No. 24-60026

In The United States Court of Appeals For The Fifth Circuit

Mar-Jac Poultry MS, L.L.C.,

Petitioner,

v.

Secretary, United States Department of Labor,

Respondent.

On Appeal from
Occupational Safety & Health Review Commission
OSHRC Docket No. 21-1347

BRIEF OF APPELLANT MAR-JAC POULTRY MS, L.L.C.

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellees:	**Counsel for Appellee:**
Secretary, United States Department of Labor	Seema Nanda of U.S. Department of Labor Washington, DC
Secretary, United States Department of Labor	William Thompson of U.S. Department of Labor Washington, DC
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Appellants:	**Counsel for Appellant:**
Mar-Jac Poultry MS, L.L.C.	James Stine and Sherifat Oluyemi of Wimberly, Lawson, Steckel, Schneider & Stine, P.C. Atlanta, GA

/s/ James Larry Stine
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STATEMENT REGARDING ORAL ARGUMENT

Appellant Mar-Jac Poultry, MS, LLC, respectfully requests oral argument in this appeal. Mar-Jac believes that oral argument will be beneficial to the Court as well as to both parties given the complicated questions of law and fact raised by the Commission's ruling.

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JURISDICTIONAL STATEMENT

Agency jurisdiction. The Commission obtained jurisdiction pursuant to 29 U.S.C. 659(c) of the Occupational Safety and Health Act of 1970 (the "Act"), when Mar-Jac timely filed its Notice of Contest on December 2, 2021.

Appellate jurisdiction. Pursuant to 29 U.S.C. § 660(a), this Court has jurisdiction over this timely appeal from a final order of the Occupational Safety and Health Review Commission. On November 21, 2023, the Commission issued its decision affirming two Citation Items in *Secretary of Labor, Complainant v. Mar-Jac Poultry, MS, LLC., Respondent*, OSHRC Docket No. 12-1247 (the "Decision"). Mar-Jac timely filed a Petition for Review ("Petition") with this Court within the time frame prescribed by Section 11(a) on January 16, 2024. Venue is proper because the citations occurred at Mar-Jac's facility located in Hattiesburg, Mississippi.

STATEMENT OF THE ISSUES

1. Whether the Commission erred in finding that Mar-Jac exposed employees to a known hazard where no hazards had been identified on the Meyn Meastro eviscerators in accordance with industry standards, which absent more specific regulation, is the prevailing standard under *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1277 (5th Cir. 1981) and *B&B Insulation, Inc. v. OSHRC*, 583 F.2d 1364 (5th Cir. 1978)?

2. Whether the Commission erred in finding that Mar-Jac failed to guard the eviscerators and place safety instruction signs where the machine was guarded in accordance with industry standards, which absent more specific regulation, is the prevailing standard under *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1277 (5th Cir. 1981) and *B&B Insulation, Inc. v. OSHRC*, 583 F.2d 1364 (5th Cir. 1978)?

3. Whether the Commission erred in affirming Citation 1, Items 1 and 2, where the ALJ failed to identify the hazard with specificity and then excluded the cited area from the zone of danger thus, improperly *sua sponte* and *ex post facto* amending the Citation?

4. Whether the Commission erred in finding that Mar-Jac failed to meet its burden of proof as to the affirmative defense of unpreventable employee misconduct, where the ALJ improperly discredited the declaration testimony of a supervisor-trainee establishing that the employer monitored compliance and enforced policies prohibiting contact with the eviscerator?

5. Whether the Commission erroneously concluded that Citation 1 Item 1 is properly classified as serious and that the proposed penalties are appropriate, where the Commission has previously determined violations of the standard to be non-serious?

STATEMENT OF THE CASE

I. Statement of Facts.

Mar-Jac Poultry, MS, LLC is a poultry processing facility located in Hattiesburg, MS. (R-Vol. 1, T. 130:16-131:15).[1] Mar Jac's facility contains two Meyn Maestro eviscerating machines (R-Vol. 1, T. 133:13-17). The eviscerator is a large machine designed to disembowel chickens – it consists of a rotating carousel with a drain pan about 16 inches below the 72-inch-high carousel. (R-Vol. 1, T. 130:16-131:3; 185:1-11; 135:4-9; R-Vol. 2, Ex. R-1; R-Vol. 2, Ex. R-5.) The space between the bottom of the carousel and the pan is clear except for a shaft at the center around which the carousel rotates. (R-Vol. 1, T. 95:23-96:5; R-Vol. 2, Ex. R-1 at Image 18.) The carousel features shackles which hang chicken carcasses upside down while a set of brackets hold the birds in place. (R-Vol. 1, T. 164:8-23.) The machine also features spoons which dip into the birds, pull out viscera and plop the viscera into cups moving on an adjacent carousel. (*Id*.) The two carousels are at least six to seven inches apart and do not converge. (R-Vol. 1, T. 77:23-78:22.)

On May 31, 2021, Mar-Jac employee "B.B." was engaged in his Floor Person duties, keeping the area surrounding one of two Meyn Maestro eviscerators clear of chicken processing debris, when he was suddenly observed to be lodged in the machine. (R-Vol. 1, T. 142:23-144:11; 144:14-16; 73:25-74:2; 39:8-9.) He was

[1] Mar-Jac's record citations refer to the Certified List of relevant docket entries.

fatally injured. His duties as a Floor Person did not require him to touch the machine. (R-Vol. 1, T. 138:18-23; 160:22-25; R-Vol. 2, Ex. R-4; Ex. R-8; and Ex. R-9.) In fact, he was expressly prohibited by written and oral work rules and training from reaching into the machine's rotating carousel. (R-Vol. 1, T. 132:23-133:7; 144:17-146:8; 148:13-149:11; R-Vol. 2, Ex. R-6; R-7; R-10; and R-11.) Instead, he was provided with a high-pressure hose and a hook to clear debris from the area. (R-Vol. 1, T. 139:18-21.) Importantly, he also was provided with a means to stop the machine should the need ever arise. (R-Vol. 1, T. 150:25-152:21; 158:22-25; R-Vol. 2, Ex. R-19; and R-18.) Surrounding the eviscerator is a bright yellow emergency pull stop cord, which was installed by Meyn, the manufacturer, 72 inches above the plant floor. (*Id*.) The machine also was installed with an emergency stop ("e-stop") button, which is used to shut down the machine. (R-Vol. 2, Ex. R-18.) Activation of the fully functional and often-used pull stop stops the machine immediately. (R-Vol. 1, T. 195:19-196:1.)

B.B. was 6 feet tall and thus had an arm's reach much higher than 72 inches. (R-Vol. 2, Ex. R-14.) Only after B.B.'s toxicology report was released did Mar-Jac learn that at the time of the accident he was under the influence of various substances including methamphetamine, tetrahydrocannabinol, and alcohol as follows:

- Alcohol 0.091 mg/dL
- Tetrahydrocannabinol 0.98 ng/ML

- Methamphetamine 210 ng/ML

(R-Vol. 2, Ex. R-15.) The levels of intoxication are sufficient to indicate that hallucination and psychosis were present (*Id*.) There is no evidence that B.B. activated the pull stop cord nor was he heard by employees, who were out of sight but within hearing range, calling for help. Prior to this accident, no employee had ever been injured by the eviscerators at Mar-Jac. (R-Vol. 1, T. 47:23-48:10; 150:6-22; 168:2-4; 191:22-192:2.)

II. Procedural History.

Mar-Jac's timely report of the fatality triggered an OSHA investigation. (R-Vol. 1, T. 104:14-106:7.) On June 1, 2021, Compliance Safety and Health Officers (CSHOs) Patrick Whavers and Jermaine Davis visited the Mar-Jac facility. Mr. Whavers, who had many years' experience, took the lead: Mr. Davis was a trainee. (R-Vol 1, T. 102:18.) They conducted an opening conference, requested documentation, and interviewed employees. They inspected the Meyn Eviscerators on both Line 1 and Line 2. (R-Vol 1, T. 104:20-106:8.) They took some measurements but failed to measure the distance from where a Floor Person works to any perceived nip point or catch point. They did not make any determination as to where the alleged points of hazard were on the eviscerators. They did not identify the equipment with any specificity. (See, R-Vol 3-2, Citation.) And due to the lack of eyewitnesses, they were unable to ascertain how B.B. had entered the machine.

At the close of the investigation, a two-item Citation was issued. The first citation item alleged that Mar-Jac failed to place safety instruction signs on the eviscerator, in violation of 29 CFR § 1910.145(c)(3) (R-Vol. 3-2, Citation 1, Item 1; R-Vol. 2, R-17). This citation was supported by the allegation at on Evisceration, Line 1 – "On or about May 31, 2021, the employer allowed employees to place hands below rotating carousel of Meyn Maestro Eviscerator to remove chicken parts. The employer did not post safety instructions warning employees of catch point and rotating parts hazards exposing employees to caught in hazards." (R-Vol 3-2, Citation, Item 1). Second, OSHA alleged violation of § 1910.212(a)(1) for failure to apply one or more methods of machine guarding "to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks." 29 C.F.R. § 1910.212(a)(1). This citation item was supported by the allegation that on Line 1, Respondent "allowed employees to routinely place hands below the rotating carousel of Meyn Maestro Eviscerator to remove chicken parts, exposing employees to caught in hazards." (R-Vol. 3-2 Citation 1, Item 2.)

Mar-Jac timely filed a Notice of Contest and OSHA filed suit. (R-Vol. 3-3, Notice of Contest and R-Vol. 3-5, Complaint.) After Mar-Jac's Motion for Summary Judgment was denied, an evidentiary hearing was held before Administrative Law

Judge, Sharon J. Calhoun ("ALJ"). (R-Vol 3-24, Mar-Jac's Motion for Summary Judgment and VOL 4-31, Order on Motion for Summary Judgment.)

At the hearing, the Secretary presented the testimony of CSHO Jermaine Davis who was a trainee during the inspection. As a trainee, Mr. Davis made no factual determinations supporting the Citation, such as where the alleged exposed points of hazard were on the eviscerators. (R-Vol. 1, T. 118:14-19; 119:1-25.) The Secretary entered Davis's notes taken during his interview with two Mar-Jac employees, Joseph Conner, a Floor Person; and Martaze Hammond who was B.B.'s supervisor. (R-Vol. 2, Ex. C-9, and Ex. C-10.) The Secretary also presented two Food Safety and Inspection Service ("FSIS") Inspectors who worked at Mar-Jac's facility on the night of the accident. The two FSIS inspectors did not witness B.B. entering the eviscerator. (R-Vol. 1, T. 39:8-10; 73:22-24.) They claimed to have witnessed Mar-Jac supervisors place hands into the machine while it was rotating, but they could not identify the points of operation, catch points, or in-running nip points, and admitted they had never seen anyone injured by an eviscerator at any poultry plant, including Mar-Jac. (R-Vol. 1, T. 44:6-13; 48:4-10; 85:24-86:21.) They corroborated the evidence of frequent and seamless use of the pull stop cord to stop the eviscerator. (R-Vol. 1, T. 1:2-10; 41:19-21; 46:9-15-47:1-25; 49:11-14; 87:1-2; 86:22-25.)

In its defense, Mar-Jac presented its Human Resource and Safety Manager, Letissha Hill. Ms. Hill testified about Mar-Jac's zero tolerance for placing hands in moving machines and for working while under the influence of drugs. (R-Vol. 1, T. 132:23-133:7; 144:17-146:8; 148:13-149:11; Ex. R-6; Ex. R-7; Ex. R-10; Ex. R-11.) She also confirmed the lack of incidents relating to the eviscerator. Mar-Jac then presented the testimony of its expert, Clyde Payne, a former OSHA Area Director, and current safety consultant. (R-Vol. 1, T. 171-176.) Mr. Payne explained that because § 1910.212(a)(1) did not prescribe a specific guard, industry standards govern any assessment of the sufficiency of the hazard identified and guard chosen by the employer. (R-Vol. 1, T. 184; 189:21-190:5.) He explained the pull stop is an accepted and effective guard in the circumstances. (R-Vol. 1, T. 186:11-16; 186:18-20; 188:20-189:5.) He also explained there was no need for safety instruction signs on the eviscerator and he "looked through the OSHA publications on poultry, the OSHA letters of interpretations on poultry industries, the citation history of poultry employers across the United States. And there was just … one violation for signage… this case." (R-Vol. 1, T. 181:16-24.)

III. Ruling Presented for Review.

Following the hearing on October 5, 2023, the ALJ issued a decision affirming the Citation, which the Commission adopted as a final order of the Commission in a Notice of Final Order dated November 21, 2023. (R-Vol. 4-37 to 41.)

With regard to Citation 1, Item 2, the ALJ held that the Secretary established Mar-Jac violated an applicable standard in that "the eviscerator's rotating carousels and speed at which the machine operated present a hazard to Mar-Jac employees." (R-Vol. 4-38, Decision at 9.) The ALJ also held that Mar-Jac admitted as much and so did the manufacturer when it placed warning decals regarding rotating parts on a newer model of the machine. (R-Vol. 4-38, Decision at 10.) The ALJ then found Mar-Jac knowingly exposed its employees, including B.B., by requiring employees to clean the machine while in operation by accessing the "area surrounding the carousel." (R-Vol. 4-38, Decision at 11-13.) Lastly, the ALJ held that Mar-Jac failed to guard the machine. The Decision states that the pull cord is insufficient because the ALJ found them to be too easily defeated.

Regarding Citation 1, Item 2, the ALJ also found in favor of the Secretary. The ALJ held that Mar-Jac failed to place signs on the eviscerator. (R-Vol. 4-38, Decision at 15-16.) Thus, the ALJ continued, Mar-Jac exposed its employees to the same hazard discussed above. The ALJ found that Mar-Jac had knowledge of the violative condition because a newer model of the eviscerator, that "operated in the same way," had recently been installed by the manufacturer with signs affixed. (R-Vol. 4-38, Decision at 16-17.)

Finally, the ALJ held that Mar-Jac failed to establish the employee misconduct affirmative defense because it had failed to take steps to discover violations and to enforce its rules. (R-Vol. 4-38, Decision at 19.)

SUMMARY OF THE ARGUMENT

The Commission's decision is in error and should be reversed. By rejecting the general industry standard element of proof required by *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1277 (5th Cir. 1981) and *B&B Insulation, Inc. v. OSHRC,* 583 F.2d 1364 (5th Cir. 1978), the Commission erroneously relieved the Secretary of his burden of proof of the existence of a hazard and means of abatement, resulting in a decision that is arbitrary and capricious, constitutes an abuse of discretion, and is otherwise not in accordance with the law. An employer whose activity has not yet been addressed by a specific regulation and whose conduct conforms to the common practice of those similarly situated in his industry is entitled to rely on industry practice as setting the standard for compliance. *S.& H. Riggers,* 659 F.2d at 1273. The Commission erred in finding a violation where Mar-Jac was in compliance with general industry standards as applied to the Meyn Eviscerators. The Commission also erred in adopting the ALJ's erroneous factual determination that the decedent was "cleaning" the machine, where the evidence demonstrated that his job duties involved only attention to the surrounding floor, and he had been forbidden by training and practice to come in contact with the machinery. This also

was true of the ALJ's erroneous conclusion that the carousel presented a hazard. Neither the mere existence of moving parts or the occurrence of an accident is legally sufficient to establish a hazard, or the employer's knowledge of a hazard. There was no history of accidents with the Meyn Eviscerator, and contrary to the Commission's conclusion, the machine was effectively guarded by location, pull-stops, and emergency stop buttons.

The Commission also erred both in affirming the citation item regarding signage and in classifying that alleged violation as "serious." There is no precedent for a "serious" classification for instructional signage. The ALJ further erred in improperly amending citation 1, item 1 after trial, in effect altering the Secretary's description of the zone of danger without allowing the employer to respond. And finally, the Commission erred in affirming the ALJ's rejection of the employee misconduct defense. The decedent's extreme intoxication with mind-altering substances was flagrantly in violation of Company rules and policies adopted and enforced to maintain a safe workplace. The citations should be vacated, and this case dismissed.

ARGUMENT

I. Standard of Review.

The Commission's findings of fact are reviewed to ensure they are supported by substantial evidence in the record. *Echo Powerline, L.L.C. v. Occupational Safety*

& Health Review Commn., 968 F.3d 471, 476 (5th Cir. 2020) (citing *Southern Hens, Inc. v. OSHRC*, 930 F.3d 667, 674 (5th Cir. 2019) (quoting 29 U.S.C. 660(a)). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951). Substantial evidence is determined by evaluating the entire record. See *Asarco, Inc. v. N.L.R.B.*, 86 F.3d 1401, 1406 (5th Cir. 1996). Reviewing the whole record, the Court is obligated to consider evidence that detracts from the ALJ's findings. See *id*.

Legal conclusions are reviewed for whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id*. (citing *Southern Hens*, 930 F.3d at 675 (quoting 5 U.S.C. 706(2)(A))). *See, e.g.*, *Gros v. City of Grand Prairie*, 181 F.3d 613, 617 (5th Cir. 1999) (vacating district courts grant of summary judgment based upon conclusion that the court "relied upon erroneous legal standards").

The Secretary of Labor has the burden of proving sufficient facts to support the citation. The Secretary must show by a preponderance of the evidence that: (1) the standard cited by OSHA applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed to or had access to the violative condition; and (4) the employer knew or should have known of the

violative condition with the exercise of reasonable diligence. *Comtran Grp. v. United States DOL*, 722 F.3d 1304, 1307 (11th Cir. 2013). The Decision thus fails to apply the general industry element of proof for identification of a hazard as is required by controlling Fifth Circuit precedent.

a. Citation 1, Item 2 Should Be Vacated Because There Was No Known Hazard.

29 CFR § 1910.212(a)(1) requires that "[o]ne or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are - barrier guards, two-hand tripping devices, electronic safety devices, etc." § 1910.212(a)(1) is a performance standard, which means "it states the result required ... rather than specifying that a particular type of guard must be used. As the Review Commission has observed:

> This is necessary because § 1910.212(a)(1) requires employers to guard against "hazards" in machine areas without providing specific ways to do so. 4 *Id.; Ladish Co.*, 10 BNA OSHC 1235, 1237 (No. 78-1384, 1981). So, the Secretary must show that the hazard results from the way the machine functions and how it operates. *Id*. The fact that it is possible for an employee to come into contact with a machine's moving parts alone is insufficient to show a hazard.

Dentsply US Prosthetics, LLC, 2017 OSAHRC LEXIS 48, *5-6 (O.S.H.R.C. August 15, 2017) (emphasis added).

Performance standards 'require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them." *Rolly Marine Serv. Co*., 2021 OSAHRC LEXIS 22, *39 (O.S.H.R.C. A.L.J. November 22, 2021) (Internal citations omitted).

To prove a violation of § 1910.212(a), the Secretary must establish that the operation of the machine exposes employees to injury. *J.C. Watson Co.,* 2006 OSAHRC LEXIS 57, *103. The Commission has noted, "there is no hard and fast rule for determining exposure in a machine guarding case--rather, exposure must be determined on a case-by-case basis depending on 'the manner in which the machine functions and the way it is operated." *Riverdale Mills Corp.,* 2022 OSAHRC LEXIS 27, *59-60 (O.S.H.R.C.A.L.J. July 18, 2022). One case elaborated thus:

> The Commission has held that in order for the Secretary to establish employee exposure to a hazard requiring guarding under § 1910.212(a)(1), she must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger. The Commission emphasized that the inquiry is not simply whether exposure is theoretically possible. Rather, the question is whether employee entry into the danger zone is reasonably predictable.

Buffets, Inc., 2005 OSAHRC LEXIS 19, *34, 21 OSHC (BNA) 1065, 2005 OSHD (CCH) P32,806 (O.S.H.R.C. April 5, 2005). See also *Jefferson Smurfit Corp*., 15 BNA OSHC 1419, 1421 (No. 89-0553, 1991) (possibility of exposure to an unguarded nip point insufficient to sustain a violation.) The mere fact that a machine "has rotating parts does not automatically require them to be guarded." *Eckel*

Manufacturing Co., 1981 OSAHRC LEXIS 214, *5, 9 OSHC (BNA) 2145, 1981 OSHD (CCH) P25,573 (O.S.H.R.C. A.L.J. June 22, 1981). Also, the mere fact that a tragic accident occurred is insufficient, alone, to establish there was a hazard to which the cited standard applied. See *Ormet Corp*., 9 BNA OSHC 1055, 1058 (No. 76-530, 1980) (vacating a citation of § 1910.212(a)(1) due to lack of evidence that a hand or arm could be pulled or caught in an unguarded area.) The Secretary *must* have evidence of actual exposure to a hazard.

Where, as here, the cited standard is a performance standard, pursuant to *S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1277 (5th Cir. 1981), reliance on industry standards is required to establish the first element of a violation of the cited standard, which is exposure to a known hazard. In *S & H Riggers,* this Court established a precedent that "[t]he employer whose activity is not yet addressed by a specific regulation and whose conduct conforms to the common practice of those similarly situated in his industry should generally not bear an extra burden." *Id* at 1273 (citing *B&B Insulation, Inc. v. OSHRC,* 583 F.2d 1364 (5th Cir. 1978). Citing *S & H Riggers* and *B&B Insulation,* the Commission's proper analysis of the appropriate element from proof is to "first determine the practice of the relevant industry with respect to [the cited condition]; then, whether [the employer's] conduct satisfied that practice." *Brooks Well Servicing*, 2003 OSAHRC LEXIS 80, *17-19 (O.S.H.R.C. August 26, 2003).

Here, the Commission erred when it disregarded the practice of the industry with regard to identifying a hazard on the Meyn Eviscerator. At the hearing the Commission received into evidence the Poultry Processing Industry E-Tool issued by OSHA, which does not identify hazards on the eviscerators. (R-Vol. 2, Ex. R-3.) In the Commission's own review of the machine, the Commission was also unable to identify, specifically, the hazards on the machine. Instead, it determined that the zone of danger "is limited to the area surrounding the carousel, were the rotating parts and associated caught-in hazards are present." (R-Vol. 4-38, Decision at 11.) Within that zone, however, neither the CSHO, the Secretary, nor the ALJ could identify, with specificity, the rotating parts and nip points that constituted a hazard. (R-Vol. 4-38, Decision at 11-12.)

The Secretary tendered no evidence whatsoever regarding the way similarly situated employers have identified safety hazards on a Meyn Maestro Eviscerator. On the other hand, Mar-Jac's expert witness Clyde Payne testified no hazards have been identified in that area. He stated:

> Q. And would it -- would it be an accurate statement to say the entire carousel can create a hazard by a point of operation, ingoing nip point, rotating parts, flying chips and sparks?
>
> A. **I do not believe so.** I believe that if you're -- if you've got the emergency stop cord around there and employees are trained and doing their work duties that there is -- and **the industry practices being that there's not -- not be any[] guarding added to that** …

(R-Vol 1, T. 189:21-190:5) (Emphasis added).

The ALJ erred when she stated that Mar-Jac had notice of the allegedly violative conditions because the hazard is "obvious." (R-Vol 4-38, Decision at 13-14.) *S & H Riggers* establishes this is not the appropriate test – industry practice and customs must be considered. Hindsight is 20-20. Prior to this accident, Respondent did not have notice of any "obvious" hazards. The record is clear, the entire carousel rotates and there are also rotating gears above the machine. The record also is clear, the spoons move upwards and downwards in and out of the upside-down bird, while the brackets holding the bird steady are immobile. The ALJ's order references "hooks" on the machine but no evidence supports the existence of hooks on the eviscerator. (*Compare*, R-Vol 4-38, Decision at 9 and R-Vol 1, T. 79:6-19.) Nor does the record establish how B.B. entered the machine.[2] The ALJ notes that "[n]o one witnessed the accident" but proceeds to draw unsupported conclusions about how the accident occurred. (R-Vol 4-38, Decision at 4.) The ALJ references Ex. C-4, which only shows how B.B. was found – it does not indicate how he came to be in that position. (R-Vol 4-38, Decision at 9.)

The ALJ also references the notes from Conner's interview where he allegedly stated that his sleeve had been caught on *something*. *Id*. Even if Conner had his

[2] The Decision erred when it found that B.B. was "cleaning" the eviscerator. (R-Vol 4-38, Decision at 12.) The record shows that Mar-Jac has a dedicated sanitation shift, during which the machine is powered down, locked out and cleaned. (R-Vol 4-38, Decision at T. 139:2-140:14.) B.B. was not a member of the sanitation shift; his duties were clearly delineated in a job description, a job hazard analysis, and training, which he acknowledged having received. (*Id*. See also, Ex. R-4, Ex. R-6 through R-10.)

sleeve caught in an eviscerator in the past, as suggested by the CSHO's notes, knowledge of that incident cannot be imputed to Mar-Jac because Conner is not a manager and did not report informing any manager about the alleged incident. *M.C. Dean, Inc. v. Sec'y of Labor*, 505 F. App'x 929, 934 (11th Cir. 2013) (Actual or constructive knowledge of a violative condition can be imputed to the cited employer through a supervisory employee).

The ALJ also erred when she found that B.B. was "cleaning" the eviscerator. (R-Vol 4-38, Decision at 12.) The record shows that Mar-Jac has a dedicated sanitation shift, during which the machine is powered down, locked out and cleaned. (R-Vol 4-38, Decision at T. 139:2-140:14). B.B. was not a member of the sanitation shift; his duties were clearly delineated in a job description, a job hazard analysis, and training, which he acknowledged having received. (*Id*. See also, Ex. R-4, Ex. R-6 through R-10.)

Thus, the ALJ's conclusion that the entire rotating carousel is a hazard without specifically identifying nip and catch points is a manifest and harmful error.

b. Citation 1, Item 1 Also Should Be Vacated Because Mar-Jac Had No Knowledge of a Hazard on the Meyn Maestro Eviscerators, and the Standard is Inapplicable.

The preceding analysis applies equally to Citation 1, Item 1, which alleges a violation of 29 CFR § 1910.145(c)(3). This standard provides that "[s]afety instruction signs shall be used where there is a need for general instructions and

suggestions relative to safety measures" but does not prescribe where, exactly, signs must be placed.

Section 1910.145(c)(3) is a broad standard but only requires signage "where there is a need." "[A] broad regulation must be interpreted in the light of the conduct to which it is being applied and external objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *Gulf Hauling & Construction, Inc.,* 2000 OSAHRC LEXIS 98, *30, 19 OSHC (BNA) 1295, 2000 OSHD (CCH) P32,218 (O.S.H.R.C. A.L.J. September 7, 2000) citing *J. A. Jones Constr. Co*., 15 BNA OSHC 2201, 2205-06 (No. 87-2059, 1993).

Here, the Secretary attempts to apply § 1910.145(c)(3) to the Floor Person's job functions regarding the Meyn Eviscerator but the standard does not fit the conditions. First, there is no hazard to which employees are exposed. The eviscerators are totally automatic: there is no operator, and no employee ever needs to put their hands on the machine. (R-Vol 1, T. 139:6-10.) Second, OSHA has not identified any unguarded points of operations on the rotating carousel. (R-Vol 2, Ex. R-3.) It is undisputed the CSHO did not witness any Mar-Jac employee expose themselves to any hazard. (R-Vol 1, T. 115:8-14.) Third, it is undisputed that Floor Persons (as all Mar-Jac employees), are trained never to put hands in moving

machinery and instead are trained to use the provided tools. (R-Vol 4-38, Decision at 19.) More importantly here, no employee had **ever** been injured by the eviscerator.

Mar-Jac had no prior notice from the government of signage requirement. Payne testified that he "looked through the OSHA publications on poultry, the OSHA letters of interpretations on poultry industries, the citation history of poultry employers across the United States. And there was just -- I found one violation for signage.… this case." (R-Vol 1, T. 181:16-24.) A review of the case law and letters of interpretation demonstrate that 29 C.F.R. § 1910.145(c)(3) applies and could be violated *only* when there is a *latent* safety-related issue requiring signage, for example:

- Maintenance employees tasked with cleaning a tank and who unfamiliar with the contents of the tank needed signs to identify the tank's contents. *United Techs.,* 1992 OSAHRC LEXIS 150, *39 (O.S.H.R.C. November 18, 1992).
- Employees required signs informing them about how to open a dock door, which required either a triggered fire alarm or continuous pressure for 15 seconds to be opened. *Dillards*, 1998 OSAHRC LEXIS 129, *15, 18 OSHC (BNA) 1801, 1999 OSHD (CCH) P31,760 (O.S.H.R.C.A.L.J. December 28, 1998).

- Employees taking samples from, or attempting rescue within, an enclosed frac tank, needed signs to be notified of hazardous atmosphere within the tank. *Atco Structures, Inc.* 1989 OSAHRC LEXIS 72, *38, 1989 OSHD (CCH) P28,561 (O.S.H.R.C.A.L.J. April 19, 1989).
- Dormant equipment requiring periodic inspections needed to be placarded instructing potential users that the equipment has not been inspected due to dormancy and must be inspected and tested prior to use. Letter of Interpretation dated August 13, 1987. URL: https://www.osha.gov/laws-regs/standardinterpretations/1987-08-13 (accessed March 20, 2023.)

On the contrary, in this case, the Secretary failed to demonstrate there were hazards requiring warning. The Secretary elicited much testimony regarding the exceedingly obvious fact that the Meyn Eviscerator carousel rotates. However, there was no evidence presented at trial, whatsoever, that the carousel also had exposed in-running nip points, accessible counter-rotating parts, catch points of operation or other hazards. (TR. 118:23-119:25.) The mere fact that a machine "has rotating parts does not automatically require them to be guarded." *Eckel Manufacturing Co.*, 1981 OSAHRC LEXIS 214, *5, 9 OSHC (BNA) 2145, 1981 OSHD (CCH) P25,573 (O.S.H.R.C. A.L.J. June 22, 1981.) This citation item should be vacated.

II. The Decision Fails to Apply the General Industry Element of Proof for Selection of an Effective Guard and Location of Safety Instruction Signs As Is Required by Controlling Fifth Circuit Precedent.

Quite contrary to the Decision's pronouncement that "[t]he parties do not dispute the Line 2 eviscerator was not guarded at the time of the accident," Mar-Jac has always asserted the machine *was* guarded. (R-Vol. 4-38, Decision at 10.) Indeed, record evidence establishes that Mar-Jac had a safety rule prohibiting employees from touching any moving points of operation, Mar-Jac had maintained the emergency stop button and safety pull stop cord, which surrounded the carousel, sharp edges and counterrotating parts were guarded by location. (R-Vol. 1, T. 132:23-133:7; 144:17-146:8; 148:13-149:11; 150:25-152:21; 158:22-25; R-Vol, 2, Ex. R-6; Ex. R-7; Ex. R-10; Ex. R-11, Ex. R-19; Ex. R-18.) This factual conclusion was not supported by substantial evidence in the record.

Given that § 1910.212(a)(1) is a general standard, which does not specify the form or style of guarding, the employer is entitled to advance notice of what OSHA will require. *E.I. Dupont De Nemours & Co*., 1997 OSAHRC LEXIS 9, *6-7 (O.S.H.R.C. January 9, 1997) ("The Commission has long recognized that § 1910.212(a)(1) is a general standard, i.e., one which does not proscribe a specific means of compliance"). (*Compare* Decision, 8.) Similarly, 29 CFR § 1910.145(c)(3) provides that "[s]afety instruction signs shall be used where there is a need for general instructions and suggestions relative to safety measures" also does not give

the employer notice of where, exactly, should safety instruction signs be placed. In *Corbesco*, the Court held that notice may be provided by 1) industry custom and practice; 2) the injury rate for the type of work; or 3) interpretations of the regulation by the Commission. *Corbesco, Inc. v. Dole*, 926 F.2d 422 (5th Cir. 1991). There was no such notice here.

The emergency stop button device is a method of machine guarding endorsed by 29 CFR § 1910.212(a)(1). *Reynolds Metals Company, Inc*, 1977 OSAHRC LEXIS 278, *10, 1977 OSHD (CCH) P22,234 (O.S.H.R.C. A.L.J. August 29, 1977). The Decision erred when it, again, failed to follow this Court's decisions in *S & H Riggers* and *B&B Insulation.* Had it done so, it would have seen that the industry's understanding of these three elements establish that the pull stop cord was an appropriate and effective guarding of the Meyn Maestro Eviscerator. First, on the issue of industry customs and practice the ALJ heard the testimony of expert witness, Clyde Payne, who in his decades-long experience with OSHA's regulation of the mechanical evisceration process and other similar equipment, testified that the pull stop cord is an acceptable means of guarding the eviscerator. He stated:

> "So the -- in addition -- in addition to that I see the emergency stop cable that is – is present **which has been accepted as OSHA practice for guarding remedies for this equipment** and the lines in a chicken facility and poultry processing facilities." (R-Vol 1, T. 186:11-16.) (Emphasis added).

See also, R-Vol 1, T. 186:18-20; 188:20-189:5. Meyn manufactured and installed that eviscerator without doors. Regarding injury rate, it was undisputed that no one has ever been injured by the eviscerators at Mar Jac since their installation in 2014. Payne also testified that even outside Mar Jac, he was not aware of anyone being injured by an eviscerator, ***at all***. Employees used the fully functioning pull stop cords, sometimes up to twice each hour. (R-Vol 1, T. 1:2-10; 41:19-21; 46:9-15-47:1-25; 49:11-14; 87:1-2; 86:22-25.) There were no reports that at a height of 72 inches, employees had difficulty accessing the pull cord. (R-Vol. 1, T. 42:22-25; 88:2-19.)

As to the Commission's interpretations of the regulation, a review of case law yields guidance. In *Reynolds Metals Company, Inc*, 1977 OSAHRC LEXIS 278, *10, 1977 OSHD (CCH) P22,234 (O.S.H.R.C.A.L.J. August 29, 1977), the Secretary admitted that "the emergency stop button device is a type of machine guarding encompassed by 29 CFR § 1910.212(a)(1)." At various points throughout OSHA standards moving machinery is required to be guarded with an emergency pull stop cord:

- 29 CFR § 1910.262(aa) and 29 CFR § 1910.262(bb)(2), a vertical standard for textiles, the emergency pull cord is the prescribed guard. It is important to note the placement of the cord at 72 inches is sufficient.

- 29 CFR § 1910.216(b)(1)(iii) pertaining to mills and calendars in the rubber and plastics industries, the regulations prescribe the use of a safety cord, not "more than 72 inches above the level on which the operator stands". The same is found at 29 CFR § 1910.216(c)(1) and 29 CFR § 1910.216(c)(2).

The Review Commission erred in rejecting the pull cord as the accepted industry standard guard and expressing a preference for the doors, which Meyn had installed on the newer eviscerator at Mar-Jac's facility. But the relevant question is not whether the eviscerator was effectively guarded, but rather whether the Secretary established that standard required the specific abatement measure set forth by the Secretary (the doors). It is the Secretary's burden to plead and prove a feasible means of abatement, which it has not done. *National Realty & Const. Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). *E.I. Dupont De Nemours & Co.*, 1997 OSAHRC LEXIS 9, *6-7 (O.S.H.R.C. January 9, 1997) (citing *Corbesco*, *supra*) ("The Fifth Circuit has held that where a general standard is cited, the Secretary has the burden of establishing that the employer had actual or constructive notice that the standard required the abatement measure set forth by the Secretary in his enforcement action."). *See also*, *Wayne Farms, LLC*, 2020 OSAHRC LEXIS 45, *4-5 (O.S.H.R.C. September 22, 2020) ("The noncompliance question here, therefore, is whether the Secretary established that the grate covering the hopper was required to

protect employees from hazards such as those created by the Accufeeder's point of operation, ingoing nip points, rotating parts, or flying chips and sparks. 29 C.F.R § 1910.212(a)(1).") (Internal punctuation omitted).

Here, the Review Commission sought to prescribe an appropriate guard for the eviscerator, assuming the employer had notice of this requirement from 1) the doors on Line 1; and 2) just observing the machine. (R-Vol 1, Decision at 10-11.) The doors installed by Meyn on its newer eviscerators are not guards because they are not interlocked, are frequently opened during operation, and could only cover three sides of the machine due to the need for the line to enter and exit the eviscerator. (R-Vol 1, T. 190:6-12.) But, more importantly, the Review Commission incorrectly dismissed industry custom, and practice and instead presumed to prescribe what, in this industry, is an acceptable means of guarding the Meyn Eviscerator. (R-Vol 1, Decision at, 12.) These are manifest and harmful errors of fact and law.

III. The Decision Improperly Amended Citation 1, Item 1 After Trial.

To establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (i.e., the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions). *Atlantic Battery Co*., 16 BNA OSHC

2131, 2138 (No. 90-1747, 1994); *T. C. Erectors, Inc*., 19 O.S.H. Cas. (BNA) ¶ 1792 (O.S.H.R.C.A.L.J. Dec. 17, 2001). In determining whether the Secretary has proven access to the hazard, the inquiry is whether exposure is reasonably predictable "either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods., Inc*., 18 BNA OSHC 1072, 1074, 1995-97 CCH OSHD § 31,463, p. 44,506 (No. 93-1853, 1997).

Here, the ALJ excluded the open space between the pan and carousel from her identified zone of danger, stating:

> The Court mostly agrees with the Secretary's characterization of the zone of danger but finds it slightly too broad. The zone of danger does not include the entire open space between the pan and carousel, where there are no moving parts. (Exs. C-5, R-1 at image 7.) Rather, it is limited to the area surrounding the carousel, where the rotating parts and associated caught-in hazards are present.

(R-Vol 1, Decision at 10-11.) The ALJ erred when she affirmed Citation 1, Item 1, which alleged "the employer allowed employees to routinely place hands **below** the rotating carousel of Meyn Maestro Eviscerator to remove chicken parts, exposing employees to caught in hazards". (R-Vol 4-30, Am. Compl., 2; R-Vol 2, Ex. R-16, Ex. R-17.) (Emphasis added.) At no point prior to or following the hearing did the Secretary move to amend the cited particulars nor did the ALJ announce she was doing so, *sua sponte* to give the Respondent an opportunity to respond. *Cleveland Consol., Inc.* v. OSHRC, 649 F.2d 1160 *; 1981 U.S. App. LEXIS 11597 **; 9

OSHC (BNA) 2043 (5th Cir. 1981) (amending the citation and pleadings after trial would be unfair to the defense of the respondent). See also, *Donovan v. Royal Logging Co.,* 645 F.2d 822, 827 (9th Cir. 1981) (an amendment is not prejudicial when it puts no different facts in issue than did the original citation). Since the original citation put the area beneath the carousel at issue and the Review Commission declared that area to be outside the zone of danger, the citation cannot be affirmed. Because the ALJ disagreed the area between the carousel and the pan is a zone of danger, the Secretary did not prove exposure to the cited hazard, a key element of her *prima facie* case, the citation should be vacated.

IV. Mar-Jac Established the Affirmative Defense of Employee Misconduct.

To establish the affirmative defense of employee misconduct with regard to a citation under the OSH Act, an employer has the burden to prove that it: 1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered. *Angel Bros. Enterprises, Ltd. v. Walsh*, 18 F.4th 827, 832 (5th Cir. 2021); *W.G. Yates & Sons Const. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006).

Here, the evidence in the record demonstrates that Mar-Jac had a comprehensively robust safety program – which the Secretary did nothing to rebut. (See, generally, R-Vol 1, Decision). The Review Commission held that Mar-Jac did

have rules forbidding employees from placing their hands in the eviscerator, this meeting the first element of the defense. (R-Vol 4-38, Decision at 19.) However, the Decision then went on to hold that Mar-Jac failed to discover the violation and enforce its rules. (*Id*.) This finding relied heavily on the hearsay statements of Joseph Conner. These factual findings are not supported by substantial evidence and require the citation to be vacated. As so often is the case, these factual errors impeded a proper legal analysis. causing the Review Commission to improperly hold Mar-Jac liable for an unpreventable accident.

a. Hearsay Statements Should Not Have Been Admitted.

At trial, the ALJ admitted into evidence the notes taken by CSHO Davis during his interview of Joseph Conner, a then-Floor Person; and Martaze Hammond, then supervisor-trainee. Mar-Jac objected to the admissibility of the CSHO's notes on the grounds they do not meet any criteria for an exception to the hearsay exclusion pursuant to FRE 804(b). The Review Commission did not address Mar-Jac's arguments and opted instead to *begin* with the hearsay exemption at FRE 801(d)(2)(D) advocated for by the Secretary. (R-Vol. 4-38, Decision at 6.) The admission by opposing party agent exemption provides as follows:

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay: […] (2) An Opposing Party's Statement. The statement is offered against an opposing party and: […] (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; […].

FRE 801(d)(2)(D). The ALJ presented no authority for her decision to apply the exemption before the exception. Had she not applied the exception, the statements would have been properly excluded because they were signed but not sworn, neither person was deposed, and Mar-Jac had no opportunity to cross-examine these individuals about the statements attributed to them prior to the hearing. Furthermore, Conner's statements were offered as proof of the facts stated. As such, the statements contained in CSHO Davis' notes are hearsay and should have been excluded.

In the alternative, since the ALJ admitted Conner and Hammond's statements, she erred by attributing more weight to Conner's statement than to Hammond's. Davis's notes from Hammond's interview state as follows: "unless birds fall off, we don't touch it." (R-Vol 2, Ex. C-9.) However, the ALJ credits Conner's statement that he was told to place his hands in the machine. (R-Vol 4-38, Decision at 14.) Given the inability to assess credibility, both statements should be given equal weight. The Secretary thus failed to prove by a preponderance of the evidence that Mar-Jac had knowledge of the allegedly violative condition and Mar-Jac is entitled to the employee misconduct defense as pled and proven at trial because it did enforce its safety rules.

b. The Accident Was Just That-An Unforeseeable, Tragic Accident.

As this Court described in *W.G. Yates & Sons Const. Co. Inc. v. Occupational Safety & Health Review Commn*, 459 F.3d 604, 60607 (5th Cir. 2006), in enacting the Occupational Safety and Health Act, Congress intended to require elimination only of **preventable** hazards. 459 F.3d 604, 606 (citing *Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm*n, 528 F.2d 564, 568 (5th Cir. 1976) (quoting *Natl Realty & Const. Co., Inc. v. Occupational Safety & Health Review Commn*, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973))). Depriving Mar-Jac of this defense, which it proved, ignores Congress's intent.

No one knows how B.B. entered the Line 2 eviscerator – no one saw him enter the machine. (R-Vol 1, T. 39:11-15.) The Secretary assumes he reached into it and became caught in the machine. If this happened, B.B. violated safety rules well known to him because he had no need even to come close to any moving parts of the machinery in the course of performing his Floor Person job. (R-Vol 1, T. 138:22-23.) There was no legitimate reason for B.B. – or any employee -- ever to place his hands into the machine, at any point. He was not a sanitation employee; rather, his role was strictly limited to keeping areas around the eviscerator free from discarded entrails and condemned birds.

The ALJ was aware that B.B. was under the influence of a cocktail of intoxicants, including methamphetamine, marijuana, and alcohol, at the time of his

injury. B.B.'s toxicology results showed blood alcohol at 0.091; Tetrahydrocannabinol (THC) at 0.98; and methamphetamine at 210. (R-Vol 2, Ex. R-17.) At methamphetamine levels between 200-600 nanograms a subject may be restless, confused, or even suffer hallucinations, circulatory collapse, and convulsions. (*Id*.) In layman's terms, B.B. may well have been out of his mind given the concentrations of drugs and alcohol in his body when the accident occurred.

The employee's state of intoxication is relevant to the Mar-Jac's defense of unforeseeable employee misconduct. Coming to work while under the influence of such intoxicants is strictly forbidden. Likewise, putting any body part into moving machinery is strictly forbidden. B.B. broke both rules. The eviscerator's rotation part, cutting unit, and points of operation were properly guarded by a stop cable, by location, and by training, and there was no reason or occasion for an employee's hands or other parts of the body to come into contact with one of these parts. Yet B.B. apparently entered the machine while it was in operation, where he had no reason to go and in defiance of repeated instructions that he was not to touch those machine parts, and where there was no legitimate reason for any employee to place a body part, unless the machine had been deenergized and locked out. The positive toxicology results reveal that drug and alcohol abuse was an obvious contributing factor in the accident. This is a classic case of unforeseeable employee misconduct.

V. The Decision Erred in Affirming Citation 1, Item 1 as Serious.

29 CFR § 1910.145(c)(3) provides that "[s]afety instruction signs shall be used where there is a need for general instructions and suggestions relative to safety measures." This is a non-serious citation item. Similar cases have determined a violation of this standard to be non-serious. *See, e.g., Atco Structures, Inc.* 1989 OSAHRC LEXIS 72, *40, 1989 OSHD (CCH) P28,561 (O.S.H.R.C.A.L.J. April 19, 1989). There is no precedent for signage violations being classified as serious. Therefore, should the Commission affirm the citation item, it ought to reclassify the item to Other-Than-Serious with no associated penalty.

CONCLUSION

For the foregoing reasons, Appellant Mar-Jac requests the Court to reverse the Decision, vacate Citation 1, Items 1 and 2 and issue judgment in favor of Mar-Jac.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, I caused a true and correct copy of this document to be electronically filed through the Court's CM/ECF system, which will send a notice of filing to all registered users.

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