THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING COMMISSION REVIEW

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,

v. OSHRC DOCKET NO. 08-1292

WAL MART DISTRIBUTION CENTER #6016
and its successors,

Respondent.

Appearances:

Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Steven R. McCown, Esq., Littler Mendelson, Dallas, Texas
For Respondent.

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

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 *et seq.* (the Act). The Occupational Safety and Health Administration (OSHA) conducted an inspection of a Wal Mart Distribution Center #6016 (Respondent or NB DC), on February 20, 2008, in response to an employee complaint. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging four serious violations of the Personal Protective Equipment (PPE) general industry standard with a proposed grouped penalty of $1.700.00. Specifically, the Secretary determined that Respondent: (i) failed to assess the NB DC to determine if hazards were present or likely to be present at that facility, and (ii)

failed to require the use of personal protective equipment for its order fillers' eyes and/or face, feet and hands. Respondent timely contested the citation and a trial was conducted May 19-20, 2009, in Austin, Texas.

Legal Standard Applicable to Alleged Violations

To establish a violation of a safety standard, the Secretary must prove by preponderance of the evidence: (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).

Jurisdiction

The parties stipulated: (i) jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act and (ii) Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5). (Complaint and Answer).

Factual Findings

The NB DC, located in New Braunfels, Texas, is "massive" – measuring roughly 1.2 million square feet or "somewhere around 20 acres." (Vol. I, Tr. 40, 71, 206; Vol. II, Tr. 64). It is one of approximately 120 Wal Mart owned distribution centers (Centers) in the continental United States, which employ more than 33,000 individuals. (Vol. II, Tr. 28, 105-106) It is

similar in design and operations to the other Wal Mart Centers, including one located in Searcy, Arkansas. (Vol. I, Tr. 192; Vol. II, Tr. 35, 44, 45, 78, 90).

Robert Damarodas (Damarodas) has been the General Manager of the NB DC at various times since 1990. Damarodas is responsible for ensuring that merchandise remains in sellable condition throughout the distribution process. (Vol. I, Tr. 154-156). Craig Lindley (Lindley) is the current Asset Protection Manager at NB DC. (Vol. I, Tr. 216). Lindley is responsible for safety at NB DC. As part of his duties, he reports injuries to regional and corporate personnel for analysis on a weekly basis. (Vol. I, Tr. 217; Vol. II, Tr. 32). Michael Trusty (Trusty) is the Safety and Environmental Director for Wal Mart Logistics Division. Trusty develops safety policy, procedures and practices for Wal Mart Centers and warehouses nationwide. (Vol. II, Tr. 27, 29). Trusty works in the Wal Mart corporate headquarters in Bentonville, Arkansas. (Vol. II, Tr. 29). The NB DC and the Searcy Center are located in different regions, and therefore, are subject to separate regional oversight. (Vol. I, Tr. 192; Vol. II, Tr. 29-30, 112).

Employees at the NB DC perform three principal functions – receiving, order filling and shipping and support functions - maintenance, security, quality assurance and data processing. (Vol. I, Tr. 155). This case focuses on employee's performance of the "order filling" function. (Vol. I, Tr. 156).

The order filling function at the NB DC is primarily performed in the vicinity of nine modules (large shelving systems) which are divided into three levels. Each level contains three layers of shelving upon which pallets or merchandise are stacked. (Vol. I, Tr. 42, 71, 215). Order fillers label and unload stacked merchandise from primarily wooden pallets on the shelves onto conveyor belts for distribution to individual Wal Mart stores. (Vol. I, Tr. 42, 44-45, 46, 71; Ex. C-2). Most pallets are stacked with items to a height of 40 inches, but some reach shoulder

level or higher. (Vol. I, Tr. 49, 52-53; Ex. C-2). In such instances, order fillers use hooks to pull the items towards them for removal. (Vol. I, Tr. 52). Moreover, to facilitate the forward movement of the pallets, the shelves are slightly inclined toward the order fillers on rollers. (Vol. I, Tr. 43, 51, 71; Ex. C-5).

Once the pallets are emptied, order fillers remove them – sometimes by "kicking–up" pallets with their feet to their hands – and carry them to a nearby pallet return area of the modules where they are restacked four to five pallets high. (Vol. I, Tr. 45, 76, 101; Vol. II, Tr. 60; Ex. C-2). Order fillers then pull the next loaded pallet forward and repeat the process - usually more than twenty times a day. (Vol. I, Tr. 55, 74). Order fillers are subject to a processing quota of close to 425 boxes an hour. (Vol. I, Tr. 54).

Order fillers at the NB DC typically perform this function without hand, eye, face or foot protection as none is required by the Respondent. (Vol. I, Tr. 45, 46, 49, 75, 76, 91, 98, 186). Some of the wood pallets that the order fillers handle are splintered, have exposed nails, and weigh as much as seventy pounds. (Vol. I, Tr. 47, 74, 92, 100, 127, 130, 208; Vol. II, Tr. 98-99; Ex. C-3). In fact, of the roughly 90,000 pallets inside the facility, approximately 2,000 damaged pallets are repaired by a third party at the NB DC every day. (Vol. I, Tr. 125, 189, 206, 214).

OSHA Compliance Safety and Health Officer Miller (CSHO) conducted an inspection of the NB DC (Vol. I, Tr. 67, 123-124, 140). Accompanied by Damarodas and Lindley, among others, the CSHO conducted a walk-around of the warehouse area where the order filling function is performed. (Vol. I, Tr. 69). At the time of the inspection, the CSHO also requested hazard assessment documentation for the NB DC. (Vol. I, Tr. 76). Respondent did not provide any documentation of an NB DC Hazard Assessment until after the issuance of the instant

citations. (Vol. I, Tr. 120). Based upon the CSHO's inspection, the Secretary issued the Citation alleging the four grouped serious items.

Hazard Assessment Discussion

Citation 1 Item 1(a): 29 C.F.R. § 1910.132(d)(1) (Hazard Assessment)

The Secretary alleges that Respondent violated 29 C.F.R. § 1910.132(d)(1) because it did not assess the NB DC. For hazards, section 1910.132(d)(1) provides in part:

> *Hazard assessment and equipment selection.* (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE).

The Respondent does not dispute that the standard applies. (Vol. I, Tr. 159). Respondent's primary argument is that it did not violate the standard. Respondent maintains that a 2006 hazard assessment conducted of the Searcy Center (Searcy Hazard Assessment) which Respondent considers "virtually identical" in operation and size to the NB DC) is a "Global Hazard Assessment" that also applied to the NB DC. (Resp't Br. at 7, 11; Ex. R-1). Because of the similarities between the facilities, and because the Commission and Secretary recognize that 29 C.F.R. 1910.132(d)(1) is a performance-oriented standard, Respondent argues that its Searcy Hazard Assessment satisfies its hazard assessment obligation with regard to the NB DC. (Resp't Post-Hr'g Br. at 9-10, 13-14; Ex. R-1). Respondent argues that the standard "confers discretion to employers on how to achieve the objective of the standard: identifying hazards that necessitate the selection and implementation of appropriate PPE to ensure the safety of employees". (Resp't Post-Hr'g Br. at 10). Respondent also argues that the "Secretary's disagreement with the results . . . is not a basis for finding that no assessment was conducted". (Resp't Post-Hr'g Br. at 11). Finally, Respondent argues that a Department of Labor

interpretation letter,[1] as well as a Michigan case that interpreted a similar state plan provision and upheld a global hazard assessment application, support its position.[2] (Resp't Post-Hr'g Br. at 14-15).

The Secretary argues that Respondent's Searcy Hazard Assessment is not a hazard assessment of the NB DC because the term 'workplace' within section 132(d)(1) means an assessment must be done for each specific work site location at which Respondent has exposed employees. (Sec'y Post-Hr'g Br. at 9). Noting the language of the applicable preamble, the Secretary continues that "[s]uch interpretation is reasonable [and] consistent with the terms and purposes of the cited regulation." (*Id).* The Secretary argues that Respondent's position is suspect given the absence of a required certification document that an assessment of NB DC was in fact performed.[3]

The intent of the Secretary, as set out in the relevant preamble, can be considered in interpreting and determining the appropriate enforcement of a performance-oriented standard. *See Am. Cyanamid Co.*, 15 BNA OSHC 1497, 1500-1502 (No. 86-681, 1992) (relying on the

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[1] *See* Letter from Raymond E. Donnelly to Mitchell S. Allen, Esq. (July 3, 1995), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21847; *United Parcel Svc. v. Bureau of Safety and Regulation*, 745 N.W.2d 125 (Mich. Ct. App. 2008). The court notes that this letter acknowledges that "similar analyses" will be performed where "multiple sites are involved."

[2] *See United Parcel Svc. v. Bureau of Safety and Regulation*, 745 N.W.2d 125 (Mich. Ct. App. 2008). The regulation at issue, Mich. Admin. Code, R 408.13308(1), provides in relevant part:

> (1) An employer shall assess the workplace to determine if hazards that necessitate the use of personal protective equipment are present or likely to be present.

[3] Section 1910.132(d)(2) provides:

> The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

reasonable intent of the Secretary to determine the appropriate enforcement of a performance-oriented requirement in the Hazard Communication Standard as that intent was explained in preamble), *rev'd on other grounds*, 5 F.3d 140 (6th Cir. 1993). Moreover, the Commission stated that it "will defer to the reasonable intent of the Secretary in promulgating the standard, as that intent is authoritatively explained in the standard's Preamble." *Id.* at 1502. *Cf., Martin v. OSHRC (CF & I)*, 499 U.S. 144, 158 (1991) (holding the Commission should defer to the Secretary's reasonable interpretation of ambiguous standards).

The court finds that the *Personal Protective Equipment for General Industry* preamble (Preamble) supports the Secretary's argument that the benchmark of any hazard assessment for a workplace must be its consideration of the hazards at the *particular* workplace. It states that:

> OSHA believes that a hazard assessment is an important element of a PPE program because it produces the information needed to select the appropriate PPE for the hazards present or likely to be present at *particular workplaces*. The Agency believes that the employer will be capable of *determining and evaluating the hazards of a particular workplace*.

59 Fed. Reg. 16334, 16336 (April 6, 1994) (emphasis added).

Indeed, the Non-mandatory Appendix A to the standard - that is also referenced in the Preamble as "providing an example of procedures that satisfy the hazard assessment requirement" - suggests a similar focus by its reference to "a walk-through *of the area in question*."[4] *See generally Article II Gun Shop, Inc., d/b/a Gun World*, 16 BNA OSHC 2035,

[4] Specifically, the Appendix states in part:

> 3. *Assessment guidelines.* In order to assess the need for PPE the following steps should be taken.
>
> a. Survey. Conduct a walk-through survey of the areas in question. The purpose of the survey to identify sources of hazards to workers and coworkers.

2039 n. 12 (Nos. 91-2146, 1994 (consolidated) (noting that statements made in a non-mandatory appendix to a standard may be used to clarify the intent of that standard). Finally, the Secretary's emphasis on an assessment of each workplace first and foremost under this standard finds support in a change in the wording of the proposed standard - "for the sake of clarity" - from a more generic "assessment of the *workplace hazards*" to the finally adopted wording that requires the employer to "*assess the workplace . . . .*" *See* 59 Fed. Reg. 16334, 16336; 54 Fed. Reg. 33832, 33842 (August 16, 1989). Moreover, the Secretary's construction furthers the policy underlying the Act. *See generally Brennan*, 513 F.2d 1032, 138 (2d Cir. 1975) (noting that "[i]t was the intention of Congress to encourage reduction of safety hazards to employees at *their places of employment*")(emphasis added).

The record establishes that in 2004 and 2008, OSHA audited the Searcy, Arkansas Center. (Vol. I, Tr. 121; Vol. II, Tr. 47, 51-54; Exs. R-8, R-9). It is also undisputed that in May 2008, OSHA granted the Searcy Center Voluntary Protection Program (VPP) status – an award that both parties agree is site specific and was based on an inspection of the Searcy facility by OSHA. (Vol. I, Tr. 123; Vol. II, Tr. 45, 109-110). However, while the record suggests that a hazard assessment of the Searcy Center was conducted prior to the February 20, 2008 inspection, it equally establishes that a hazard assessment of the NB DC was not. (Vol. II, Tr. 50-51; Exs. R-1, R-8).

Trusty admitted that he had no involvement with the Searcy Hazard Assessment because it was "in place prior to [his] tenure" in his division. (Vol. II, Tr. 35, 38). As such, his testimony

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See Appendix A to § 1910.132(d), *Non-mandatory Compliance Guidelines for Hazard Assessment and Personal Protective Equipment Selection.*

primarily focused on what his team currently considers in assessing hazards,[5] as opposed to whether the Respondent specifically considered the NB DC during the Searcy Hazard Assessment. (Vol. II, Tr. 38, 90-92). Indeed, Trusty was unable to identify who in fact conducted that assessment or describe with any specificity how it was conducted. (Vol. II, Tr. 38, 88, 90). In addition, General Manager Damarodas specifically testified that he never conducted a hazard assessment of the NB DC, and that prior to the inspection resulting in the issuance of the Citation in this case, he had not met with anyone from corporate about conducting one. (Vol. I, Tr. 191). Trusty's testimony confirmed the general manager's lack of involvement in any hazard assessments. (Vol. II, Tr. 78). Similarly, Trusty specifically testified that the NB DC Asset Protection Manager Lindley – the only individual at the NB DC qualified to perform a hazard assessment - had no involvement with the Searcy Hazard Assessment. (Vol. I, Tr. 216; Vol. II, Tr. 78, 80). Finally, Trusty admitted that prior to the 2008 inspection, he had neither communicated with Lindley about any NB DC hazard assessment issues nor had he ever visited the NB DC. (Vol. II, Tr. 79-78).

Trusty maintains that Wal Mart's "cookie cutter" approach to constructing and operating Centers obviated any need to assess the particular order filling function at the NB DC. (Vol. II, Tr. 78). Our footprint as a building. . . is substantially *similar*. . . .

> And so an order filling module is an order filling module, whether you're in New Braunfels, Texas, Searcy, Arkansas, Bentonville, Arkansas, Lewiston, Maine.

(Tr. Vol. II 35). (emphasis added).

[5] Trusty testified that Wal Mart Logistics Division *currently* employs a "multi-tiered approach" to reporting injuries and analyzing hazards that includes input from local and regional Asset Protection Managers, as well as employees. (Vol. II, Tr. 30-33).

The court finds, however, that this corporate approach - which by its own terms simply *assumed* a uniformity of workplace and thus hazards with Searcy - belies Respondent's claim that the Searcy Hazard Assessment was also a hazard assessment of the NB DC under this standard. The flaw in this approach is apparent from Trusty's admission that conditions at other distribution centers differ from those at Searcy. (Vol. II, Tr. 93-94). It is an assessment of work conditions that is the focus of the standard; not whether the physical layout of one facility is similar to the layout of another facility. In this case, Trusty has never been to the NB DC. Trusty is not familiar with the plant's layout except by viewing it on paper. Trusty is not familiar with the machines, equipment and processes of the NB DC. Respondent did not designate anyone to conduct a comparison of different distribution centers, namely the Searcy and NB DC, to determine the appropriateness of applying the Searcy Hazard Assessment to other Centers. These facts distinguish the present case from the *Drexel Chemical Co. and United Parcel Svc. v. Bureau of Safety and Regulation* cases cited by the Respondent.

Finally, Trusty testified that Exhibit R-1 in and of itself establishes the existence of a NB DC hazard assessment because it "resided" in Wal Mart's overall safety manual and was posted on the corporate intranet. (Vol. II, Tr. 35, 40, 81; Ex. R-1). The court is not persuaded.

First, Trusty testified that R-1 does not specifically identify or address the NB DC, and that there is no documentation that certifies that R-1 is the hazard assessment for the NB DC or for that matter any other Center pursuant to section 1910.32(d)(2). (Vol. II, Tr. 80, 88). Second, Trusty's credibility with regard to the significance of R-1 to the NB DC in view of Wal Mart's delay in providing it to the CSHO must be assessed. Trusty testified that the CSHO caused the delay by failing to reduce the request to writing. (Vol. II, Tr. 36-37). However, Respondent provided other verbally requested documentation to the CSHO prior to the issuance of the

Citation. (Vol. II, Tr. 37). Moreover, the CSHO testified that Trusty's subordinate agreed to send her the documentation. (Vol. I, Tr. 76-77). At best, Trusty's testimony regarding the delay instead raises a reasonable inference that Respondent's hesitation reflected its realization that no NB DC hazard assessment had in fact been performed and for that reason is Trusty's testimony is not credible on this fact *See generally A. G. Mazzocchi, Inc.*, 22 BNA OSHC 1377, 1387 (No. 98-1696, 2008) (relying on motive, conflicting testimony, and the failure to provide certain documentation to the compliance officer, to establish an inference relative to the respondent's failure to provide OSHA with a report); 1 Clifford S. Fishman, Jones on Evidence §§ 1.5, 4.2 (7th ed. 1972) (drawing reasonable inferences from circumstantial evidence).

Based upon the findings set forth, the court finds that the Secretary: (i) has established that employees engaged in order filling at NB DC were exposed to actual and potential hazards as a result of Respondent's failure to conduct a hazard assessment, and (ii) that Respondent knew or could have known of the violative condition in view of its knowledge that its employees were exposed to hazards resulting from the failure to perform a hazard assessment at the NB DC. (Exs. C-11, C-13, C-15). The Secretary has established a violation of § 1910.132(d)(1). The weight of the evidence shows that Respondent's cookie cutter "hazard assessment" was not merely deficient – it was instead a "failure to evaluate" the NB DC. (Exs. C-11, C-13, C-15).

PPE DISCUSSION

The Commission found the former Section 1910.133(a)(1) to be "broadly-worded." *See Atlantic Battery Co., Inc.*, 16 BNA OSHC 2131, 2153 (No. 90-1746, 1994).[6] Because of the

[6] The prior standard provided in relevant part:

> Suitable eye protectors shall be provided where machines or operations present the hazards of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

similarities between that standard and the current Section 1910.133(a), the court finds the current section to be "broadly-worded." Under Commission precedent, the Secretary typically demonstrates the violation of a broadly-worded standard by showing that a reasonable person familiar with the situation would recognize a hazardous condition requiring the use of protective measures. *See Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793 (No. 90-998, 1992). However, in the Fifth Circuit, where this case arises, the Court has held that "[i]f the language of the regulation is not specific enough . . . other sources may provide constructive notice: industry custom and practice; the injury rate for that particular type of . . . work; the obviousness of the hazard; and the interpretations of the regulation by the Commission." *Corbesco Inc.*, 926 F.2d at 427 [14 BNA OSHC at 2119].

Because the foot and hand protection standards are also similar to the former Section 1910.133(a)(1), the court finds these sections to be broadly worded as well. Moreover, that interpretation may even be stronger as it relates to foot protection because the standard only requires protective foot equipment "where there is a danger of foot injuries." *Compare Weirton Steel Corp.*, 20 BNA OSHC at 1259 (citing case law that requires the Secretary to prove significant risk under standard requiring protective equipment "where danger exists." In conclusion, a violation of the PPE standards will only be found where industry custom and injury rate, among other factors, provide the employer with either constructive or actual knowledge of the hazard.

Citation 1, Item 1b: 29 C.F.R. § 1910.133(a)(1) (Eye and Face Protection)

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29 C.F.R. § 1910.133(a)(1)(1993). The standard was revised effective April 6, 1994. *See* 59 Fed. Reg. 16334.

Under Citation 1, Item 1b, the Secretary alleges Respondent violated 29 C.F.R. § 1910.133(a)(1) because "[i]n the warehouse, personal protective equipment for the eyes and/or face was not required for employees who were exposed to the hazards of eye injuries from dust, wood chips and spilled solids while pulling boxed merchandise from pallets stacked overhead and from debris such as wood chips and nails from damaged pallets falling through floor openings . . . ." The cited provision states that "[t]he employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation." The Secretary argues that she established the violation of this standard in view of photographs, testimony and OSHA recordkeeping records indicating employee exposure to eye and face hazards with no corresponding PPE use requirement by management. (Sec'y Post-Hr'g Br. at 13-15).

Respondent argues that it did not violate the standard because eye injuries were "infrequent and incidental" and do not "rise to the level of a *substantial* probability of serious harm." (Resp't Post-Hr'g Br. at 17-18).

Applicability and Exposure

The Respondent does not dispute that the standard applies. (Resp't Post-Hr'g Br. at 17). Moreover, by its terms, § 1910.133(a)(1) applies when an employee is "exposed to eye or face hazards from flying particles." Here, the CSHO testified that, during her inspection, she determined that wood chips from damaged pallets were falling through the upper level metal floor grating onto the underlying walkways where order fillers work. (Vol. I, Tr. 94; Ex. C-8). She also observed wood pieces fall off the pallets themselves as they slid forward in the module towards the face and head of the order fillers. (Vol. I, Tr. 93-94; Ex. C-3). Finally, the CSHO

testified that she interviewed employees who indicated that dust and other debris, including poison ant granules in one instance, were falling from the top of pallets stacked above eye level. (Vol. I., Tr. 76, 98, 138). Indeed, Trusty and order filler DeLeon, in their testimony, confirmed that order fillers encounter these conditions daily. (Vol. I, Tr. 52-53; 57-59; Vol. II, Tr. 71-73, 98-99). Moreover, OSHA's Form 300s as well as Respondent's own Exhibit R-7, confirm exposures beginning in 2006.[7] (Vol. I, Tr. 80-82; Exs. C-11, C-13, R-7). It is undisputed that protective eye wear was not required. (Vol. I, Tr. 98).

Knowledge and Noncompliance

Citing its low eye injury rate and a non-binding administrative law judge decision, the Respondent argues that the Secretary did not establish its noncompliance because it lacked both actual and constructive knowledge of a hazard necessitating the use of eye or face PPE. *See Koch Eng'r Co., Inc.*, 12 BNA OSHC 1081 (No. 83-0611, 1984) (ALJ); (Resp't Post-Hr'g Br. at 17-18). Specifically, it relies upon its analysis of OSHA's Form 300 records for the NB DC between 2006 through 2008 to establish what it terms its "insubstantial" eye injury rate of .32 percent. (Resp't Post-Hr'g Br. at 17; Ex. R-7). Moreover, it argues that only one of those injuries involved order-filling. (Resp't Post-Hr'g Br. at 18). Finally, it also argues that, in any event, PPE would not have prevented these injuries. The Secretary maintains that because objective facts show the presence of a hazard, the "[i]nfrequency of injury may, at best, be considered in conjunction with the probability of a hazard causing an accident in penalty calculations." [8] (Sec'y Br. at 24-26). Regardless of which test is more appropriate, (i.e. specific

[7] Exhibits C-11, C-13, and C-19 reference several relevant eye injuries (C-6219386, C7227084, C7242546 and C8219705).

[8] The Secretary presented this as a general argument that has equal application to Items 1c and 1d. As such, it will not be repeated in those discussions.

v. broadly worded) the Secretary has established the knowledge necessary for a violation of the eye and face PPE standard.

Turning first to industry custom, the CSHO, who had twenty years of experience, testified that she has conducted approximately 400 OSHA inspections involving PPE. Based on her experience, she testified that "employers h[ad] a blanket policy of [requiring] safety-glasses when you enter" warehouses and other facilities with conditions similar to the NB DC. (Vol. I, Tr. 147). *See generally ConAgra Flour Milling Co.*, 16 BNA 1137, 1142 (No. 88-1250, 1993) (noting the need to show the equipment is in use throughout the relevant industry in similar circumstances to establish a violation).

As to the number of eye injuries, the Fifth Circuit has stated that while "the Act does not establish as a *sine qua non* any specific injury rate, a very low injury rate has a definite bearing on the question whether an employer has notice that personal protective equipment is necessary under a general regulation . . . ." *Owen-Corning Fiberglass Corp.*, 659 F.2d 1285, 1290 10 BNA OSHC 1070, 1074 (5th Cir. 1981); *See generally General Motors Corp.*, 11 OSHC 2062, 2065-2066 (Nos. 78-1443, 1984) (consolidated) (finding no actual knowledge warranting protective shoes in light of low injury rate), *aff'd*, 764 F.2d. 32 (1st Cir., 1985) (finding Secretary failed to establish that employer had actual knowledge of hazards which required the use of safety shoes in the absence of a "significant level of risk"). However, in evaluating PPE standards, the Commission has also noted that "[a]s the severity of the potential harm increases in a particular situation, its apparent likelihood of occurrence need not be as great." *Weirton Steel Corp.*, 20 BNA OSHC 1255, 1259 (No. 98-0701, 2003) (finding the severity of potential hazard weighed in favor of finding a hazard requiring the use of respirators under 29 C.F.R. § 1910.134(a)); *Anoplate Corp.*, 12 BNA OSHC 1678, 1682 (No. 80-4109, 1986) (finding that splashing of

chemical was a hazard that required protective eyewear, notwithstanding records indicating low number of relevant injuries). *Compare Owens-Corning Fiberglass Corp.*, 659 F.2d at 1290 (noting that a "substantial risk of a less serious harm" supports a finding of noncompliance under the Act).

The record establishes actual eye injuries, albeit low in number. The CSHO described conditions which were likely to cause injuries that could result in lost time from work, restricted work activity, medical treatment, hospital care and possible permanent eye injury. (Vol. I, Tr. 97, 98 and 99). Moreover, Damorados agreed that if splintered wood chips from pallets or similar objects fell to the eye that it could result in a serious injury. (Vol. I, Tr. 199). In addition, the daily practice of hooking stacks of pallets filled with the broad variety of household products sold by Wal Mart, and pulling them toward the employee's face and head area on the higher shelves, presents a repeated risk of any number of spilled or partially open product contacting the employee's eyes and face. Indeed, the Commission has noted "the considerable vulnerability of the eye." *See Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1060 (No. 7-4945, 1982). Given these facts, the Secretary has established a violation of section 1910.133(a)(1) based on Respondent's failure to ensure that employees in the order-filling areas of the warehouse used eye protection while exposed to flying particles, spills and debris.

Citation 1, Item 1c: 29 C.F.R. § 1910.136(a) (Foot Protection)

Under Citation 1, Item 1c, the Secretary alleges Respondent violated 29 C.F.R. § 1910.136(a) because "[i]n the warehouse . . . employees were wearing tennis shoes in lieu of protective footwear . . . while manually handling heavy items such as boxed merchandise, furniture and wood pallets, including stacking and kicking up damaged pallets with exposed

nails, exposing employees to the hazards of contusions and fractures from dropped items on feet, and lacerations and puncture wounds from nails and splintered wood." The cited provision states, as relevant, that "[t]he employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole . . . ." The Secretary argues that she established this violation in view of testimony and other evidence (such as OSHA logs and incident report forms) indicating actual foot injuries and employee exposure to foot hazards from damaged and heavy pallets and merchandise – with no corresponding PPE use requirement. (Sec'y Post-Hr'g Br. at 17-18; Exs. C-11, C-15, C-16).

Respondent argues that the record fails to demonstrate a substantial probability of injury to order fillers at the NB DC. (Resp't Post-Hr'g Br. at 19).

Applicability and Exposure

The Respondent does not dispute that the standard applies. (Resp't Post Hr'g Br. at 19). Moreover, the CSHO testified that OSHA Forms 300 and 301 reflect order filler foot injuries between 2006 and 2008. (Vol. I, Tr. 102-103; Exs. C-11, C-13, C-16). Trusty's testimony, as well as Respondent's own exhibit, confirmed at least two injuries.[9] (Vol. II, Tr. 70, 73, Ex. R-7) In addition, Damarodas testified that he was personally aware of a foot injury sustained by an order filler kicking up a pallet. (Vol. I, Tr. 195-196). Finally, Trusty also acknowledged a possibility of foot injuries from nails and falling objects. (Vol. II., Tr. 99). Both Damarodas and

[9] *See* Exs. C-11 (case number C6206827), C-13 (case number C7244204). In addition, the OSHA logs reference at least four additional foot/lower leg injuries that appear to relate to individuals performing order filling (case numbers C6219338, C7224578, C7235096, C8204825).

Trusty, as well as an NB DC order filler, acknowledged that protective footwear was not required for order fillers. (Vol. I, Tr. 49, 186; Vol. II, Tr. 99).

Knowledge and Noncompliance

Citing its low foot injury rate of .43 percent between 2006 through 2008 and a Fifth Circuit decision, the Respondent raises its prior PPE argument - that the Secretary failed to establish its noncompliance because it lacked both actual and constructive knowledge of any hazard necessitating the use of protective footwear. *See Cotter & Co., v. OSHRC,* 598 F2d 911 (5th Cir. 1979). (Resp't Post-Hr'g Br. at 19). The Secretary argues that the Respondent had actual knowledge of the exposed employees through its supervisory employee Damarodas, as well as Trusty. In particular, she notes that Damarodas reviewed and signed OSHA's annual Summaries of Work Related Injuries and Illnesses. (Sec'y Post-Hr'g Br. at 19; Exs. C-12, C-14).

As to industry custom regarding the use of protective footwear in warehouse facilities that use wood pallets, the evidence was, at best, inconclusive. The CSHO testified that she "normally" saw foot protection during inspections of similar facilities and could not recall whether she also observed employees without it. (Vol. I. Tr. 146-147). Trusty only had limited knowledge regarding industry custom on this issue. (Tr. Vol. II 127-128).

But more persuasive here – in view of the low rate of foot injuries - is the lack of evidence indicating severe harm from NB DC working conditions. Likewise, the evidence indicated that the most likely possible injury of the laceration of the foot would likely require limited, if any, medical treatment and would not result in a function of the body being substantially impaired. The evidence indicates that any foot injury did not have a substantial and significant effect on the employee's ability to perform normal activities or return to work. (Vol. I, Tr. 102-104, 195-196; Vol. II, Tr. 73; Exs. C-11, C-15, C-16). For example, according to

Damarodas and Trusty, the employee in case number C-8204825 - that the CSHO specifically discussed during the trial and involved a splinter in the right foot – only required a tetanus shot with no time off. (Vol. I, Tr. 103-104, 196 ; Vol. II, Tr. 73; Exs. C-15, C-16).

Under these facts the Secretary has failed to meet her burden of proof with respect to knowledge of the foot hazard. Thus, Item 1c of Citation 1 is VACATED.

Citation 1, Item 1d: 29 C.F.R. § 1910.138(a) (Hand Protection)

Under Citation 1, Item 1d, the Secretary alleges Respondent violated 29 C.F.R. § 1910.138(a) because "[i]n the warehouse, personal protective equipment for the hands was not provided for, and used by, employees who were manually handling pallets, including stacking damaged pallets with exposed nails and splintered wood, and manually pushing pallets back against inclined rollers in modules, exposing employees to the hazards of lacerations and puncture wounds to the hands." The cited provision states, as relevant, that "[e]mployers shall select and require employees to use appropriate hand protection when employees are exposed to hazards such as those from . . . severe cuts or lacerations; severe abrasions; punctures . . . ." The Secretary argues that testimony and other evidence indicating actual and potential order filler hand injuries from wooden pallets that were splintered and had exposed nails, with no corresponding glove requirement and limited glove availability, establish this violation. (Sec'y Br. at 20-21). Moreover, the Secretary notes that Damarodas' testimony minimized the potential effect of the use of gloves on production. (Sec'y Post-Hr'g Br. at 21).

Respondent reiterates its argument that the record fails to demonstrate a substantial probability of hand injuries to order fillers at the NB DC. (Resp't Post-Hr'g Br. at 20).

Respondent also argues that the use of gloves would "substantially limit associates' productivity and ability to perform job tasks." (Resp't Post-Hr'g Br. at 21).

Applicability and Exposure

The Respondent does not dispute that the standard applies. (Resp't Post-Hr'g Br. at 20). As to exposure, the CSHO testified that she observed numerous pallets with splintered wood and nails that order fillers had to handle in order to perform their jobs. (Vol. I, Tr. 92, 105; Ex. C-3). The CSHO testified that from talking with employees and reviewing the OSHA logs, she learned of actual hand injuries, including one that required surgery. (Vol. I, Tr. 106)[10] Indeed, both Damarodas and Trusty, as well as an order filler, each acknowledged that splinters and nails posed risks to the hands of order fillers. (Vol. I, Tr. 47, 189; Vol. II, Tr. 99).

Knowledge and Noncompliance

Citing its low hand injury rate of .32 percent between 2006 through 2008 and, here, the aforementioned administrative law judge decision, the Respondent largely reiterates its prior PPE argument - that the Secretary failed to establish noncompliance because it lacked both actual and constructive knowledge of any hazard necessitating the use of hand protection. *See Koch Eng'r Co., Inc.*, 12 BNA OSHC 1081 (No. 83-0611, 1984) (ALJ); (Resp't Br. at 21). Moreover, it argues that only one out of the six hand injuries reflected in that roll-up related to the order-filling function at issue here. (Resp't Post-Hr'g Br. 20; Vol. II, Tr. 71, 77; Ex. C-20).

The court concludes that the Secretary failed to establish industry custom requiring the use of hand protection in warehouse facilities that use wood pallets. The CSHO specifically testified that she "remember[s] inspecting facilities where there [were] wooden pallets where there was no hand protection." (Vol. I, Tr. 146). Moreover, the record indicates that relevant

[10] Trusty testified, however, that the one clearly relevant injury noted on OSHA records – case number C-8220322 – was removed from the 2008 OSHA log. (Vol. II, Tr. 77; Exs. R-6, C-20).

order filler hand injuries were not only few in number, but also of lesser severity. Indeed, the Secretary's own witness, order filler DeLeon, testified that during his nine years at NB DC he'd "gotten a few stickers, but not very many." (Vol. I, Tr. 47). Mr. DeLeon continued that he had "never heard of anything major happening."

Under these facts the Secretary has failed to meet her burden of proof with respect to knowledge of a hand hazard requiring personal protective equipment. Thus, Item 1d of Citation 1 is VACATED.

Penalty

The record establishes the seriousness of Citation 1, Item 1(a) and Citation 1, Item 1 (b) Respondent's failure to conduct a hazard assessment exposed order fillers to the daily possibility of serious eye injuries in the order filler function of NB DC.

In calculating the appropriate penalty for a violation, Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. OSH Act § 17(j), 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by "the number of employees exposed, the duration of the exposure, the precautions taken against the injury, and the likelihood that any injury would result." *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

The Secretary proposed a total penalty of $1,700.00 for the four grouped items. In calculating the proposed penalty, the CSHO testified that the initial gravity-based penalty was $2,000.00 – an amount that reflected a lesser probability of an accident and the fact that any injuries would be of medium severity. (Vol. I, Tr. 107-108). The CSHO then testified that she reduced the original penalty by fifteen percent based upon the Respondent's safety and health

program. No evidence was introduced regarding Respondent's history of prior violations. The court notes Respondent did not address or otherwise object to the penalty either during the hearing or in its post-hearing brief.

The record indicates that the Respondent's failure to conduct a hazard assessment exposed order fillers to serious eye injuries. Yet, while the evidence indicates that the duration of exposure extended at least from 2006 and the number of employees exposed was high (twenty order-fillers per shift), the low injury rate suggests a low probability of injury. (Vol. I, Tr. 96, 171). Given the totality of these circumstances the court assesses a penalty of $1,700.00 for the violations of 29 C.F.R. § 1910.132(d)(1) and 29 C.F.R. § 1910.133(a)(1).

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1(a) is AFFIRMED as a serious violation.
2. Citation 1, Item 1(b) is AFFIRMED as a serious violation.
3. Citation 1, Item 1(c) is VACATED.
4. Citation 1, Item 1(d) is VACATED.
5. For the Serious Violations of Citation 1, Item 1(a) and Citation 1, Item 1(b) the court assesses a penalty of $1,700.00.

Patrick B. Augustine
Judge, OSHRC

Dated: December 4, 2009