustry standards and guidelines such as those published by ANSI are evidence of industry recognition”); *see also Cargill, Inc.*, 10 BNA OSHC 1398, 1402 (No. 78-5707, 1982) (“It is well established that voluntary industry standards are admissible and probative evidence of industry recognition of hazards.”). It also does not matter that Safety Manager Lusk did not understand whether and how NFPA 61 applied to Vitakraft’s facilities. *Titanium Metals Corp.*, 579 F.2d 536, 541 (9th Cir. 1978) (“An activity or practice may be a ‘recognized hazard’ even if the employer is ignorant of the existence of the activity or practice or its potential for harm.”). The Secretary has established recognition of the hazard.

In addition to recognition of the hazard, the Secretary must prove that Vitakraft knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. “Reasonable diligence involves consideration of several factors, including the employer’s obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations.”

Burford's Tree, Inc., 22 BNA OSHC 1948, 1950 (No. 07-1899, 2010) (citations omitted). Even though the record does not establish that Vitakraft had actual knowledge of the dust room hazard, I find that Vitakraft could have known about the dust room hazard if anyone had understood the Sebench proposal. The record shows that neither CEO Weinman nor Safety Manager Lusk even attempted to understand the Sebench proposal. As leaders of the company and as the head of safety, they can reasonably be expected to have read and understand the proposal, especially because Safety Manager Lusk sent it to OSHA in an abatement letter to satisfy CEO Weinmann's signed settlement agreement. Constructive knowledge has been established.

Likelihood of Harm

The Secretary alleges that "Vitakraft's fire and explosion hazards are likely to cause death or serious physical harm." (Sec'y Br. at 16.) CO Jensen testified that fire and explosion due to the excessive grain dust accumulation can cause death to employees. (Tr. at 110-111.) It is undisputed that Vitakraft employees work in or adjacent to the dust room. Duct work connects the dust room to other rooms where Vitakraft employees work. CO Jensen testified that fire can propagate through duct work, exposing employees in another room connected by duct work. (Tr. at 80-81.) It is undisputed that Vitakraft's duct work is not designed for fire hazards. It is undisputed that the potential ignition sources inside the duct room, augers and fans, were also not designed for fire hazards. The record establishes that the fire and explosion hazards here could cause death or serious physical harm to Vitakraft employees.

Feasibility of Abatement

"The Secretary must specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard. The Secretary must also show that her proposed abatement measures are economically feasible." *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000) (consolidated). "'Feasible' means economically and technologically capable of being done." *Id.* at 1191.

The Secretary has proposed many means of abatement. The Secretary recommends that Vitakraft minimize the combustible dust accumulations by installing sheet metal on the walls of the dust room, flexible tubing over dust outlets that feed the trailer, or installing a tarp or tent over the trailer to prevent pluming or spillage. (Sec'y Br. at 17.) The Secretary also proposes that Vitakraft could increase the frequency of the cleaning. (*Id.*) The Secretary also proposes

that Vitakraft “eliminate ignition sources,” such as installing “non-sparking fan blades, mov[ing] the auger motor out of the room, install[ing] temperature monitoring device for bearings, and enclos[ing] the auger belts.” (*Id.* at 18.) The Secretary also recommended that Vitakraft could reduce employee exposure to fire or explosion by installing “rotary valves or choke seals on equipment to prevent flames from propagating though the upstream duct work and into the production area.” (*Id.* at 17.) The Secretary finally proposes that Vitakraft could have “eliminated the dust room entirely, connecting the process duct work to the already existing dust collections system.” (*Id.*)

I find, however, that the Secretary has not demonstrated that these measures would be effective in materially reducing the hazard. The hazard is fire or explosion caused by an inadequately designed room for safely collecting and storing combustible dust. There may be excessive accumulation of dust on the walls and floor of the dust room, but it is negligible to the 5,000 pounds of combustible dust inside the wagon trailer. The methods proposed by the Secretary to minimize accumulations do not, in any way, address this mountain of combustible dust inside the wagon that underlies the very purpose of the dust room. The Secretary’s proposed recommendations for eliminating ignition sources do not address the uncontroverted fact that there have been no safety concerns regarding the motor inside the dust room or any safety concerns regarding the fan blades in the ductwork of the dust room. (Tr. at 242.) The Secretary also does not address the tractor motor that is backed into the dust room weekly to remove the dust. And, while rotary valves or choke seals may prevent flames from propagating, the Secretary has not demonstrated that rotary valves or choke seals can prevent an explosion from propagating through ductwork.

Furthermore, by recommending that Vitakraft connect the dust room to the existing dust collection system, the Secretary essentially proposes that Vitakraft re-design its dust room so that it is compliant with NFPA 61. The problem with this proposed means of abatement is that CEO Weinmann expressly rejected Sebench’s similar proposal due to cost. The Secretary has not provided any evidence to rebut this statement. It is on the Secretary to prove that this means of abatement would not “threaten the economic viability” of Vitakraft. *Natl Realty & Constr. Co.*, 489 F.2d 1257, 1266 n.37 (D.C. Cir. 1973). The Secretary has not met his burden in establishing a feasible means of abatement for this general duty citation. This Citation Item is therefore vacated.

IV. Repeat Citation 2, Item 2 – Safety Warning Sign

a. Merits

The Secretary claims that Vitakraft violated 29 C.F.R. § 1910.145(c)(3) by not posting a sign warning employees of the combustible dust hazard in the dust room. (Sec’y Br. at 19.) Respondent claims that the Secretary “failed to adduce any evidence of a need for [a] safety instruction sign.” (Resp’t Br. at 24.) Respondent asserts that all employees knew of the dust room and that it collected dust. (Resp’t Br. at 24.) Respondent further argues that only certain individuals “were permitted to enter the dust room in order to clean the dust room and they were provided the requisite knowledge to safely perform their cleaning activities.” (Resp’t Br. at 24.)

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 a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharm. Prods.*, 9 BNA OSHC at 2129.

As to applicability, the Secretary has established that the cited standard applies. It is undisputed that dust room contained a substantial amount of combustible dust, which, when met with an ignition source, could cause a fire or an explosion in and around the dust room. I agree with the Secretary’s assertion that “tractor operators who removed the trailer from the dust room should have been warned that they were operating the tractor in the presence of combustible dust.” (Sec’y Br. at 19.) I also find that employees working inside the dust room and even passing by the dust room should be warned and reminded of the presence of combustible dust, so as to put employees on alert of safety measures, such as the prohibition of any possible ignition sources, in that area.

As to non-compliance, it is undisputed that no warning signs were posted in or around the dust room. The Secretary has established non-compliance.

With regard to employee exposure, it is undisputed that workers regularly enter the dust room, and also that employees work in rooms adjacent and/or connected to the dust room by duct work. CO Jensen testified that the hazards associated with violating this standard are fire and explosion. (Tr. at 121.) I find that Vitakraft employees work in close proximity to the dust room, and are therefore exposed to the fire and explosion hazard arising from non-compliance with the cited standard.

I also find that the Secretary has established knowledge of the violative condition. The record shows that Safety Manager Lusk was aware that no warning signs were posted near the dust room. (Tr. at 66; Ex. C-9 at 3.) This awareness is notable because Ms. Lusk also knew about the warning signs that were posted as a result of the previous OSHA citation for the dust collection system for the hay room. (Tr. at 246; 248-249; Ex. R-C at 37). Ms. Lusk's awareness constitutes knowledge for this Citation Item and is imputed to Vitakraft. *Phoenix Roofing, Inc.*, 17 BNA OSHC at 1079 (“[K]nowledge is established by a showing of employer awareness of the physical conditions constituting the violation”); *Access Equip. Sys., Inc.*, 18 BNA OSHC at 1726 (“[K]nowledge can be imputed to the cited employer through its supervisory employee.”). This Citation Item is affirmed.

b. Characterization

The Secretary characterizes this Citation Item as a repeat violation. “A violation is repeated under section 17(a) of the Act 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 (No. 16183, 1979). The Secretary establishes a *prima facie* case of similarity by showing that both violations are of the same standard. *Capform*, 16 BNA OSHC 2040, 2045 (No. 91-1613, 1994).

The record shows that Vitakraft received a citation in October 2008 for violating the same standard at its facility in Weston, Ohio. (Ex. C-4.) Vitakraft never contested the citation because it reached an informal settlement agreement with OSHA, conceding the violation, on November 6, 2008. (Ex. C-6.) Because a citation was issued and Respondent did not contest it, the citation of the same standard became a final order of the Commission under section 10(a) of the Act, 29 U.S.C. § 659(a), before the violation occurred here. *Potlatch*, 7 BNA OSHC at 1062. The Secretary has established a *prima facie* case of similarity between both violations.

Respondent claims that, in 2008, different equipment, different processing, different ingredients, and a different dust collection system were involved. (Resp't Br. at 22.) The test for similarity, however, goes to the nature of the hazard. “The principal factor in determining whether a violation is repeated is whether the two violations resulted in substantially similar hazards.” *Amerisig Se., Inc.*, 17 BNA OSHC 1659, 1661 (No. 93-1429, 1996). Here, the hazard of fire and explosion in 2012 is the same as the hazard of fire and explosion in 2008. The violation is properly characterized as repeat.

V. Penalties

“Section 17(j) of the Act, 29 U.S.C. § 666(j), requires that when assessing penalties, the Commission must give due consideration to four criteria: the size of the employer's business, gravity of the violation, good faith, and prior history of violations.” *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994) (internal quotations and citations omitted). When determining gravity, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Capform, Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001). Gravity is typically the most important factor in determining penalty. (*Id.*) The Commission is the “final arbiter” of penalties. *Hern Iron Works*, 16 BNA OSHC at 1622 (citation omitted).

For each of the affirmed citations, the gravity of the violation is substantial. *Farmers Coop. Grain and Supply Co.*, 10 BNA OSHC at 2089 (finding substantial gravity due to exposing employees to death or serious injury from a fire or explosion resulting from excessive grain dust accumulation). Respondent also has a prior history of dust violations. Respondent, however, is a small company with 50-60 employees at the time of the inspection, and exhibited good faith in cooperating with OSHA during the inspection. (Ex. R-C at 8; Tr. at 135.) I also agree with OSHA’s assessment that the likelihood of injury is low as evidenced by the testimony that Vitakraft has been operating the dust room for over 20 years and has never had a fire or explosion resulting from the combustible dust inside it. (Tr. at 122.) Accordingly, I find that the proposed penalties for each of the affirmed violations are appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on these findings of fact and conclusions of law, it is ordered that:

- 1) Items 1(a) and 1(b) of Citation 1, alleging a violation of 29 C.F.R. § 1910.22(a)(1) and 29 C.F.R. § 1910.22(a)(2), are **AFFIRMED** and a penalty of \$3,850.00 is **ASSESSED**.
- 2) Item 1 of Citation 2, alleging a repeat violation of section 5(a)(1) of the OSH Act, is **VACATED**.
- 3) Item 2 of Citation 2, alleging a repeat violation of 29 C.F.R. §1919.145(c)(3), is **AFFIRMED** and a penalty of \$154.00 is **ASSESSED**.

Date: September 30, 2014
Washington, D.C.

/s/ _____
Keith E. Bell
Judge, OSHRC