No. 15-3903

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN RECYCLING AND MANUFACTURING COMPANY, INC.,

Petitioner - Appellant,

v.

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent - Appellee.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Judge Dennis L. Phillips)

FINAL FORM BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary believes that the issues in this case can be resolved on the papers and does not request oral argument.

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STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA)[1] enforcement proceeding before the Occupational Safety and Health Review Commission (Commission). The Commission had jurisdiction pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 659(c).

On September 14, 2015, administrative law judge (ALJ) Dennis L. Phillips affirmed three multi-item citations that OSHA issued to American Recycling & Manufacturing Co., Inc. (American Recycling). SPA0001-126[2]. The Commission did not grant discretionary review of the ALJ's decision, and it became a final Commission order on October 16, 2015. Vol.III, JA0824; 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90. American Recycling filed a timely petition for review with this Court on December 4, 2015, and the Court has jurisdiction over this appeal under section 11(a) of the OSH Act. 29 U.S.C. § 660(a).

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[1] The Secretary of Labor's (Secretary) responsibilities under the Occupational Safety and Health Act have been delegated to an Assistant Secretary who directs OSHA. Secretary of Labor's Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

[2] Citations to the ALJ's decision use the page numbers in the Special Appendix ("SPA[####]"), while the citations to record documents in the Corrected Deferred Joint Appendix cite to the volume number, followed by the page number ("Vol.[#], JA[####]"). Citations to American Recycling's opening brief are abbreviated "Br."

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ALJ's determination that 29 C.F.R. § 1910.212(b), which requires employers to anchor machines that are designed for a fixed location and are capable of moving or walking if not anchored, applied to American Recycling's pop-up saw, where the bottom of the saw's legs had tabs with pre-drilled holes, American Recycling quickly bolted the saw to the floor after a workplace accident, and American Recycling's wood shop supervisor credibly testified that the saw moved during operation before it was anchored.

2. Whether the ALJ correctly found that 29 C.F.R. § 1910.213(b)(6), which requires employers to protect "operating treadles" that power woodworking machinery against accidental tripping, applied to the foot pedal that activated American Recycling's pop-up saw, where both OSHA's compliance officer and American Recycling's expert witness testified that the standard applied, and interpreting "treadle" to include the foot pedal comports with the wording and purpose of the standard.

3. Whether substantial evidence supports the ALJ's finding that American Recycling willfully violated 29 C.F.R. §§ 1910.212(b) and 1910.213(b)(6) where American Recycling's employees repeatedly complained to management about the pop-up saw's movement during operation and the risk of accidental activation

created by its unprotected foot pedal, but American Recycling failed to address the saw's hazards and exhibited a dismissive attitude toward employee safety.

4. Whether the ALJ correctly determined that OSHA's Bloodborne Pathogens Standard, 29 C.F.R. § 1910.1030, applied to American Recycling, where injuries that cause bleeding were reasonably anticipated to occur at American Recycling, and American Recycling required employees to clean up blood after a workplace injury.

5. Whether substantial evidence supports the ALJ's finding that American Recycling committed a serious violation of two provisions of OSHA's housekeeping standard, 29 C.F.R. §§ 1910.22(a)(1) and (a)(2), where American Recycling allowed excessive combustible wood dust to accumulate and create fire and explosion hazards.

STATUTORY AND REGULATORY BACKGROUND

The OSH Act authorizes the Secretary to promulgate and enforce workplace safety and health standards. 29 U.S.C. §§ 655, 658. OSHA enforces the OSH Act by inspecting workplaces and issuing citations when it believes that an employer has violated a standard. *Id.* § 658. OSHA's citations require employers to abate violations, and, where appropriate, pay a civil penalty. *Id.* §§ 658-659, 666. Violations may be categorized as either "not serious," "serious," or "willful." *Id.* §

666(a)-(c). If an employer contests a citation, the matter is adjudicated by the Commission, an independent adjudicatory body that is not within the U.S. Department of Labor. *Id*. §§ 659, 661. An ALJ appointed by the Commission adjudicates the dispute, *id*. § 661(j), after which a party that is dissatisfied with the ALJ's decision may petition the Commission for discretionary review. *Id*. §§ 659(c), 661(j); 29 C.F.R. § 2200.91(a). If the Commission does not direct review, the ALJ's decision becomes the final order of the Commission. 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90(d). The Commission's final orders are reviewable in the courts of appeals. 29 U.S.C. § 660(a).

Subpart O of 29 C.F.R. Part 1910, *Machinery and Machine Guarding*, contains OSHA standards regulating machinery. Section 212 of subpart O provides "[g]eneral requirements for all machines," including that "[m]achines designed for a fixed location shall be securely anchored to prevent walking or moving." 29 C.F.R. § 1910.212(b). Additionally, § 1910.213 contains provisions that specifically apply to woodworking machinery, including that "[e]ach operating treadle shall be protected against unexpected or accidental tripping." *Id.* § 1910.213(b)(6).

OSHA's Bloodborne Pathogens Standard (BPS), located in subpart Z of Part 1910, regulates occupational exposure to blood and other bodily fluids. 29 C.F.R. § 1910.1030. The BPS specifies that "occupational exposure" means "reasonably

anticipated … contact with blood or other potentially infectious materials that may result from the performance of an employee's duties." *Id.* § 1910.1030(b). Employers to which the BPS applies must "establish a written Exposure Control Plan designed to eliminate or minimize employee exposure," *Id.* § 1910.1030(c)(1)(i), and provide bloodborne pathogen safety training to "each employee with occupational exposure." *Id.* § 1910.1030(g)(2)(i).

Subpart D of Part 1910, *Walking-Working Surfaces*, contains OSHA's housekeeping standard, and states that "all places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition," 29 C.F.R. § 1910.22(a)(1), and that "[t]he floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition." *Id.* § 1910.22(a)(2). This standard covers all hazards that may arise from poor housekeeping, including fire and explosion hazards created by the excessive accumulation of combustible dust. *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 834 (5th Cir. 1981).

STATEMENT OF THE CASE

OSHA initiated an enforcement action against American Recycling after an employee's hand was amputated while operating a wood saw. After conducting two inspections of American Recycling's facility on December 3, 2012, and January 30, 2013, OSHA issued three citations alleging eighteen violations,

including twenty-two citation items, of OSHA standards. Vol.II, JA0262-284, JA0359-366. The alleged violations of 29 C.F.R. §§ 1910.212(b) and 1910.213(b)(6) were characterized as "willful"; the remaining sixteen violations were characterized as "serious." *Id.*; SPA0002.

After American Recycling contested the citations, Vol.III, JA0858, a Commission ALJ held a four-day hearing on the merits, and on September 14, 2015, the ALJ docketed his decision and order affirming twenty-one of the twenty-two citation items. SPA0123-125. The Commission did not direct the decision for discretionary review, and the ALJ's decision became a final order of the Commission on October 16, 2015. Vol.III, JA0823.

American Recycling timely filed its petition for review with this Court on December 4, 2015, 29 U.S.C. § 660(a), and contests only six of the affirmed citation items: the two willful violations of 29 C.F.R. §§ 1910.212(b) and 1910.213(b)(6), a serious violation (with two citation items) of the BPS (29 C.F.R. §§ 1910.1030(c)(1)(i) and (g)(2)(i)), and a serious violation (with two citation items) of the housekeeping standard (29 C.F.R. §§ 1910.22(a)(1) and (2)).

STATEMENT OF FACTS

I. American Recycling's Woodworking Facility and Purchase of a Pop-up Saw

Located in Rochester, New York, American Recycling produces wood packaging materials and pallets, and had approximately 38-58 employees in

December 2012, most of whom did not speak English. Vol.I, JA0151, JA0167; Vol.II, JA0417; SPA0004. SPA0004 n.3. In the fall of 2011, American Recycling's Vice President, Joseph Meindl, and former plant manager, Chris Mangold, hired Joel Rivera to perform "quality control and translating" tasks, but put Mr. Rivera in charge of American Recycling's wood shop on his first day, even though he did not have prior woodworking experience. Vol.I, JA0039-42; SPA0006. American Recycling did not provide safety training to Mr. Rivera or any of his wood shop subordinates prior to December 3, 2012. Vol.I, JA0044-46; SPA0092. After Mr. Mangold quit in the spring of 2012, Mr. Rivera also served as acting plant manager until September 2012, when Karl Joslin, a former mattress company employee, was hired to serve as plant manager. Vol.I, JA0042, JA0172-174, JA0185, JA0195-197, JA0240-241; SPA0006.

In the spring of 2012, American Recycling purchased a pop-up saw from an online auction, which it used to cut wood for pallets. Vol.I, JA0013, JA0018-21, JA0089, JA0186-187, JA0251; SPA0008, SPA0064, SPA0097. No one at American Recycling knew who manufactured the pop-up saw, and it did not come with a manual. Vol.I, JA0052-53, JA0089-90, JA0133, JA0187, JA0261; SPA0097.

The pop-up saw's blade was powered by air: a worker pressed on a foot pedal that was attached to the saw by a six-to-seven foot long air hose, which

caused the saw's blade to rise "vertically through a slot in the top surface of the cabinet." SPA0008-9; Vol.I, JA0050-51, JA0055, JA0070, JA0072, JA0082, JA0083. The length of the air hose "allow[ed] the pedal to be a significant distance from the saw." SPA0103; Vol.I, JA0055, JA0083, JA0222. American Recycling did not identify a permanent location for the pop-up saw in the wood shop in 2012, and occasionally relocated the saw using a forklift to study the wood shop's work flow. Vol.I, JA0053, JA0087-88, JA0131, JA0206, JA0212-213, JA0227-228, JA0247, JA0257-258, JA0261; SPA0082-83. In April 2012, American Recycling replaced the pop-up saw's foot pedal after Mr. Rivera reported to Mr. Meindl that it was sticking, and the replacement pedal did not have a cover or guard. Vol.I, JA0055, JA0179, JA0186, JA0229-230, JA0251-253, JA0259; SPA0097, SPA0097 n.144.

Mr. Rivera used the pop-up saw "at least two to three times a week," Vol.I, JA0060, and also supervised the wood shop employees who operated the pop-up saw. Vol.I, JA0012-13, JA0050; SPA0086. According to Mr. Rivera, he initially refused to operate the pop-up saw because "the blade was coming up real hard and fast" and was "really unpredictable," but was ordered by Mr. Meindl to continue using it because the company "need[ed] to make money with it." Vol.I, JA0060; SPA0087 n.127. Mr. Rivera also said that many of his subordinates complained

that they did not want to use the saw because of its unpredictability. Vol.I, JA0059; SPA0093.

Mr. Rivera repeatedly complained to Mr. Meindl, Mr. Mangold, and Mr. Joslin about the condition of the pop-up saw, including that the pop-up saw's vibrations caused it to move during operation because the saw was not anchored to the floor, which brought the saw into dangerous proximity of workers using neighboring machines. Vol.I, JA0048-50, JA0054-60, JA0066; SPA0087, SPA0092-93, SPA0101-102. Mr. Rivera also said that he complained about the pop-up saw's foot pedal, including that "you had to look for the pedal every time you cut something." Vol.I, JA0055-56; SPA0101-102. Steven Lebron, a wood shop worker, also complained to Mr. Rivera "twice a week" about the foot pedal, Vol.I, JA0017, and particularly, that it was "free," "loose," and covered in dirt. Vol.I, JA0013-14, JA0016-17; SPA0092, SPA0099 n.148.

When Mr. Rivera alerted Mr. Mangold, and subsequently Mr. Joslin, they replied that they would relay the issue to Mr. Meindl, because "everything went through Joe [Meindl]." Vol.I, JA0056; *see also* JA0049, JA0058; SPA0087. Mr. Rivera said that he discussed the pop-up saw's movement during operation with Mr. Joslin "very often," Vol.I, JA0049; SPA0087, and when he told Mr. Joslin that his subordinates did not want to use the saw, Mr. Joslin replied "[j]ust find guys who want to run it." Vol.I, JA0059; SPA0093. Mr. Rivera notified Mr. Meindl

directly about "all the problems that [the pop-up saw] had," but Mr. Meindl's response was simply "we'll take care of it." Vol.I, JA0056-58; SPA0087, SPA0099 n.149.

II. The Amputation of American Recycling Employee Steven Lebron's Hand While Operating the Pop-Up Saw

In December 2012, Steven Lebron was twenty-years-old and had been with the company for approximately eighteen months, working under the supervision of Mr. Rivera. Vol.I, JA0004, JA0006, JA0024; SPA0008. Prior to joining American Recycling, Mr. Lebron had no experience cutting wood with saws, and though Mr. Rivera showed him how to use American Recycling's saws, Mr. Lebron did not receive any safety training from American Recycling. Vol.I, JA0006, JA0007, JA0037; SPA0008, SPA0008 n.15. Posted on machines in the wood shop, including the pop-up saw, were instructions and warning signs, but they were all in English, which Mr. Lebron could not read. Vol.I, JA0024, JA0071, JA0226; SPA0010, SPA0091, SPA0106; *see, e.g.*, Vol.II, JA0296, JA0298-299.

On the morning of December 3, 2012, Mr. Rivera gave out work assignments to wood shop employees at 7:00 a.m., and assigned Mr. Lebron to build pallets with a coworker, Carlos Martinez, which required them to use the pop-up saw. Vol.I, JA0018-20, JA0025-26; Vol.II, JA0437; SPA0007-9. Mr. Lebron positioned wood on the saw blade area of the cabinet, after which Mr.

Martinez would step on the foot pedal to activate the blade and cut the wood. Vol.I., JA0032-33, JA0069; SPA0009. At approximately 8:45 a.m., Mr. Lebron was positioning wood on the cabinet to prepare for a cut when Mr. Martinez accidently stepped on the foot pedal, which activated the saw blade and amputated Mr. Lebron's left hand. Vol.I, JA0021-22, JA0025-26, JA0031-32; Vol.II, JA0417; SPA0009-10. After Mr. Lebron's injury, Mr. Joslin cleaned Mr. Lebron's blood from the floor with two employees from the maintenance department, Anieal "Manny" Rodriguez and Fernando Rodriguez, and then sent everyone home for the day. Vol.I, JA0061, JA0157, JA0162, JA0181, JA0209-210, JA0213-214, JA0248; SPA0010-11, SPA0119.

III. The OSHA Inspection and Issuance of the Citations

After OSHA learned of the amputation, Compliance Safety and Health Officer (CSHO) Nick Donofrio opened a safety inspection of American Recycling and arrived at the worksite approximately an hour after Mr. Lebron's injury. Vol.I, JA0073-74, JA0248; SPA0011. CSHO Donofrio observed that American Recycling's pop-up saw had "[a]t the bottom of each leg [of the saw] … a tab that was parallel to the floor with a hole in that tab that allowed it to be anchored or secured to the floor," but the saw was not anchored. Vol.I, JA0080-82; SPA0012, SPA0081. He also found that the pop-up saw's foot pedal was not covered with a toe guard, and was about six feet away from the cabinet of the saw. Vol.I, JA0099,

JA0100, JA0132; SPA0012. He took several photographs of the pop-up saw. *See, e.g.*, Vol.II, JA0296, JA0355-356; Vol. I, JA0081, JA0100.

CSHO Donofrio recommended that American Recycling install a cover over the foot pedal and bolt the pop-up saw to the floor. Vol.I, JA0137-138, JA0176; SPA0012. American Recycling bolted the pop-up saw to the floor about an hour later using bolts and a drill that it had in-stock, Vol I., JA0061-62, JA0064-65, JA0217-218, JA0250-251; SPA0081-82, and ordered a guarded foot pedal for the saw, which was installed a few days later. Vol.I, JA0062-63, JA0189, JA0218-219; *see* Vol.II, JA0445.

During the inspection, Mr. Rivera told CSHO Donofrio that "he began receiving complaints from the employees about the safe operation of the saw" shortly after American Recycling purchased it, including concerns that "the saw would move, change positions, and … about a cut hazard." Vol.I, JA0084-85. Mr. Rivera also stated that he had refused to use the pop-up saw because of its safety issues, but Mr. Meindl told him to use the saw because they "need[ed] the production." Vol.I, JA0097-98; *see also* JA0107, JA0141; Vol.II, JA0423; SPA0100 n.153. Additionally, CSHO Donofrio reported that Mr. Rivera said that he complained to Mr. Joslin "three or four times" about the uncovered foot pedal and that the saw would activate "even if you kicked it," to which Mr. Joslin replied

that "they would fix it." Vol.I, JA0142-JA0143; Vol. II, JA0438-39; SPA0100 n.150.

Additionally, two other supervisors, Robert Hart and Robert Hess, told CSHO Donofrio that they had complained to Mr. Meindl that the foot pedal moved around and lacked a cover. Vol.I, JA0101-JA0104, JA0107, JA0139, JA0143-JA0145, JA0148, JA0150; Vol.II, JA0427, JA0441; SPA0102, SPA0102 n.154. When CSHO Donofrio discussed the issue with Mr. Meindl during the inspection, Mr. Meindl said that "he may have been told about the foot pedal not being covered," but "could not recall." Vol.I, JA0104-105; *see also* JA0430; SPA0102.

CSHO Donofrio reviewed American Recycling's safety manual and found that it was generic and non-site-specific, and had been created by a human resources provider. Vol.I, JA0074-JA0078, JA0128-JA0129, JA0175; SPA0011, SPA0016, SPA0092, SPA0105. Section XXIII of American Recycling's safety manual contained a "Machine Guarding Safety Program," which included work rules stating that "[f]ixed machinery must be anchored and secured to prevent walking or movement during operation," and also that "[s]pecific controls must be in place to assure that equipment cannot be accidently tripped to activate the machine." Vol.II, JA0376A-B. Additionally, Section XXIII had a "machine guard program assessment" checklist that asks "Is equipment designed for a fixed location secured to prevent tipping, walking or moving?" *Id.*, JA0376C.

During his inspection, CSHO Donofrio also observed and photographed four instances of excessive wood dust accumulations in the wood shop: approximately one inch-thick accumulations on the horizontal ceiling bar joists above the panel saw's dust collector; between one-half inch and three inches on the corner frame of the dust collector in the panel saw area; approximately one-fourth inch to one inch on the frame of the panel saw; and one-half inch to one inch on the walkway behind the panel saw. Vol.II, JA0266-267; Vol.I, JA0108-JA0114; SPA0022; *see* Vol.II, JA0285-287, JA0294-295. He used a tape measure to establish the depth of three of the instances, and estimated the depth of the one-inch dust accumulations on the "ceiling joists," because they were "approximately 12 to 15 feet above the floor of the wood shop." Vol.I, JA0111; *see* Vol.II, JA0266-267, JA0285; Vol.I, JA0108-113, JA0125.

Mr. Meindl told CSHO Donofrio that there were problems with the dust collector system, and that one of the dust collection bags had been leaking. Vol.I, JA0109-110; SPA0025. Mr. Meindl also acknowledged that he was aware that wood dust could be explosive. Vol.I, JA0121; SPA0025. Both Mr. Rivera and Mr. Hart told CSHO Donofrio that American Recycling had had a dust fire in the wood shop a few weeks before the inspection. Vol.I, JA0122-123; SPA0022 n.47.

CSHO Donofrio collected two samples of the wood dust at American Recycling, which OSHA's laboratory in Salt Lake City tested and confirmed were

explosive. Vol. I, JA0114; Vol. II, JA0288-293; SPA0013, SPA0020-21. He also collected Material Safety Data Sheets (MSDS) for the wood products that American Recycling used, each of which cautioned that accumulation of dust could create an explosion hazard. Vol.I, JA0115-120, Vol.II, JA300-354; SPA0021, SPA0021 n.41-45.

Because American Recycling's employees cleaned up Mr. Lebron's blood after the amputation, CSHO Donofrio referred the case for a health inspection, and CSHO Kimberly Mielonen, an industrial hygienist, initiated a separate health inspection on January 30, 2013. Vol.I, JA0154-155; SPA0013. CSHO Mielonen confirmed that three American Recycling employees had been exposed to blood while cleaning up after Mr. Lebron's injury. Vol.I, JA0156-JA0158, JA0162; SPA0013-14, SPA0119, SPA0122. American Recycling did not have a written exposure control plan for bloodborne pathogens, nor did the company provide exposure training to any of its employees. Vol.I, JA0155, JA0156, JA0161, JA0213; SPA0013, SPA0120. CSHO Mielonen also reviewed American Recycling's injury logs from 2011 and 2012; they revealed four prior injuries that CSHO Mielonen believed would have caused bleeding. Vol.I, JA0159-160; Vol.II, JA0367; SPA0118-119.

On May 30, 2013, OSHA issued American Recycling three Citations and Notifications of Penalties containing multiple citation items. Vol.II, JA0262-284,

JA00359-366. Six citation items remain before this Court: two willful violations (and associated penalties of $32,000 and $56,000) of 29 C.F.R. §§ 1910.212(b) and 1910.213(b)(6) related to the pop-up saw; a serious violation (with two citation items[3] and a combined penalty of $4900) of OSHA's housekeeping standard, 29 C.F.R. §§ 1910.22(a)(1) and (2), due to the accumulations of wood dust at the facility; and a serious violation (with two citation items and a combined penalty of $3500) of the BPS for failing to develop a written exposure control plan (29 C.F.R. §§ 1910.1030(c)(1)(i)), and failing to provide exposure training to employees with reasonably-anticipated occupational exposure to blood (29 C.F.R. §§ 1910.1030 (g)(2)(i)). Vol.II, JA0266-267, JA0283-284, JA0365-366.

IV. The ALJ Decision Affirming the Citations

After a four-day hearing on the merits, the ALJ affirmed all six of the citation items at issue in this appeal, and assessed total penalties for these items of $96,400. SPA0003, SPA0123-125. The ALJ first determined that 29 C.F.R. § 1910.212(b) applied to American Recycling's pop-up saw. SPA0081-86. The ALJ found that the pop-up saw was "designed for a fixed location" based on CSHO Donofrio's testimony about the saw's design, photographs of the saw before and after it was anchored, and the ease with which American Recycling

[3] Three of the four instances of excessive dust were grouped as one citation item pertaining to § 1910.22(a)(1), while the "one-half inch to one inch [of dust] on the walkway behind the panel saw" supported the citation item pertaining to § 1910.22(a)(2). Vol.II, JA0266-267.

anchored the saw after Mr. Lebron's injury. SPA0081-83. Finding him a "very credible witness," SPA0085 n.12, the ALJ also credited Mr. Rivera's testimony that the pop-up saw moved and "walked" before it was anchored, SPA0083-86, and noted that American Recycling's repair documents corroborated that the saw's movement brought it close to the other machines in the wood shop. SPA0084 (citing Vol.II, JA0407).

American Recycling's supervisors and managers knew that the pop-up saw was not anchored, SPA0086-87, and had "heightened awareness" that the unanchored pop-up saw was hazardous due to the numerous complaints that employees voiced about the pop-up saw's condition. SPA0092-93. Further, the ALJ found that American Recycling demonstrated "plain indifference to employee safety by its lax attitude about safety, its inattention to its safety manual, and a lack of good faith efforts to comply with the standard." SPA0090. Particularly, the ALJ noted that American Recycling made no "attempt at complying with applicable OSHA requirements," and despite having a work rule that was "very similar to OSHA's requirement to securely anchor a machine to prevent walking," American Recycling failed to implement the safety rules in its manual. SPA0090-91. American Recycling also did not provide substantial safety training to its employees, performed no oversight of managers' safety efforts, and only used

English-language instructions and warnings on its machines, even though most employees could not read English. SPA0091-92.

The ALJ likewise found that American Recycling willfully violated 29 C.F.R. § 1910.213(b)(6), SPA0094-107, and in holding that the standard applied, deferred to the Secretary's interpretation that the term "operating treadle" included the pop-up saw's foot pedal because it was "reasonable and makes sense in the context of the requirements for woodworking equipment." SPA0097. American Recycling's supervisors and managers knew that the foot pedal was unguarded, SPA0099-100, and had heightened awareness that the unguarded foot pedal was hazardous due to the complaints of Mr. Lebron, Mr. Rivera, Mr. Hart, and Mr. Hess, which put management "on notice that there were problems with the foot pedal." SPA0102. Additionally, because American Recycling's safety manual had a "clear requirement to protect employees from accidental activation of equipment by tripping," Vol.II, JA0376B, American Recycling's professed ignorance of the foot pedal's dangerous condition was "disingenuous." SPA0103. Indeed, American Recycling was plainly indifferent to employee safety, as it made "no efforts to secure, guard or otherwise protect the foot pedal from accidental activation before Mr. Lebron's accident," even though it could have guarded the pedal "with minimal cost and effort." SPA0103-104.

In affirming that American Recycling violated the BPS, SPA0114-123, the ALJ found that "it is reasonable to anticipate employee exposure to blood in [American Recycling's] woodworking shop," because – as American Recycling's injury logs from 2011 and 2012 demonstrated – "it is reasonable to expect cuts and other injuries that result in bleeding for employees engaged in woodworking activities," and, as occurred after Mr. Lebron's amputation injury, "someone at the facility must be tasked with the responsibility to clean the work area or ensure that employees are not exposed to blood." SPA0118-119.

With respect to American Recycling's violation of OSHA's housekeeping standard, American Recycling knew that its dust collection system leaked and created dust accumulations in the wood shop, SPA0025-26, and "did not keep its woodworking shop, including its floor, in a clean, orderly and sanitary condition." SPA0026. And, the wood dust accumulations created fire and explosion hazards, SPA0019-24, as the ALJ found that CSHO Donofrio's measurements and photographs proved that there was sufficient fuel for a fire or explosion, SPA0021-22, and also noted that the National Fire Protection Association's (NFPA) voluntary industry "Standard for Prevention of Fires and Explosions in Wood Processing and Woodworking Facilities" (NFPA 664) would consider the amount of wood dust at American Recycling as creating fire and explosion hazards. SPA0022; Vol.III, JA0639. Because the wood dust was combustible, SPA0020-

21, the machinery at American Recycling provided an ignition source, SPA0022-23, and oxygen was in the air at the wood shop, SPA0020, the ALJ concluded that "three elements needed for a fire hazard existed at American Recycling on December 3, 2012." SPA0023 n.4. The ALJ went on to find that the "suspension" and "confinement" elements necessary for an explosion were also present, as "the accumulations of dust on the ceiling bar joists establish[ed] that the dust had been suspended in the air at some point," and American Recycling's wood shop was "an enclosed building that could confine a dust cloud." SPA0023-24.

SUMMARY OF THE ARGUMENT

The ALJ correctly found that American Recycling violated the cited OSHA standards. American Recycling needed to use a forklift to relocate the pop-up saw. The pre-holed tabs on the feet of the saw, through which American Recycling quickly bolted the saw to the floor after Mr. Lebron's amputation injury, also indicated that the pop-up saw was designed for a fixed location. American Recycling's managers chose not to anchor the saw because it would inconvenience their occasional relocation of the saw for a work flow study, even though Mr. Rivera repeatedly complained that the unanchored saw moved and "walked" during operation. 29 C.F.R. § 1910.212(b) therefore applied to the pop-up saw.

Similarly, given the context and purpose of 29 C.F.R. § 1910.213(b)(6), requiring the protection of woodworking equipment against unintentional

activation, the term "operating treadle" encompassed the foot pedal that powered American Recycling's pop-up saw. In fact, multiple supervisors and employees complained to management that the pop-up saw's unguarded foot pedal created an unintentional activation hazard.

American Recycling knew that the unanchored pop-up saw and its unprotected foot pedal put its employees in danger, but required employees to keep using the saw without addressing the hazards. And, as demonstrated by their failure to implement their boilerplate safety manual, provide safety training to their employees, or post safety warnings on machines in a language that employees could understand, American Recycling's supervisors and managers would not have cared even if they knew that the pop-up saw's condition violated OSHA's standards. Substantial evidence therefore supports American Recycling's willful violations of §§ 1910.212(b) and 1910.213(b)(6).

The ALJ also properly found that American Recycling violated the BPS, 29 C.F.R. §§ 1910.1030(c)(1)(i) and (g)(2)(i). As American Recycling's injury logs attest, injuries that cause bleeding are likely to occur at a woodworking facility, and American Recycling should have reasonably anticipated that it would assign employees to clean up blood, as it did after Mr. Lebron's amputation. And, American Recycling allowed excessive combustible wood dust to accumulate; the

accumulation created fire and explosion hazards in violation of OSHA's housekeeping standard, 29 C.F.R. §§ 1910.22(a)(1) and (2).

STANDARD OF REVIEW

This Court must uphold the Commission's order unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Solis v. Loretto-Oswego Residential Health Care Facility*, 692 F.3d 65, 73 (2d Cir. 2012) (citation omitted). Legal conclusions are reviewed *de novo*, *id.*, but the Secretary's interpretation of an OSHA standard is entitled to deference if it "sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 151 (1991).

The Commission's factual findings must be upheld if they are supported by "substantial evidence on the record considered as a whole."[4] 29 U.S.C. § 660(a); *Loretto-Oswego*, 692 F.3d at 73 (citations omitted). Substantial evidence means "less than a preponderance, but more than a scintilla," and amounts to "such relevant evidence as a reasonable person might accept as adequate to support a conclusion." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89 (2d Cir. 2000) (citation omitted). The Court must also "give great deference to credibility determinations by the ALJ," *P. Gioioso & Sons, Inc., v. OSHRC*, 675 F.3d 66, 72

[4] Where an ALJ's decision becomes a final order after the Commission declines to direct it for discretionary review, the substantial evidence standard "applies with undiminished force" to the ALJ's findings. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 104 n.3, 108 (1st Cir. 1997).

(1st Cir. 2012), as "agency credibility resolutions are essentially nonreviewable unless contradicted by uncontrovertible documentary evidence or physical facts." *Olin Const. Co., Inc. v. OSHRC*, 525 F.2d 464, 467 (2d Cir. 1975) (citation and internal quotation marks omitted).

ARGUMENT

The ALJ properly found that American Recycling violated the cited standards. To establish a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) the employer failed to comply with the standard, (3) employees were exposed to the violative condition, and (4) the employer knew or should have known of the violative condition. *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996). With respect to these elements, American Recycling challenges only the ALJ's findings that 29 C.F.R. §§ 1910.212(b), 1910.213(b)(6), and 1910.1030 applied, and that it failed to comply with §§ 1910.22(a)(1)-(2). American Recycling also disputes the willful characterization of the violations of §§ 1910.212(b) and 1910.213(b)(6). As explained below, American Recycling's arguments are meritless, and the Court should dismiss the petition for review.

I. The ALJ Correctly Held that 29 C.F.R. § 1910.212(b) Applied Because American Recycling's Pop-Up Saw Was Designed for a Fixed Location and Moved During Operation Before it was Anchored.

29 C.F.R. § 1910.212(b) states that "[m]achines designed for a fixed location

shall be securely anchored to prevent walking or moving," and the Secretary must show that a machine is "designed for a fixed location" for the standard to apply. The phrase "designed for a fixed location" is not defined, but "a court should give a standard that is plain on its face its obvious meaning." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000), and the ALJ found that the "text of the standard is clear; a machine designed for use in a fixed location, *i.e.*, non-portable, must be securely anchored to prevent walking or moving." SPA0083.

Substantial evidence supports the ALJ's determination that American Recycling's pop-up saw was designed for a fixed location. SPA0081-83. CSHO Donofrio testified that the pop-up saw was not portable, Vol.I, JA0088-89, and observed that the saw's legs had tabs that were "parallel to the floor with a hole in the tab that allowed it to be anchored or secured to the floor." *Id.*, JA0081-82. His photographs of the pop-up saw before and after it was anchored to the floor support his testimony, Vol.II, JA0355[5], JA0358, as does the evidence indicating that a maintenance employee, Duane Cansdale, easily bolted the pop-up saw to the floor shortly after Mr. Lebron's amputation injury. Vol.I, JA0061-62, JA0064-65, JA0217-218, JA0250-251. In fact, a forklift was required to relocate the pop-up saw, *id.*, JA0261, and the saw was not anchored because American Recycling

[5] Contrary to American Recycling's objection, Br. 24, the ALJ reasonably found that Vol.II, JA0355 shows "what looks like a pre-drilled hole in the tab," SPA0082, because a close examination of a photograph reveals that the foremost leg has a tab with a hole in it, albeit partially obscured by the dust.

considered it to be in a "temporary" location while they studied the wood shop's work flow. *Id.*, JA0087-88, JA0258-259.

American Recycling disputes that CSHO Donofrio observed pre-drilled holes, Br. 23-24, but a careful review of his trial testimony reveals otherwise: after the Secretary's counsel asked CSHO Donofrio to look at a photograph of the pop-up saw from his December 3, 2012 visit (Vol.II, JA0355)), he explained that the saw could have been anchored because each leg had a tab "with a hole in that tab that allowed it to be anchored or secured to the floor." Vol.I, JA0081-82. Following that statement, CSHO Donofrio was asked to look at a photograph of the saw after it had been anchored (Vol.II, JA0358) to identify the tabs that he had just described, and confirm that the tabs had bolts in them. *Id.*, JA0082. From that sequence, the ALJ accurately concluded that CSHO Donofrio observed holes in the tabs before the pop-up saw was anchored. SPA0082.

Also incorrect is American Recycling's claim that Mr. Cansdale remembered drilling holes in the tabs when he anchored the saw, Br. 9, 24, as Mr. Cansdale testified that he *thought* that he drilled holes in the tabs, but immediately clarified "I don't really remember." Vol.I, JA0220. The ALJ appropriately found that "Mr. Cansdale did not say that he drilled holes in the pop-up saw's leg plates." SPA0082 n.113. And, regardless of whether the holes were pre-drilled, Mr. Cansdale bolted the saw to the floor through its leg tabs using in-stock materials in

"less than an hour," Vol.I, JA0250, which supports that the saw was designed to be anchored at a fixed location. SPA0082.

The Commission has held that § 1910.212(b) applies when a machine is shown to be capable of moving or walking if not anchored, *Sec'y of Labor v. Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1329 (Nos. 97-0469 & 97-0470, 2003), and here, substantial evidence establishes that American Recycling's pop-up saw moved and "walked" before it was bolted to the floor. Mr. Rivera regularly used the pop-up saw and "testified that the pop-up saw gradually moved (walked) as a result of vibrations during operation," SPA0084, and the saw walked "every time it was used," bringing it dangerously close to neighboring machines and the employees who were using them. Vol.I, JA0048-49, JA0054, JA0057-58, JA0066. The ALJ found that this latter claim was corroborated by American Recycling's own machine repair records. SPA0084; Vol.II, JA0407 (stating that the pop-up saw was "too close" to another machine).

Although American Recycling questions his reliability, Br. 6, 25, the ALJ found that Mr. Rivera was "a very credible witness" whose testimony "was direct, persuasive, and presented without hesitation or evasion." SPA0085 n.121; *see also* SPA0084 n.119 (explaining that Mr. Rivera "spoke clearly and assuredly and displayed no intent to deceive the Court" when discussing the pop-up saw's walking). American Recycling also protests that the repair document does not

indicate *how* the pop-up saw got too close to another machine, Br. 26, but, when viewed in combination with Mr. Rivera's testimony, Vol.I, JA0048-49, the ALJ reasonably inferred that the saw's hazardous location was attributable to its walking during operation. *P. Gioioso & Sons, Inc.*, 675 F.3d at 72 (appellate court accepts the Commission's reasonable factual inferences under substantial evidence review).

American Recycling erroneously claims that ALJ did not provide a reasonable basis for crediting Mr. Rivera's testimony over that of Tanka Khadka, a wood shop employee, Mr. Cansdale, and Mr. Joslin. Br. 25-26. To the contrary, the ALJ explicitly found American Recycling's witnesses "not persuasive" because "three of those witnesses never operated the pop-up saw," and two others – Mr. Meindl and Mr. Khadka – did not use the saw routinely. SPA0085, SPA0085 n.122. The ALJ also specifically discredited Mr. Meindl's testimony about the saw's movement as "self-serving," SPA0085, as well as Mr. Joslin's statement that no one told him that the pop-up saw walked, because "[a]t times, his testimony appeared to be evasive." SPA0092-93 n. 132. Mr. Rivera, on the other hand, personally operated the pop-up saw "at least two to three times a week," Vol.I, JA0060, supervised the wood shop employees who used the saw, and gave credible testimony about the pop-up saw's movement. SPA0084, SPA0085 n.121, n.122.

American Recycling unpersuasively nitpicks the ALJ's analysis of Mr. Khadka's and Mr. Cansdale's testimony.[6] Br. 25-26. The ALJ's statement that Mr. Khadka – who used the pop-up saw "a long time ago," but could not remember how often, just that he used it when necessary for an order, Vol.I, JA0232, JA0235-236 – used the pop-up saw "occasionally" should be read in comparison with the finding in the same footnote that Mr. Rivera used it "regularly." SPA0085 n.122. Additionally, the ALJ reasonably characterized Mr. Cansdale as "newly hired," *id.*, as American Recycling's email records show that Mr. Joslin requested to hire Mr. Cansdale on October 16, 2012, giving Mr. Cansdale *at most* one-and-a half months of experience before Mr. Lebron was injured. Vol.II, JA0403; SPA0007; Vol.I, JA0198, JA0202. The Court should therefore defer to the ALJ's reasonable decision to credit Mr. Rivera's testimony that the saw moved during operation. *Cellular Telephone Taskforce*, 205 F.3d at 89 (an agency's finding may

[6] American Recycling also describes evidence that it believes the Secretary should produce for § 1910.212(b) to apply, Br. 26-28, but cites no authority indicating that such evidence is required. Though American Recycling criticizes the Secretary for not identifying the manufacturer of the saw, CSHO Donofrio attempted to do so, but no one at American Recycling knew who manufactured the saw, American Recycling did not possess a manual for the saw, and the saw lacked a serial number. Vol.I, JA0090-92, JA0133, JA0187, JA0261. American Recycling also claims that a CSHO's personal knowledge of a machine's movement during operation is "an important factor," Br. 22, but the ALJ decision that it cites simply mentioned the CSHO's lack of personal knowledge when explaining that a manager's testimony that the machines did not move during operation was "uncontroverted." *Sec'y of Labor v. Hackney, Inc.*, 14 BNA OSHC 1300, 1301 (No. 88–0231, 1989) (ALJ).

be supported by substantial evidence despite "the possibility of drawing two inconsistent conclusions from the evidence") (citations omitted); *Olin Const. Co., Inc.*, 525 F.2d at 467.

II. The ALJ Correctly Determined that 29 C.F.R. § 1910.213(b)(6) Applied Because the Term "Operating Treadle" Encompasses the Foot Pedal that Activated American Recycling's Pop-Up Saw.

29 C.F.R. § 1910.213's woodworking machinery requirements include that "[e]ach operating treadle shall be protected against unexpected or accidental tripping[7]," 29 C.F.R. § 1910.213(b)(6), but the term "operating treadle" is not defined. Where the meaning of regulatory language is "not free from doubt," the Secretary's interpretation of an OSHA standard is entitled to deference if it "sensibly conforms to the purpose and wording of the regulation." *CF&I Steel Corp.*, 499 U.S. at 150-51 (citation and internal quotations omitted); *see also Fluor Constructors, Inc. v. OSHRC*, 861 F.2d 936, 940-41 (6th Cir. 1988) ("Even if inartful drafting of the regulations lends itself to more than one possible construction, [the courts] nevertheless 'find that a common sense consideration of

[7] "Tripping" refers to the activation of the machine. While Subpart O's definitions section, § 1910.211, does not separately define "tripping" for purposes of § 1910.213, it does define "tripping" for § 1910.217 (which applies to mechanical power presses), and states that "'[t]rip or (tripping)' means activation of the clutch to 'run' the press." 29 C.F.R. § 1910.211(d)(55); *see also* § 1910.217(b)(7)(x) (requiring the protection of "foot operated tripping controls" to prevent unintentional operation of a machine).

the regulations with a view toward safety compensates for cloudy regulations…'") (citations omitted).

American Recycling's pop-up saw was activated by stepping on its foot pedal, which used air power to drive the saw blade through a slot in the saw's cabinet. Vol.I, JA0050-JA0051, JA0070, JA0072, JA0082, JA0083. CSHO Donofrio considered the foot pedal to be a "treadle" as contemplated by the standard, *id.*, JA0099 (defining "treadle" as "a foot pedal that operates a machine"); *see also* JA0136, as did American's expert, Douglas Miller, who "consistently referred to [American Recycling's] pop-up saw's foot pedal as a treadle." SPA0095; *see* Vol.I, JA0188, JA0189, JA0225. Additionally, Mr. Miller's consultation report to American Recycling quoted from an OSHA publication on guarding machines to prevent amputations, which cautions that "[f]oot controls must be guarded to prevent accidental activation…." Vol.II, JA0462-463 (quoting JA0498). Given this shared understanding of what "treadle" means (a foot pedal that powers a machine), along with the context in which the term appears (Section 1910.213's woodworking machinery requirements), and its explicit purpose (to prevent unintentional activation of such machinery), the ALJ correctly deferred to the Secretary's reasonable interpretation that "operating

treadle" includes the foot pedal that delivered air power to American Recycling's pop-up saw.[8] SPA0095-97; *CF&I Steel Corp.*, 499 U.S. at 150-51.

Citing two dictionaries that describe a "treadle" as using "continual action to impart motion to a machine," Br. 12, American Recycling unconvincingly argues that the Secretary's interpretation is unreasonable because the pop-up saw's foot pedal powers the blade with air, rather than "continuous" foot action. Br. 28. Other dictionary definitions of "treadle," however, do not include the "continual action" component, indicating that "treadle" is used more broadly than American Recycling's restrictive reading. *See Oxford Dictionaries online* (2016), http://www.oxforddictionaries.com/us/definition/american_english/treadle ("a lever worked by the foot that imparts motion to a machine"); *Meriam-Webster online* (2016), http://www.merriam-webster.com/dictionary/treadle ("a swiveling

[8] Alternatively, as the Secretary argued below, *see* SPA0095, the "common sense" meaning of the term "operating treadle" in the context of OSHA's woodworking machinery standard plainly encompasses American Recycling's foot pedal. *Christensen v. Harris Cnty.*, 529 U.S. at 587 (a court should give an unambiguous standard its "obvious meaning"). At a minimum, American Recycling's assertion that the term "operating treadle" is unambiguous and precludes the Secretary's interpretation, Br. 29, is belied by the varied testimony regarding the term's meaning. Conflicting with CSHO Donofrio's and Mr. Miller's understanding, Mr. Meidl said he did not know what a treadle is, Vol.I, JA0253-254, and Armando Santiago – American Recycling's President and majority owner, who performed financial and administrative tasks – thought "treadle" is a type of foot pedal that uses "people power" to drive a machine. *Id.*, JA0165A- JA0166, JA0185, JA0179-JA0180; *see Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207 (2011) (finding a term "ambiguous as to the question presented" where both parties offered plausible readings, "and text alone does not permit a more definitive reading").

or lever device pressed by the foot to drive a machine"). Furthermore, this Court has long cautioned against making "a fortress out of the dictionary," because the purpose of regulations (as with statutes) "is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

American Recycling fails to explain how its interpretation aligns with the standard's explicit purpose of preventing the unintentional activation of woodworking machinery. In fact, subpart O's standards regulating mechanical power presses and forging machines, §§ 1910.217(b)(4)(i), 1910.217(b)(7)(x), 1910.218(b)(2), ANSI's standards for safeguarding machines, Vol.III, JA0701 (ANSI B11.19-2010, §§ E8.8.1.1 and E8.8.1.3), and American Recycling's own safety manual, Vol.II, JA0376B, all require that foot controls that activate machinery be protected against unintended activation. So while the Secretary sensibly reads § 1910.213(b)(6) to likewise require the foot control that powers American Recycling's pop-up saw to be protected against accidental activation, American Recycling's alternative reading contravenes that purpose, and nonsensically suggests that § 1910.213 is intended only to cover unspecified woodworking machines that use continuous foot pumping for power. Not only are such machines not known to be used in modern wood shops,[9] but considering the

[9] Before the ALJ, American Recycling relied on an internet website for "Union Hill Antique Tools," a "site [that] is dedicated to manually powered woodworking equipment manufactured from 1870 to 1937." SPA0095.

standard's concern with accidental tripping (*i.e.*, activation), it is absurd to read the standard as covering machines that need continuous foot pumping to power, but not a saw that is activated with the single press of a foot control.

III. Substantial Evidence Supports the ALJ's Finding that American Recycling Willfully Violated 29 C.F.R. §§ 1910.212(b) and 1910.213(b)(6).

A violation may be characterized as "willful" where it was "done either with an intentional disregard of, or plain indifference to, the statute." *A. Schonbek & Co., Inc. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981). Willful violations "are characterized by an employer's heightened awareness of the violative nature of its conduct or the conditions at the workplace," *Chao v. Barbosa Grp., Inc.*, 296 Fed. Appx. 211, 212-213 (2d Cir. 2008) (unpublished), and to prove a willful violation, the Secretary must show that the "employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (citations omitted); *see also A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1350-51 (D.C. Cir. 2002) ("*A.E. Staley*") (explaining that "'plain indifference' is an alternative to 'knowing or voluntary disregard' (also referred to as 'conscious disregard')"). Substantial evidence in the record establishes that American Recycling willfully violated both 29 C.F.R. §§ 1910.212(b) and 1910.213(b)(6) when it demonstrated plain

indifference to employee safety by requiring employees to continue using its hazardous pop-up saw without correcting its known safety problems, and by exhibiting a generally dismissive attitude toward safety, including failing to implement a meaningful safety program.

A. American Recycling Had Heightened Awareness that the Unanchored Pop-Up Saw Created a Safety Hazard.

American Recycling had actual knowledge that the pop-up saw was not bolted to the floor, SPA0086-87, and Mr. Rivera's and his subordinates' complaints about the pop-up saw's unstable condition gave American Recycling heightened awareness that the unanchored saw was hazardous. SPA0092-93. The ALJ credited Mr. Rivera's testimony that he complained numerous times to Mr. Mangold, Mr. Joslin, and Mr. Meindl about the pop-up saw's movement during operation, including initially refusing to use the saw, and relaying that his subordinate employees "did not want to use the pop-up saw because it was 'real unpredictable.'" SPA0093; Vol.I, JA0049-50, JA0055-60.

American Recycling's managers' reactions to these complaints show that they were aware of the hazard, but simply chose not to correct it. Mr. Mangold and Mr. Joslin promised to relay Mr. Rivera's complaints to Mr. Meindl, Vol.I, JA0049, JA0056, but Mr. Meindl instructed Mr. Rivera to use the saw because American Recycling "need[ed] to make money with it," *id.*, JA0060, and idly said that they would "take care of it." *Id.*, JA0056-58. Mr. Rivera spoke with Mr.

Joslin "very often" about the saw's movement, *id.*, JA0049, and when he reported that his subordinates did not want to use the saw, Mr. Joslin told him to "[j]ust find the guys who want to run it." *Id.*, JA0059. As managers and supervisors, the knowledge and mental state of Mr. Rivera, Mr. Mangold, Mr. Joslin, and Mr. Meindl are imputable to American Recycling, *Caterpillar, Inc. v. Herman*, 154 F.3d 400, 402 (7th Cir.1998), and substantial evidence thus demonstrates that American Recycling was aware that the unanchored pop-up saw posed a hazard to wood shop employees.

The ALJ relied on Mr. Rivera's testimony both because his courtroom demeanor was credible – a finding to which this Court must defer, *Olin Const. Co., Inc.*, 525 F.2d at 467 – and because it was consistent with other witnesses' testimony. SPA0093. Mr. Lebron testified that he complained to Mr. Rivera "twice a week" about the pop-up saw, and even if his complaints specifically pertained to the pop-up saw's "free," "loose," and "dirty" foot pedal, his testimony corroborates that subordinates complained to Mr. Rivera about the saw's condition. Vol.I, JA0013, JA0016-17, JA0059. Besides, when Mr. Rivera reported the saw's safety issues to management, he complained about "the whole machine…all the problems it had." *Id.*, JA0058. Moreover, the unanchored saw's movement was connected to the hazard created by the unprotected foot pedal; as CSHO Donofrio explained, "when the pop-up saw moved, it changed the position of the foot pedal

that activated the saw, increasing the likelihood of an unintended and unintentional activation of the saw." *Id.*, JA0093.

Mr. Rivera's testimony was also consistent with what he told CSHO Donofrio during the inspection, SPA0093, as CSHO Donofrio recounted that Mr. Rivera "began receiving complaints from the employees about the safe operation of the saw" shortly after American Recycling purchased it, including that "the saw would move, change positions, and … about a cut hazard," Vol.I, JA0084-85, but despite repeatedly complaining about "the saw not being anchored to the floor," "no action was taken." *Id.*, JA0097. The ALJ thus had good reason to credit Mr. Rivera's testimony about the saw's movement, and his finding that American Recycling had heightened awareness of the unanchored saw's hazardous condition should be upheld. *Loretto-Oswego,* 692 F.3d at 73

American Recycling's theory that Mr. Rivera fabricated these complaints because Mr. Cansdale did not need permission to make "minor" repairs to machines, and therefore must not have been asked to anchor the saw prior to Mr. Lebron's amputation injury, is meritless. Br. 36. Mr. Cansdale received work assignments from Mr. Meindl, and Mr. Joslin "once in a while," but not Mr. Rivera. Vol.I, JA0220-221. Additionally, both Mr. Meindl and Mr. Joslin corroborated that they received safety complaints from Mr. Rivera; Mr. Meindl confirmed that Mr. Rivera complained to him about the pop-up saw's blade and

original foot pedal in April 2012, *id.*, JA0252-253, JA0259, and Mr. Joslin, who was in charge of safety at the facility, confirmed that supervisors raised safety issues at production meetings. *Id.*, JA0207-208; *see* JA0049-50 (Mr. Rivera "brought [the saw's movement] up in a few meetings"). Suggesting that Mr. Rivera would have *only* raised his safety concern to a maintenance employee, rather than his managers, defies both the record and common sense.[10]

B. American Recycling Had Heightened Awareness that the Unprotected Foot Pedal Created a Safety Hazard.

Substantial evidence also supports the ALJ's finding that American Recycling had heightened awareness that the pop-up saw's unprotected foot pedal created an accidental activation, or "tripping," hazard. Section 1910.213(b)(6) requires employers to protect a foot pedal from accidental activation, but "it does not dictate a particular method." SPA0107; SPA0101 n.152; *cf. Modern Drop Forge Co. v. Sec'y of Labor*, 683 F.2d 1105, 1112 (7th Cir. 1982) (§ 1910.218(b)(2)'s similar requirement to protect foot controls "does not specify any particular method [for] … preventing 'unintended operation'"). CSHO Donofrio and Mr. Miller both identified a cover as an appropriate method for protecting the

[10] Also meritless is American Recycling's claim that Mr. Cansdale's use of in-stock tools to anchor the saw after Mr. Lebron's amputation injury discredits Mr. Rivera's testimony that he asked "the maintenance crew" to bolt down the saw, but they lacked the necessary equipment. Br. 36; Vol.I, JA0066-67. The record does not indicate when Mr. Rivera made his request, to whom he made it, or what equipment American Recycling possessed at the time.

pop-up saw's foot pedal, Vol.II, JA0284; Vol.I, JA0225, but the only hazardous condition of which the Secretary must show American Recycling had heightened awareness is that the foot pedal was not protected (in any manner) against accidental activation.

Here, American Recycling's managers and supervisors (Mr. Santiago, Mr. Meindl, Mr. Joslin, Mr. Rivera, Mr. Hart, and Mr. Hess) all knew that the pop-up saw did not have a cover or guard, SPA0099-100, and also knew from numerous employee complaints that the unprotected pedal created a unintentional activation hazard. SPA0101-103. Mr. Lebron complained twice weekly to Mr. Rivera about the "free," "loose," and "dirty" foot pedal, Vol.I, JA0013-14, JA0016-17, and Mr. Rivera relayed his safety complaints, along with his own concerns about the foot pedal – including that it "would just go everywhere" and that "you had to look for the pedal every time you cut something," *id.*, JA0055-56 – to Mr. Mangold, Mr. Joslin, and Mr. Meindl. *Id.*, JA0055-59. These complaints put American Recycling on notice that the foot pedal was susceptible to being accidentally stepped on and activated, which is exactly how Mr. Lebron's hand was amputated. SPA0010, SPA0102; Vol.I, JA0031-32.

CSHO Donofrio's conversations with American Recycling employees during the inspection further demonstrated that American Recycling knew that the unprotected pedal was hazardous. Mr. Rivera told CSHO Donofrio that he

complained to Mr. Joslin three or four times about the foot pedal and the unintentional activation hazard, Vol.I, JA0142-143; Vol.II, JA0438-439, and also complained to Mr. Meindl about the pedal's lack of a toe guard, but Mr. Meindl responded that they "needed production [and] to continue using the saw." Vol.I, JA0107. Two other supervisors, Mr. Hart and Mr. Hess, also told CSHO Donofrio that they complained to Mr. Meindl that the pedal moved around and was not covered. *Id.*, JA0107, JA0139, JA0143-145, JA0148-150; Vol.II, JA0427, JA0441. Mr. Meindl conceded during the inspection that "he may have been told about the foot pedal not being covered," but "could not recall." Vol.I, JA0104-105; Vol.II, JA0430. Add to this American Recycling's safety manual's requirement "to protect employees from accidental activation of equipment by tripping," SPA0103 (citing Vol.II, JA0376B), and substantial evidence supports that American Recycling had heightened awareness that the unprotected foot pedal created an unintentional activation hazard.

Contrary to American Recycling's assertion, Br. 39-40, CSHO Donofrio's testimony about Mr. Rivera's, Mr. Hart's, and Mr. Hess's statements during his inspection is not hearsay, Br. 39-41, because – as the Secretary's counsel explained during the hearing, Vol.I, JA0085-86, JA0096 – each out-of-court statement about which CSHO Donofrio testified was made by an American Recycling employee "on a matter within the scope of their employment." *See P. Gioioso & Sons, Inc.*,

675 F.3d at 74 (statements made by employees to OSHA's compliance officer are not hearsay under Fed. R. Evid. 801(d)(2)(D)[11]) (citation omitted). It is well-settled that CSHO testimony regarding employees' inspection statements is admissible during Commission proceedings. *See, e.g., MVM Contracting Corp.*, 23 BNA OSHC 1164, 1166 (No. 07-1350, 2010); *Regina Constr. Co.*, 15 BNA OSHC 1044, 1047 (No. 87-1309, 1991). Nor is the testimony "hearsay within hearsay" under Fed. R. Evid. 805[12] because Fed. R. Evid. 801(d)(2)(D) "opposing-party statements" are explicitly *not* hearsay, and "each part of the combined statements" about which CSHO Donofrio testified is attributable to an active American Recycling employee speaking about a matter within the scope of his employment. *See Regina Constr. Co.*, 15 BNA OSHC at 1047-48.

The ALJ also reasonably afforded probative weight to CSHO Donofrio's testimony about the inspection statements, *see* SPA0102 (the inspection was "close in time to the accident and conditions surrounding it"), and American Recycling's challenges to its value are not compelling. Br. 41. Just because Mr. Rivera's in-court testimony did not specifically mention the pedal's lack of a cover does not make it "inconsistent" with the more specific statement that he gave CSHO

[11] The Federal Rules of Evidence are applicable to Commission hearings. 29 C.F.R. § 2200.71.

[12] Fed. R. Evid. 805 states that "[h]earsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule."

Donofrio nearly two years earlier. The fact that neither Mr. Hart nor Mr. Hess testified does not affect the admissibility of their inspection statements, *Regina Constr. Co.*, 15 BNA OSHC at 1049, and the fact that Mr. Hart did not sign a written statement that CSHO Donofrio prepared for him does not mean that he "refused" to sign it for any specific reason, nor does subsequently stating at a deposition that he "did not remember complaining about the foot pedal" mean that he "disavowed" his inspection statements to CSHO Donofrio. Vol.I, JA0145-146. The record simply does not support American Recycling's inferential leaps. Moreover, even if the Court ignored CSHO Donofrio's testimony and concluded, as American Recycling proposes, that no employees specifically complained about the lack of a pedal *guard*, Br. 13, 38, Mr. Rivera's and Mr. Lebron's testimony about the foot pedal's *movement and condition*, Vol.I, JA0013-14, JA0016-17, JA0055-59, is sufficient to establish that American Recycling had heightened awareness of the foot pedal's accidental activation hazard, and the ALJ's findings should be upheld. *Cellular Phone Taskforce*, 205 F.3d at 89.

C. American Recycling's Failure to Address the Unanchored Pop-Up Saw and its Unprotected Foot Pedal Demonstrated Plain Indifference to Employee Safety.

Substantial evidence supports the ALJ's determination that American Recycling was plainly indifferent to the safety of its employees.[13] American Recycling's supervisors and managers knew that the pop-up saw jeopardized wood shop employees' safety, but still required them to use the saw without correcting its issues. Such willingness to expose employees to a known safety hazard is common grounds for finding that an employer was plainly indifferent to employee safety. *See, e.g., Valdak Corp. v. OSHRC*, 73 F.3d 1466, 1469 (8th Cir. 1996) (employer knew that a machine's safety mechanism was broken, but still required employees to use the machine); *Kent Nowlin Const. Co., Inc. v. OSHRC*, 648 F.2d 1278, 1280 (10th Cir. 1981) (three supervisors knew that a crane created a hazard, but required employees to use it anyway); *McKie Ford, Inc. v. Sec'y of Labor*, 191 F.3d 853, 857 (8th Cir. 1999) (despite a prior accident, employer required employees to continue using a hazardous freight elevator).

[13] Muddling the distinction between the intentional disregard and plain indifference tests, American Recycling describes several cases "where… a company was aware of a standard … but nonetheless substituted its own judgment regarding what was necessary to comply." Br. 31. But in plain indifference cases, "willfulness can be inferred … without direct evidence that the employer knew of each individual violation," because the employer's indifferent mental state "substitutes for knowledge," rendering it unnecessary to also show that the employer knew about a relevant OSHA standard or a condition that violated it. *A.E. Staley*, 295 F.3d at 1351-52; *see also Georgia Electric Co. v. Marshall*, 595 F.2d 309, 319-20 (5th Cir. 1979) (employer that "never made any effort to acquaint its supervisory personnel with the OSHA standards" willfully violated a standard despite its lack of awareness of the standard).

The ease with which American Recycling remedied the pop-up saw's hazards after Mr. Lebron's injury also exhibited an "indifference to implement even simple safety measures," SPA0104, as American Recycling bolted the pop-up saw to the floor about an hour after Mr. Lebron's injury using in-stock tools, Vol.I, JA0061-62, JA0064-65, JA0217-218, JA0250-251, and installed a guarded foot pedal a few days later. *Id.*, JA0062-63, JA0189, JA0219-220; Vol.II, JA0455. Its speedy acquisition of a guarded foot pedal also confirmed that, when American Recycling previously replaced the foot pedal in April 2012, *id.*, JA0251-252, it "chose to purchase a replacement foot pedal without a guard or other protection against accidental tripping," even though the long air hose that attached the pedal to the saw "increased the likelihood of tripping and accidental activation of the blade." SPA0103.

Similar to the employer in *Georgia Electric Co.*, 595 F.2d at 319, American Recycling provided no evidence that it attempted to comply with applicable OSHA requirements, SPA0090, SPA0106, nor did it perform "any oversight of its managers' safety efforts." SPA0092. Additionally, none of American Recycling's managers attempted to implement the safety manual, SPA0089, SPA0090-91; *see also* SPA0105 (finding that "it appears none of [American Recycling's] management read the safety manual … [nor did] they train its employees on safety rules"), which contained safety rules that were extremely similar to 29 C.F.R. §§

1910.212(b) and 1910.213(b)(6). Vol.II, JA0376A-C. Nor did American Recycling tailor the manual to the facility, SPA0016, SPA0092, SPA0105, SPA0106; Vol.I, JA0077-78, JA0128-129 (CSHO Donofrio's testimony explaining that the manual required American Recycling to write site specific procedures); *see also* SPA0039-41 (the manual's "lock-out/tag-out" program was "boilerplate and not adapted to its facility," and "the forms provided in the manual to assist an employer with establishing its procedures, assessments, and training were blank").

Furthermore, American Recycling "made little to no effort to train its employees or supervisors on safety matters." SPA0091; *see also* SPA0106. No safety training was provided to Mr. Rivera or his subordinates prior to Mr. Lebron's injury, Vol.I, JA0006, JA0044-46, and several other violations that the ALJ affirmed in this case concerned the company's failure to provide requisite safety training to its employees. *See, e.g.*, SPA0056-57 (affirming serious violation of 29 C.F.R. § 1910.178(l)(1)(i) for allowing employees to operate forklifts without requisite training). Additionally, American Recycling made no effort to post instructions and safety warnings on machines in a language that its employees could read. Vol.I, JA0024, JA0071, JA0215, JA0226; SPA0091, SPA0106.

Taken together, this evidence establishes that American Recycling deliberately put workers in harm's way and generally had "a nonchalant and

dismissive attitude toward safety." SPA0093. The ALJ thus reasonably concluded that even if American Recycling knew that the condition of its pop-up saw violated 29 C.F.R. §§ 1910.212(b) and 1910.213(b)(6), it would not care, and the Court should uphold that American Recycling willfully violated the cited provisions.[14] *Loretto-Oswego*, 692 F.3d at 73

American Recycling's attempts to rebut the willfulness finding by citing the existence of its unimplemented safety manual, two unrelated repairs that it made to the pop-up saw in April 2012, and the so-called audits that its insurance company

[14] Contrary to American Recycling's suggestion, neither *A.E. Staley* nor *AJP Constr., Inc.* modified the "plain indifference" definition to require a "pattern or practice" of disregarding warnings or failing to correct hazards. Br. 32-33, 43. While *AJP Const., Inc.* simply affirmed that an employer demonstrated plain indifference because "prior citations and warnings coupled with [the employer's] failure to act demonstrated that it was aware of the unsafe conditions and yet chose not to correct them," *AJP Const., Inc.*, 357 F.3d at 75, American Recycling lifts the "pattern or practice" language from *A.E. Staley*, 295 F.3d at 1347. But the Commission decision preceding *A.E. Staley* explained that finding "a pattern, practice, or course of conduct" is only required when the Secretary seeks to characterize as "willful" a series of disparate violations – such as 89 separate violations of a single standard – based solely on "general evidence" of an employer's indifference to safety. *A.E. Staley Mfg. Co.*, 19 BNA OSHC 1199, 1212-13, n.28 (Nos. 91-0637 & 91-0638, 2000). Such a finding is not required, however, where the Secretary proves that an individual violation was willful because the employer "had a heightened awareness of the illegality of the conduct or condition, yet failed to take corrective action." *Id.*, 19 BNA OSHC at 1212; *see also A.E. Staley*, 295 F.3d at 1347 ("Even a single violation of the OSH Act may be found willful…").

periodically conducted of the facility, are unavailing.[15] Br. 42-43. Also mentioned is the hiring of Mr. Joslin in September 2012 and the minor improvements that he made prior to Mr. Lebron's injury. But taking some steps toward improving safety does not negate willfulness. *See Sal Masonry Contractors*, 15 BNA OSHC 1609, 1613-14 (No. 87–2007, 1992). And, even Mr. Joslin evinced an indifference to safety when he required Mr. Rivera to "just find the guys who want to run" the saw rather than addressing its hazards, Vol.I, JA0059, and admitted that he "probably" knew that the foot pedal was not covered, but "hadn't given it much thought." *Id.*, JA0211-212.

Moreover, the ALJ appropriately characterized American Recycling's overall safety program as "minimal," explaining that American Recycling was responsible for employee safety both before and after Mr. Joslin was hired, and that the company "cannot defer its responsibility for implementing safety in its facility to a single person." SPA0105. American Recycling's lack of a meaningful safety program is therefore probative of its plain indifference. *See, e.g.*, *McKie Ford, Inc.*, 191 F.3d 853 at 857 (employer had "no meaningful safety program"); *Valdak Corp.*, 73 F.3d at 1469 (8th Cir. 1996) (employer had "no formal safety programs," including a "troubling" lack of training).

[15] The record's only evidence of Liberty Mutual's audits is Mr. Santiago's ambiguous testimony that Liberty Mutual visited American Recycling "periodically…to see the nature of the business." Vol.I, JA0169; *see* JA0169-171.

Because the D.C. Circuit has held that a "good faith, reasonable belief by an employer that its conduct conformed to the law negates a finding of willfulness." *Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1255 (D.C. Cir. 2012), American Recycling claims that it believed that the pop-up saw's weight sufficiently anchored it, and disingenuously attributes its failure to protect the foot pedal to a "difference in interpretation." Br. 37-38. But there is no "generic good faith defense" to willful violations, *Stark Excavating, Inc. v. Perez*, 811 F.3d 922, 928 (7th Cir. 2016) (citation omitted), and to negate that it acted willfully, an employer has the burden to prove that it made objectively reasonable efforts to comply with the OSH Act. *Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1127 (No. 88-572, 1993); *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444-45 (No. 91-102, 1993).

The ALJ properly rejected American Recycling's good faith arguments below, SPA0083, SPA0104-107, as American Recycling offered no evidence that it made *any* efforts to comply with OSHA's standards or to correct the pop-up saw's hazardous condition. American Recycling's lack of compliance efforts therefore distinguishes it from the employer in *Dayton Tire*, Br. 37-38, which – after each incident that reasonably put it on notice of problems with its lockout-tagout (LOTO) program – "made *some* effort to ensure [the company's] LOTO compliance." *Dayton Tire*, 671 F.3d at 1257. Even if American Recycling had shown that it read, but misinterpreted, OSHA's standards, American Recycling

could have learned of its obligation to anchor the saw and protect the foot pedal from its own safety manual. SPA0090-91, SPA0100, SPA0103, SPA0104, SPA0107; Vol.II, JA0376A-C; *see also Morrison-Knudsen Co.*, 16 BNA OSHC at 1126-27 (employer ignoring the requirements of its own safety program evidenced its willfulness). But American Recycling did not implement its manual, SPA0091, SPA0100, SPA0105, and it is clear that American Recycling did not "interpret" anything, but rather was willfully blind to its obligations under the OSH Act and casually dismissive of its employees' safety.

IV. The ALJ Correctly Determined that the BPS Applied to American Recycling.

The Court should affirm the ALJ's determination that American Recycling violated the BPS by failing to establish a written exposure control plan and provide bloodborne pathogen training. The BPS applies to "all occupational exposure to blood," 29 C.F.R. 1910.1030(a), and defines "occupational exposure" as "reasonably anticipated … contact with blood … that may result from the performance of an employee's duties." 29 C.F.R. § 1910.1030(b). The BPS is not limited to specific industries or specific types of jobs because "the hazard of exposure to infectious materials affects employees in many types of employment." Vol.II, JA0542; *see also* 56 Fed. Reg. 64004, 64089 (Dec. 6, 1991) (the BPS seeks to "protect all employees at risk regardless of their job title or place of employment"); *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 827 (7th Cir. 1993)

("The risk [of exposure] goes with practices…rather than with industries, and the rule is therefore based on practices rather than on industries."). Accordingly, to achieve the BPS's purpose of "prevent[ing] bloodborne infections by eliminating or reducing occupational exposure," employers must "examine the *tasks and procedures* and determine if it can be reasonably anticipated that exposure may occur." 56 Fed. Reg. at 64102 (emphasis added).

Here, the task at issue was cleaning blood, and to find that cleaning blood was a "reasonably anticipated" job duty at American Recycling, the ALJ relied on CSHO Mielonen's testimony, Vol.I, JA0158-159 (it is reasonable to expect occupational exposure to blood at a woodworking facility where employees clean blood after injuries), the common sense expectation that woodworking activities may result in injuries that cause bleeding,[16] SPA0119, SPA0119 n.166, and American Recycling's 2011 and 2012 injury logs, which documented four injuries that "likely caused bleeding" prior to Mr. Lebron's amputation injury, including "a cut on the hand from a dismantler resulting in 51 days away from work." SPA0118; *see* Vol.II, JA0367; Vol.I, JA0159-160. The logs do not indicate whether the prior injuries actually required employees to clean blood, but the ALJ

[16] Looking to the nature of the work to assess whether exposure to blood is reasonably anticipated is consistent with Commission precedent. *Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2169, 2176 (No. 97-257, 2000) (where the nature of the work involved "cutting out and replacing, large heavy steel plates that might have sharp edges," Commission found that "an injury that would cause bleeding was reasonably foreseeable").

reasonably inferred from their descriptions that they "more likely than not result[ed] in bleeding." SPA0119. American Recycling's employees also cleaned blood as a job duty on December 3, 2012, when Mr. Joslin and "two guys from maintenance" cleaned Mr. Lebron's blood after the amputation. Vol.I, JA0061.

American Recycling blurs the distinction between a challenge to a standard-as-applied (which is reviewed for substantial evidence) and to a standard-as-interpreted (in which the Court defers to the Secretary's interpretation if it is reasonable), *see Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Donovan*, 715 F.2d 57, 61-64 (2d Cir. 1983), but the crux of its arguments is that "occupational exposure" should only extend to "frequent occupational exposure to pathogens in the course of performing the tasks that are an integral part of the job duties they were hired to do." Br. 51. This position lacks merit, as it conflicts with the plain language of the BPS's definition of "occupational exposure," and contravenes the BPS's explicit intent to cover all reasonably anticipated occupational exposures to blood. 29 C.F.R. § 1910.1030(a) & (b).

American Recycling first points to the BPS's preamble, Br. 50-51, but that lends no credibility to its position. The preamble distinguishes reasonably anticipated occupational exposures from those of Good Samaritans – who voluntarily assist injured coworkers after an accident, and are thus exposed to blood "while performing a task that he or she is not required to do" – but it does

not require exposures to occur frequently or routinely to be reasonably anticipated. 56 Fed. Reg. at 64101-02. In fact, the preamble explains that the BPS's definition of "occupational exposure" intentionally omitted language from the proposed version of the rule that would have excluded "incidental exposures that may take place on the job and that are neither reasonably nor routinely expected and that the worker is not required to incur in the normal course of employment." *Id.* at 64102 (quoting 54 Fed. Reg. 23134, 23112 (May 30, 1989)). Commenters aptly stated that there "might be situations where the exposures are incidental or infrequent yet reasonably anticipated due to the nature of the employee's duties and thus, not excluded from coverage," and the Secretary thus deleted the "confusing" language that American Recycling now attempts to reinsert into the BPS. *Id.*

Nor do the cited unreviewed[17] ALJ decisions and OSHA letters of interpretation support that exposure must be "frequent" or "routine" to be reasonably anticipated. Br. 52-54. For example, the two first aid responder cases – *Sec'y of Labor v. Borg-Warner Protective Services Corp.*, 18 BNA OSHC 1119 (No. 96-0253, 1997) (ALJ) (security guards had occupational exposure to blood, albeit "minimal," because they were required to give first aid to injured employees) and *Crown Cork & Seal USA, Inc.*, 23 BNA OSHC 1674 (No. 09-0973, 2011) (ALJ) (employees did not have occupational exposure because they were not

[17] Unreviewed ALJ decisions have no precedential value. *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2120 n. 4 (No. 07-1578, 2012).

assigned or expected to give first aid in the event of an emergency) – show that employee exposure must result from the performance of an assigned job duty, but neither case suggests that a first aid responder's exposure must be frequent or routine to be reasonably anticipated.

And, while American Recycling offers cases that considered the frequency of prior exposures when assessing if an exposure was reasonably anticipated, *see, e.g.*, *Sec'y of Labor v. UniFirst Corp.*, 24 BNA OSHC 2261 (No. 13-1703, 2014) (ALJ) (a laundry employee who handled a single, "atypical" blood-stained garment did not have reasonably anticipated exposure), evidence of past exposures may be relevant, but is not required, because occupational exposure includes "the potential for contact as well as actual contact." *Sec'y of Labor v. Unifirst Corp.*, 2015 CCH OSHD (CCH) ¶ 33423, 2014 WL 6722567, at *13, *15 (No. 12-1304, 2014) (ALJ). To require exposures to have actually occurred in the past would contradict the BPS's goal of *preventing* all foreseeable workplace exposures to blood. 56 Fed. Reg. at 64102.

Contrary to American Recycling's misreading, Br. 53-54, OSHA's 1992 letter of interpretation makes clear that "[w]orkers who are engaged in maintenance operations and who have occupational exposure are covered under the standard," and "it is the employer's responsibility to determine which job classifications or specific tasks and procedures may place employees at risk."

OSHA Std. Interp. 1910.1030 (DOL), "Bloodborne pathogens standard's relationship to employees who perform maintenance operations," available at 1992 WL 12146518, *1 (Aug. 14, 1992). Accordingly, it was incumbent on American Recycling to assess whether it would assign any of its employees, including its maintenance staff, to complete a task resulting in potential contact with blood. But American Recycling did not do so, even though, as discussed above, substantial evidence demonstrated that cleaning blood was a reasonably anticipated job duty, and actually fell to Mr. Joslin and his maintenance staff.[18]

V. Substantial Evidence Supports the ALJ's Finding that the Accumulations of Combustible Wood Dust at American Recycling Constituted a Serious Violation of OSHA's Housekeeping Standard.

OSHA's housekeeping standard requires that "places of employment" and "[t]he floor of every workroom" be kept clean. 29 C.F.R. § 1910.22(a)(1)-(2), and because it presumes that a hazard exists if a workplace is not kept in a clean condition, the type of hazard created "is relevant only to whether the violation constitutes a 'serious' one." *Bunge Corp.* 638 F.2d at 834. Combustible dust accumulations constitute a serious violation of the standard when they are "significant" or "excessive" enough to create a fire or explosion hazard. *Con Agra*

[18] American Recycling repeatedly protests that the ALJ's decision would expand the BPS to "cover every employee in every workplace." Br. 49. This is plainly wrong, as the BPS only applied to American Recycling because the evidence demonstrated that cleaning blood was a reasonably anticipated job duty at American Recycling. *See supra* pp. 49-50.

Inc. v. Sec'y of Labor, 672 F.2d 699, 702 (8th Cir. 1982); *Vitakraft Sunseed, Inc.*, 25 BNA OSHC 1176, 1183 (No. 12-1811, 2014).

Substantial evidence supports the ALJ's determination that American Recycling's facility was not kept in a clean condition, SPA0021-26, as CSHO Donofrio documented and photographed four instances of excessive wood dust during his December 3, 2012 visit. Vol.II, JA0266-267, JA0285-287, JA0294-295. He took measurements of three of the four instances,[19] omitting only the piles of dust on the "ceiling joists" that were "approximately one inch" thick. Vol.II, JA0266-267; Vol.I, JA0108-JA0113, JA0125; *see* Vol.II, JA0285. A defective dust collector system was partly to blame; Mr. Meindl admitted that dust accumulated on the ceiling joists and that American Recycling's dust collector system had problems, Vol.I, JA0109-110, adding that dust bags would sometimes break and cause dust to "fly all over the place." *Id.*, JA0255.

Mr. Meindl claimed that American Recycling cleaned dust at the end of every work day, Vol.I, JA0255, but considering that Mr. Rivera gave out assignments to wood shop employees at 7:00 a.m. on December 3, 2012, SPA0007; Vol.II, JA0437, and American Recycling shut down operations after Mr. Lebron's injury occurred at 8:45 a.m., SPA0009, SPA0011; Vol.I, JA0181,

[19] The observed instance of "one-half inch to one inch [of dust] on the walkway behind the panel saw" supported the citation item for 29 C.F.R. § 1910.22(a)(2), while the other three instances of excessive dust supported the citation item for 29 C.F.R. § 1910.22(a)(1). Vol. II, JA0266-267; SPA0021-22.

JA0248; Vol.II, JA0417, the excessive dust that CSHO Donofrio observed clearly did not accumulate from the less-than-two hours of work conducted that morning. Similarly, the one-inch-thick dust accumulations that CSHO Donofrio observed on the ceiling joists contradicts American Recycling's claim that it periodically cleaned the ceiling joists on weekends. Vol.I, JA0181, JA0255; Vol.II, JA0285. Because substantial evidence demonstrates that American Recycling's facility and workrooms were not kept in a clean condition, the company violated the housekeeping standard, 29 C.F.R. § 1910.22(a)(1)-(2), and both citation items should be upheld. *Loretto-Oswego*, 692 F.3d at 73.

Substantial evidence also supports the ALJ's determination that the dust accumulations created both fire and explosion hazards and constituted a serious violation, as all five elements of the "explosion pentagon" – including the three elements of the "fire triangle" – were present on December 3, 2012.[20] Far from just "four tiny piles," Br. 46, CSHO Donofrio's photographs and measurements show that the wood dust accumulations were excessive, Vol.II, JA0266-267, JA0285-287, JA0294-295; Vol.I, JA0108-113, and OSHA's laboratory analysis of the wood dust samples and American Recycling's MSDS sheets established that the dust was combustible. Vol.II, JA0288-294, JA0300-0354; Vol.I, JA0113-120.

[20] American Recycling objects that the ALJ failed to mention that the five factors of the explosion pentagon must all occur simultaneously for an explosion to occur, Br. 45, 47, but the ALJ plainly stated that all five factors were "present at [American Recycling's] facility on December 3, 2012." SPA0024.

The accumulations on the ceiling joists also proved that the wood dust had been suspended in air, SPA0023; Vol.II, JA0285, and American Recycling's wood shop was an enclosed building that could confine a dust cloud. SPA0024 (citing Vol.III, JA0634 (Section 3.3.12 of NFPA 664, defining "explosion hazard")). In fact, American Recycling knew that the wood dust accumulations created fire hazards, as Mr. Rivera testified that wood dust particles would "light up on fire, start smoking," Vol.I, JA0047, and both Mr. Rivera and Mr. Hart told CSHO Donofrio that American Recycling had "a fire at one of the woodworking locations" a few weeks before the inspection. *Id.*, JA0122-123.

In contesting the ALJ's reliance on NFPA 664, Br. 15-16[21], 44-47, American Recycling reveals its misunderstanding of both NFPA 664 and how industry standards are used. First, NFPA standards are advisory, but the Secretary may use industry codes to aid the interpretation of OSHA standards without promulgating the code as a standard. *A.E. Staley*, 19 BNA OSHC at 1219 (industry standards are not controlling but may be used to clarify the meaning of standards); *Gold Kist, Inc.*, 7 BNA OSHC 1855, 1859, 1861 (No. 76-2049, 1979) (industry codes may be used to aid the interpretation of OSHA standards without constituting an improper promulgation of a standard); *Con Agra Flour Milling Co.*,

[21] American Recycling also discusses provisions of NFPA 654, "Standard of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids," but those general standards are not applicable where a specific occupancy standard, such as NFPA 664, applies. Vol.III, JA0569.

16 BNA OSHC 1137, 1142, n.4 (No. 88-1250, 1993), *rev'd on other grounds*, 25 F.3d 653 (8th Cir. 1994) ("Like all evidence of industry custom or understanding, [industry standards] are not controlling but are simply additional evidence to be considered as part of the entire record.").

Accordingly, when the ALJ stated that each instance of excessive dust at American Recycling "exceeded the amount considered a hazard" by Section 6.4.2.2 of NFPA 664, the ALJ properly used NFPA 664 as evidence that the woodworking industry would consider American Recycling's wood dust accumulations as sufficient fuel for fire and explosion hazards. SPA0022; Vol.III, JA0639. And, contrary to American Recycling's assertion, Br. 45-46, the ALJ's use of NFPA 664 does not fail for lack of evidence of the surface area that the wood dust covered.[22] Although Section 4.2.1 of NFPA 664 defines a deflagration hazard as existing where wood dust accumulations "exceed 3.2mm (1/8 in.) over 5 percent of the area or 93 m^3 (1000 ft^2), whichever is smaller," Vol.III, JA0635,

[22] American Recycling's claim that the Commission requires evidence of the "horizontal area that was covered in dust" to substantiate a serious violation of 29 C.F.R. § 1910.22 is inaccurate, Br. 45, as it cites an unreviewed ALJ decision with no precedential value, *supra* p. 51 n.17, which found that OSHA had used NFPA 654 as a standard (based on arguments that NFPA 654 "applied" to the employer), and thus required proof of NFPA 654's surface coverage requirement. *Cooper Tire & Rubber Co.*, No. 11-1588, 2015 WL 9854708 at *44-46 (OSHRC Mar. 17, 2015) (ALJ). Here, the ALJ used NFPA 664 (not NFPA 654) as industry custom evidence (not as a standard), and the Secretary was not required to prove that NFPA 664's advisory guidelines were met.

Annex A to NFPA 664 explains that ceiling joist accumulations can satisfy this surface area measurement, as "the available surface area of the bar joist is about 5 percent of the floor area," and "[f]or steel beams, the equivalent surface area can be as high as 10 percent." Vol.III, JA0659. Here, the one-inch-thick accumulations that CSHO Donfrio observed and photographed on American Recycling's ceiling joists, Vol.II, JA0285; Vol.I, JA0109-111, would satisfy NFPA 664's five percent surface coverage criteria. *See A.E. Staley,* 19 BNA OSHC at 1220 n.41 (accepting photographs in lieu of precise measurements to establish that dust accumulations were substantial).

Moreover, the Secretary is not required to prove the "minimal explosive concentration" (MEC) of American Recycling's wood dust, Br. 46-47, because even if NFPA 664 were not advisory, it does not require MEC measurements to establish fire or explosion hazards.[23] Section 3.3.7 of NFPA 664 defines a "deflagration hazard" as existing when "(1) deflagrable wood dust is present as a layer on upward facing surfaces at a depth greater than that permitted in Section 4.7 or (2) deflagrable wood dust is suspended in the air at a concentration in excess of 25% of the MEC under normal operating conditions." Vol.III, JA0634. The definition is bifurcated because, if wood dust has accumulated in excess of NFPA's

[23] "The ALJ did not discuss the MEC," Br. 47, because American Recycling did not argue that MEC measurements were required until its petition for discretionary review. Vol.III, JA0853.

depth criteria, it is presumed that the dust is concentrated in amounts above the MEC. Annex A to NFPA 664 further clarifies that MEC measurements are not required, as MEC is listed as merely one of 13 factors that are "sometimes used" to determine the deflagration hazard of a dust, Vol.III, JA0654, and is not included in the guidelines for assessing deflagration hazards in buildings. Vol.III, JA0659. Because the combustible wood dust at American Recycling exceeded the NFPA's depth requirements, *see supra* pp. 57-58, and was observed in a building, *see* Vol.III, JA0634 (§ 3.3.12), NFPA 664's explosion hazard criteria are satisfied.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for review and affirm the Commission's decision.

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SEPTEMBER 20, 2016

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(B)

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SEPTEMBER 20, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2016, the following counsel of record for American Recycling and Manufacturing, Inc., was served with a copy of the foregoing Final Form Brief for the Secretary of Labor through the Court's CM/ECF filing system:

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