No. 16-11280

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PECO FOODS, INC.,

Petitioner – Appellant,

v.

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,

Respondent – Appellee.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Judge Heather A. Joys)

BRIEF FOR THE SECRETARY OF LABOR

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OCTOBER 12, 2016

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 enforcement proceeding brought by the Occupational Safety and Health Administration (OSHA)[1] before the Occupational Safety and Health Review Commission (Commission). After conducting an inspection of Peco Foods, Inc.'s (Peco) facility on February 12, 2015, OSHA issued Peco a citation for a serious violation of 29 C.F.R. § 1910.133(a)(1). App.1.[2] Peco timely contested the citation, App.2, and the Commission had jurisdiction over the proceeding under section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 659(c).

Following a one-day hearing, a Commission administrative law judge (ALJ) transmitted a written decision to the parties and the Commission's Executive Secretary on December 18, 2015, Supp.App.[3], which was docketed with the

[1] The Secretary of Labor's (Secretary) responsibilities under the statute 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 record documents in the Appendix that Peco filed on September 15, 2016, are abbreviated to the appendix tab number, followed by the page number ("App.[#], [page#]"). Because the Appendix is not consecutively paginated, the page number used in citations correlates with the original page number that appears on the document, unless otherwise indicated. Citations to Peco's opening brief are abbreviated "Br. [page#]."

[3] Although the Table of Contents to Peco's Appendix states that Tab 11 contains the ALJ's Notice of Decision, it actually contains the ALJ's Decision and Order.

Commission on December 21, 2015. App.12. The Commission did not direct the ALJ's decision for discretionary review, and – in accordance with 29 U.S.C. § 661(j) – the ALJ's decision became a final order of the Commission and disposed of all parties' claims on January 20, 2016. *See* App.14. A petition for review of a Commission's final order may be filed with an appropriate court of appeals within sixty days following its issuance, 29 U.S.C. § 660(a), making March 21, 2016, the final day for Peco to file a petition for review with this Court. Peco filed its petition for review on March 22, 2016, App.15, and the Court therefore lacks jurisdiction over this appeal.

STATEMENT OF THE ISSUES

1. Whether the Court has jurisdiction to hear this appeal where Peco filed its petition for review after the filing period provided by the OSH Act expired, and the Commission properly processed the ALJ's decision in accordance with its procedural regulations.

2. Whether the ALJ correctly determined that 29 C.F.R. § 1910.133(a)(1) – which requires employers to provide protection to employees who are exposed to eye and face hazards from "flying particles" – applied to Peco, where the plain meaning of "flying particles" encompasses drops of liquid splatter, and where substantial evidence supports the ALJ's finding that Peco's debone line workers

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The Secretary has therefore filed a Supplemental Appendix with the ALJ's Notice of Decision, references to which are abbreviated "Supp.App."

were actually exposed to eye safety hazards from the liquid that splattered during the chicken deboning process.

3. Whether substantial evidence supports the ALJ's determination that Peco had constructive knowledge of the eye safety hazard to which its debone line workers were exposed, where safety glasses are commonly used by other poultry processors to protect debone line workers' eyes, the liquid splatter hazard was obvious, and previous eye injuries and assessments of the debone line should have further alerted Peco to the need for eye protection.

4. Whether the ALJ correctly rejected Peco's affirmative defense that using safety glasses on the debone line would create a greater hazard than not using them, where Peco did not demonstrate that wearing safety glasses with defogging capabilities would create tripping and cutting hazards that outweigh the eye safety hazards on the debone line, or that using safety glasses on the debone line would create a consumer safety risk that outweighs the eye safety hazards to which its employees were exposed.

STATEMENT OF THE CASE

I. Procedural History

Peco appeals the Commission's January 20, 2016 final order affirming a citation that OSHA issued Peco for a serious violation of 29 C.F.R. § 1910.133(a)(1). App.11. OSHA issued the citation on June 5, 2015, App.1, and

Peco timely contested it on June 30, 2015. App.2. A Commission ALJ held a one-day hearing on October 29, 2015, pursuant to the Commission's procedures for "Simplified Proceedings," after which she transmitted a written decision to the parties and the Commission on December 18, 2015, Supp.App., and the Commission docketed the decision on December 21, 2016. App.12. Peco filed a petition for discretionary review on January 11, 2016, App.13, but because the Commission did not direct the ALJ's decision for review, it became a final order of the Commission on January 20, 2016. 29 U.S.C. § 661(j); *see* App.14.

Peco filed a petition for review with this Court on March 22, 2016, App.15, one day after the sixty-day filing period prescribed by 29 U.S.C. § 660(a) expired. This Court posed a jurisdictional question requesting that the parties address whether the Court has jurisdiction over Peco's petition for review, App.16, to which the Secretary responded on April 21, 2016, App.18, and Peco responded on June 8, 2016. App.19. On July 18, 2016, this Court ordered that the jurisdictional question be carried with the case and that the determination of the timeliness of Peco's petition for review be made following briefing on the merits.

II. Statement of Facts

A. Statutory and Regulatory Background.

The OSH Act, 29 U.S.C. §§ 651-678, is intended "to assure so far as possible every working man and woman in the Nation safe and healthful working

conditions and to preserve our human resources." 29 U.S.C. § 651(b). To effectuate that purpose, the OSH Act empowers the Secretary to promulgate and enforce workplace safety and health standards, *id.* §§ 655, 658, which must be liberally construed so as to afford workers the broadest possible protection. *National Eng'g Contracting Co. v. OSHA*, 928 F.2d 762, 767 (6th Cir. 1991).

OSHA enforces its standards 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. 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, and "shall make a report of any such determination which constitutes his final disposition of the proceedings." *Id.* § 661(j). Unless a Review Commission member directs it for discretionary review, "[t]he report of the [ALJ] shall become the final order of the Commission within thirty days after such report by the [ALJ]." *Id.*

Pursuant to 29 U.S.C. § 661(g)'s authorization "to make such rules as are necessary for the orderly transaction of its proceedings," the Commission has promulgated procedural regulations found in 29 C.F.R. part 2200. Subparts A through G of part 2200 provide the procedures that apply to most Commission

proceedings, but subpart M (29 C.F.R. §§ 2200.200–211) provides "Simplified Proceedings," which are used in a minority of cases in order to "reduce the time and expense of litigation." 29 C.F.R. § 2200.200; *see also* 60 Fed. Reg. 41805 (Aug. 14, 1995) (Simplified Proceedings are "designed to simplify and accelerate adjudication for cases that warrant a less formal, less costly process"). Subpart M outlines the criteria used for determining if a case is eligible for Simplified Proceedings, 29 C.F.R. § 2200.202, and provides that the Commission's Chief ALJ may assign a case to be adjudicated using Simplified Proceedings either at his own discretion or at the request of a party. *Id.* § 2200.203.

For regular, non-simplified Commission proceedings, subpart F of part 2200 provides the rules for "Post-Hearing Procedures," including rules governing the "Decisions of Judges" in 29 C.F.R. § 2200.90. Paragraph (b) addresses "The Judge's report," and includes the following procedure for docketing an ALJ's written decision:

> **(2) Docketing of Judge's report by Executive Secretary.** On the eleventh day after the transmittal of his decision to the parties, the Judge shall file his report with the Executive Secretary for docketing. The report shall consist of the record, including the Judge's decision, any petitions for discretionary review and statements in opposition to such petitions. Promptly upon receipt of the Judge's report, the Executive Secretary shall docket the report and notify all parties of the docketing date. The date of docketing of the Judge's report is the date that the Judge's report is made for purposes of section 12(j) of the Act, 29 U.S.C. 661(j).

Id. § 2200.90(b)(2). However, when a case has been assigned for Simplified Proceedings, the rules in 29 C.F.R. § 2200.209 specify when an ALJ will transmit a written decision to the parties and to the Commission for docketing. Section 2200.209 provides that the ALJ may issue a written decision if he or she does not render a decision from the bench, *id.* § 2200.209(f), and further states that

> [w]hen the Judge issues a written decision, it shall be filed simultaneously with the Commission and the parties. Once the Judge's order is transmitted to the Executive Secretary, § 2200.90(b) applies, with the exception of the 11-day period provided for in rule § 2200.90(b)(2).

Id. § 2200.209(g). After the ALJ's decision is docketed, any party that is dissatisfied with the ALJ's decision may petition the Commission for discretionary review. 29 C.F.R. § 2200.91(b). If the Commission does not direct review, the ALJ's decision becomes the final order of the Commission thirty days after it was docketed. 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90(d).

In subpart I of 29 C.F.R. Part 1910, OSHA has promulgated standards governing the use of personal protective equipment (PPE) by general industry employers. *See* 29 C.F.R. §§ 1910.132-138. Section 1910.133 of subpart I provides rules on the use of "Eye and Face Protection," and paragraph (a)(1) of that section states:

> The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or

> caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

Id. § 1910.133(a)(1).

B. OSHA's Inspection of Peco's Facility, OSHA's Issuance of a Citation, and the Hearing Before a Commission ALJ.

Peco is a food production company, and its Tuscaloosa, Alabama facility processes chickens for resale as various food products. App.6, 17-18; App.11, 2. In addition to permanent employees, Peco also employs temporary workers that it acquires from Onin, a temporary staffing agency. App.6, 58; App.11, 2. Peco's facility includes a "debone line," where workers use sharp knives to cut chickens into parts as chickens move down an assembly line. App.6, 19-20; App.11, 2-3. Approximately eighty employees stand roughly two-to-three feet apart on both sides of the production line, and a chicken that is placed on a cone moves down the line's conveyer belt, with each employee on the line making cuts to, and pulling off parts of, the bird as it proceeds to the end of the line. App.6, 21-22, 70-71, 101; App.11, 2-3; *see* App.7, 16-21[4] (C-4a-C-4f). The debone line area is refrigerated, so workers periodically warm their hands in a trough of warm water that runs along the line. App.6, 71-72; App.11, 2-3. Each work station has a knife holder,

[4] Because Tab 7 of the Appendix does not contain original pagination, citations to the documents in Tab 7 cite to the Secretary's manual count of the pages in the tab, followed in parentheses by the exhibit number that was assigned to the document during the Commission proceeding.

as well as a knife sharpener above the worker's head. App.6, 24, 53, 73, 87, 88; App.11, 3.

On February 12, 2015, OSHA opened an inspection of the Tuscaloosa facility in response to a report from Peco that one of its employees suffered a workplace injury; while retrieving a chicken that had fallen to the floor, a debone line worker accidently struck himself in the eye with his knife. App.6, 17, 52, 67-68, 91; App.11, 3. OSHA Compliance Safety and Health Officer (CSHO) Ronald Hynes conducted the inspection, and after an opening conference with Peco's human resources manager, Mr. Steven Johnston, CSHO Hynes donned protective equipment – a lab coat, a hair net, overshoes, safety glasses, a hard hat, and a gown – and was escorted into the plant to observe the work being conducted on the debone line. App.6, 18-19, 60; App.11, 4.

CSHO Hynes observed that chickens moved down the debone line "quite rapidly," App.6, 19, and that the work produced a large amount of "splatter of fluids, blood, chicken parts, and skin and cartilage and shavings of bone or splinters." App.6, 20-21; *see also* 24 (describing the "splatter everywhere" as consisting of "the juices, the blood, the fluids, [and] the chicken parts"). He took several photographs of the debone line and the residual mess that the work produced. App.7, 16-22 (C-4a-C-4g). When he examined Peco's injury and illness logs for the deboning line from years 2012 through 2015, CSHO Hynes

found that two prior eye injuries had occurred on the debone line, including an instance where blood from a chicken splattered into the worker's eye. App.6, 27-28, 47, 58; *see also* 124 (in 2013, worker got "blood in eye from blood pocket behind breast meat popping"); App.8, 167 (R-5). Based on his observations of the process, CSHO Hynes concluded that debone line workers were exposed to hazards due to their "use of sharp knives" and their exposure to "flying particles, [such as] chicken fats, blood, fluids, juices, cartilages, [and] bone shavings." App.6, 29.

CSHO Hynes observed that Peco's debone line workers wore gowns, cut-resistant gloves, hair and beard nets, aprons, and rubber boots during their work shifts. App.6, 21-22; App.11, 3. No one on the debone line was wearing safety glasses, and from his conversations with Onin's on-site manager and temporary employees at Peco, CSHO Hynes learned that Onin provides workers with safety glasses, but Peco forbids workers from wearing them on the debone line due to "USDA issues." App.6, 22, 23, 24, 54-55, 59-60. He did, however, observe one individual working off of the debone line who was wearing safety glasses, and who was later identified as the operator of the "saw cutter." App.6, 25, 75-76, 99; App.11, 4; *see* App.7, 20, 23 (C-4e and C-4h).

As a result of the inspection, OSHA issued Peco a citation on June 5, 2015, for a serious violation of 29 C.F.R. § 1910.133(a)(1) because "[p]rotective eyewear

equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment." App.6, 27; App.1, 6. In addition to his concern with the use of sharp knives, CSHO Hynes determined that employees were exposed to "flying particles" in the form of "the liquids, the fats, [and] the fluids" that were splattered on the debone line. App.6, 33-34. The citation assessed a civil penalty of $4590, App.1, 6; App.11, 1, 15, and recommended that employees wear safety glasses "to prevent employees from having further eye injuries on the deboning line." App.6, 29; App.11, 5.

Peco timely contested the citation on June 30, 2015, App.2, and submitted a request to use the Commission's Simplified Proceedings on July 14, 2015. App.3. The Commission's Chief ALJ Covette Rooney assigned the case to Simplified Proceedings on July 22, 2015, App.5; App.11, 2, and Commission ALJ Heather A. Joys thereafter administered the proceeding, including holding a one-day hearing on October 29, 2015. App.11, 2.

In addition to the observations that he made during his inspection of the plant, CSHO Hynes testified at the hearing about the practices of two other chicken processors in the region – specifically, Alatrade and Pilgrim's Pride – that, unlike Peco, required workers on the deboning line to wear safety glasses. App.6, 30. He explained that he personally observed workers at Pilgrim's Pride wearing safety glasses on the debone line, and also recalled that Alatrade showed him a training

video in which all debone line workers wore safety glasses during their work. App.6, 51. CSHO Hynes further explained that safety glasses are available in various colors, including with tinted lenses, and that some are available with "defogging capabilities" – *i.e.*, venting designed to reduce or eliminate the fogging of the lenses. App.6, 122-24.

Peco offered testimony from three of its employees: Sylvia Prince, a superintendent who supervised the debone line supervisors, App.6, 65-66, Amber Dunkling, the safety and health manager, App.6, 90, and Bryan Bradley, a quality assurance manager. App.6, 115. Ms. Prince and Ms. Dunkling discussed the work on the debone line and practices that Peco has adopted in an effort to control the spread of debris during the deboning process. Ms. Prince stated that debone line workers are instructed to make cuts to the bird in front of their bodies, and that debris from the bird ("fat and bones") is intended to fall into a tray positioned below them. App.6, 71. However, she further explained that debris would get "on the floor or on the line," requiring Peco to periodically wash the area. App.6, 74. Ms. Dunkling also stated that debone line workers make cuts away from their bodies, and that Peco has "debone floor attendants" who intentionally "wet the area so that things don't fly around." App.6, 100, 101. Both Ms. Price and Ms. Dunkling acknowledged three prior eye injuries that debone line workers suffered over the past ten years. App.6, 82-83, 102-03.

Ms. Dunkling discussed several "hazard assessments" that Peco conducted of the debone line, from which it allegedly determined that eye protection was not needed on the debone line. In addition to a 1998 assessment conducted by the "DCH Health System," App.6, 95, 109-10, which did not address eye or face hazards, App.11, 4; App.8, 155 (R-1), Ms. Dunkling testified regarding a hazard assessment that two Peco employees (Alexis Watts and Mr. Johnston) completed in 2013, App.6, 95-96, 109-110; App.8, 163 (R-4); App.11, 4-5, and a March 2015 assessment that Ms. Dunkling completed while OSHA's inspection was in-progress. App.6, 96-99, 110-11; App.8, 161-62 (R-2 and R-3); App.11, 5. Additionally, Ms. Dunkling discussed an "experiment" that she conducted in August and September of 2015 (after OSHA issued its citation), in which a handful of randomly-selected debone line workers wore goggles for an hour of their shift, after which a nurse would count the number of drops of liquid, or "specks", that had landed on the goggles. App.6, 103-08. Ms. Dunkling explained that they used goggles, rather than safety glasses, for the experiment, App.6, 104-05, 113; *compare* App.8, 180 (R-15) (photograph of safety glasses) *with* App.8, 182 (R-16) (photograph of goggles), and that Peco ultimately counted a total of nineteen specks that landed on the tested workers' goggles. App.6, 106-07; App.8, 168-69 (R-6).

Ms. Prince stated that she believed that safety glasses could not be used on the debone line because of fogging issues. She stated that the refrigerated work area, combined with the heat from the hand-warming trough, will cause her prescription spectacles to fog. App.6, 72, 80, 83. Ms. Prince further claimed that Peco once "had a young man trip" because of fogged glasses, App.6, 73, and also speculated that fogged glasses might cause workers to "cut themselves or others." App.6, 76. She reported that the saw cutter – who wears safety glasses because "when the blade hits the chicken, [debris] flies back in his face," App.6, 76 – has had problems with his safety glasses fogging, but she did not know whether the safety glasses that Peco issued the saw cutter were equipped with defogging capabilities. App.6, 86.

Peco's witnesses also claimed that allowing debone line workers to wear safety glasses would create a food safety risk to the company's customers. Ms. Prince stated that a Peco employee previously dropped a pair of safety glasses "into a tub of tenders, and it was sent to a customer," App.6, 76-77, and expressed concern that, if glasses were to break and get into the product, it would be hard to detect due to the glasses' transparency. App.6, 83; *see also* 108 (Ms. Dunkling testifying to her concern that safety glasses could fall off someone's head and get into the product). Mr. Bradley, who is in charge of "food safety, food quality, regulatory compliance with USDA" at Peco, App.6, 115, similarly stated that he

believed that the use of "safety glasses … would increase [Peco's] liability of having clear glass or brittle plastic that could be a food safety hazard." App.6, 117; App.8. He claimed that it would be difficult for Peco to detect glass or brittle plastic if it fell into the product, App.6, 118, and concluded that "the food safety hazard would far outweigh the benefit of everybody wearing those clear glasses." App.6, 119.

C. The ALJ's Decision Affirming OSHA's Citation.

The ALJ found that the Secretary proved by a preponderance of the evidence that Peco violated 29 C.F.R. § 1910.133(a)(1), and first determined that the standard applied because Peco's debone line employees were exposed to eye hazards from "flying particles" that necessitated the use of eye protection. App.11, 6-10. The ALJ looked to dictionary definitions of the words "flying" and "particle" to determine that the plain meaning of the term "flying particles" encompasses particles of liquid splatter. App.11, 8. However, the ALJ determined that neither "flying particles," nor the other sources of eye and face hazards listed in 29 C.F.R. § 1910.133(a)(1), encompass hazards created by the use of knives, *id.*, and thereafter considered only the eye safety hazard created by the flying particles of liquid splatter.

Because "the eye is an especially delicate organ and … any foreign material in the eye presents the potential for injury," App.11, 9 (quoting *Vanco Constr. Inc.*,

11 BNA OSHC 1058, 1060 (No. 79-4945, 1992)), the ALJ next concluded that the flying particles of liquid splatter created a significant risk of harm to Peco's debone line workers, and further determined that eye safety hazards from liquid splatter actually existed on Peco's debone line.[5] *Id.*, 7-9. To make the latter finding, the ALJ credited CSHO Hynes' testimony regarding the splattered liquid and chicken parts that he observed during his inspection, App.11, 7; *see* App.6, 19-20, 24, and also found that the photographs of the debone line made clear that "work on the debone line is messy," as they depicted "visible liquid on the product and in the area" and "[c]hicken skin and fat splatter …throughout the area." App.11, 7. Testimony from Peco's witnesses also indicated that the deboning process produced substantial liquid splatter, as Ms. Dunkling acknowledged that Peco intentionally wets the area "so that things don't fly around," and trains debone line workers to cut away from their body. *Id.* The ALJ noted that debone line workers must periodically reach over their head to sharpen their knives (thus increasing the likelihood of eye and face exposure to debris and splatter), and found that Ms. Dunkling's 2015 safety goggle experiment further indicated that "drops of liquid fly toward the eyes of employees working on the debone line." *Id.*

Because it was "undisputed that employees on the debone line do not use eye protection" despite this exposure to eye hazards from flying particles of liquid

[5] The ALJ did not, however, find sufficient evidence that the splatter included bone shards, fragments, or splinters. App.11, 7-8.

splatter, the ALJ found that Peco was not in compliance with the standard, App.11, 10, and also concluded that Peco had constructive knowledge of the hazard for which the use of PPE was required. App.11, 9-11. The ALJ found that "safety glasses are recognized in the industry as commonly used equipment for employees working on debone lines" based on CSHO Hynes' "unrebutted testimony that other chicken processing facilities use protective eye wear on the debone line," as well as Onin's practice of providing safety glasses to its workers at Peco, and Mr. Bradley's testimony that Peco had determined that "the food safety hazard outweighed the benefit of wearing the safety glasses." App.6, 9. Additionally, the ALJ found that the messiness of the work was "obvious to any observer," App.6, 11, and that the prior eye injury suffered by a debone line worker when chicken blood splattered into the worker's eye would have alerted Peco to the eye safety hazard as early as 2013. *Id*. The work practices that Peco implemented to control the splatter, as well as the drops of splatter that were observed on the workers' goggles during Ms. Dunkling's safety goggle experiment, further showed that Peco was aware of the liquid splatter to which debone line employees were exposed, and should have recognized that eye protection was needed. App.6, 9, 11.

After determining that the Secretary had proven its *prima facie* case, the ALJ rejected three affirmative defenses that Peco raised during the proceeding, App.6, 12-15, including Peco's argument that requiring debone line workers to wear

safety glasses would create a greater hazard than not wearing them. App.6, 13-15. Peco argued that safety glasses would fog and thereby increase the risk of tripping or cutting accidents, but the ALJ dismissed this argument because Peco failed to rebut CSHO Hynes testimony that safety glasses with defogging capabilities are available, and also "failed to establish [that] the hazard created by fogged glasses was greater than the hazard of splatter in an employee's eye." App.6, 14. Peco also argued that the potential for safety glasses to get into the food would create a consumer safety risk, but the ALJ found that Peco did not provide "facts sufficient to find [that] the potential hazard to the customer exceeds the hazard to employees," nor did the company explain why debone line workers' use of safety glasses was "more likely to contaminate the food product than safety glasses worn by other employees," such as the worker using the saw cutter. *Id*. Accordingly, the ALJ denied Peco's "greater hazard" defense and affirmed the serious violation of the standard. App.6, 15, 16.

D. Peco's Untimely Appeal to This Court.

The ALJ's decision was docketed with the Commission on December 21, 2016, App.12, and because the Commission did not direct it for discretionary review, the decision became a final order of the Commission on January 20, 2016. 29 U.S.C. § 661(j); *see* App.14. Peco filed its petition for review with this Court

on March 22, 2016, App.15, one day after the sixty-day filing period prescribed by 29 U.S.C. § 660(a) expired.

III. Standard of Review

On review, the factual findings in Commission decisions are entitled to "considerable deference," *Quinlan, d.b.a. Quinlan Enters. v. Sec'y, U.S. Dept. of Labor*, 812 F.3d 832, 837 (11th Cir. 2016), and a reviewing court must uphold the Commission's decision if it is supported by "substantial evidence on the record considered as a whole." 29 U.S.C. § 660(a); *Quinlan*, 812 F.3d at 837. "[S]ubstantial evidence is more than a scintilla and is such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Quinlan*, 812 F.3d at 837 (citations omitted). Where the Commission does not direct review of an ALJ's decision, the ALJ's findings become the Commission's, and the substantial evidence standard "applies with undiminished force" to the ALJ's findings. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 108 (1st Cir. 1997).

The Commission's legal determinations "must be upheld as long as they are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Quinlan*, 812 F.3d at 837 (citing 5 U.S.C. § 706(a)(2)) (internal quotations omitted).

SUMMARY OF ARGUMENT

The Court must dismiss this appeal for want of jurisdiction because Peco did not timely file its petition for review. The Commission issued its final order in this case on January 20, 2016, making Peco's appeal due by March 21, 2016. *See* App. 14. Peco, however, did not file its appeal until March 22, 2016. App.15. The Commission properly processed the ALJ's decision in accordance with the rules for Simplified Proceedings, and because the sixty-day filing period provided by 29 U.S.C. 660(a) is jurisdictional, Peco's failure to file within that time period is fatal to the appeal.

Even if this Court had jurisdiction to consider the petition for review, the ALJ correctly concluded that Peco committed a serious violation of 29 C.F.R. § 1910.133(a)(1) by failing to protect its employees on the debone line from eye safety hazards. The plain meaning of the term "flying particles" encompasses drops of liquid splatter, and substantial evidence supports the ALJ's finding that Peco's debone line workers' eyes were exposed to eye safety hazards from flying particles of liquid splatter. Peco also could have known with the exercise of reasonable diligence that its workers were exposed to eye safety hazards for which eye protection was necessary, as it is common in the industry for debone line workers to wear safety glasses, the liquid splatter hazard was obvious, and both Peco's process assessments and a previous eye injury caused by liquid splatter should have alerted the company that eye protection was needed on the debone

line. And, the ALJ correctly rejected Peco's argument that compliance with § 1910.133(a)(1) would create a greater hazard than non-compliance because Peco failed to prove that using safety glasses on the debone line would create tripping, cutting, or food safety hazards that are greater than the eye safety hazard that the liquid splatter poses to the company's debone line workers.

ARGUMENT

I. Peco's Petition for Review Was Not Timely Filed and Must Be Dismissed For Lack of Jurisdiction.

The Federal Rules of Appellate Procedure require that a petition for review of an agency order be filed with the Clerk "within the time prescribed by law," Fed. R. App. P. 15(a)(1), and the OSH Act states that petitions for review of Commission final orders must be filed "within sixty days following the issuance of such order." 29 U.S.C. 660(a). Statutory filing timeframes are "mandatory and jurisdictional," and "and if a party fails to appeal 'within the time limited by the acts of Congress, [the case] must be dismissed for want of jurisdiction.'" *Nyffeler Const., Inc. v. Sec'y of Labor*, 760 F.3d 837, 841 (8th Cir. 2014) (*quoting Bowles v. Russell*, 551 U.S. 205, 209, 213 (2007)). A jurisdictional statutory filing deadline cannot be extended by a court of appeals for equitable reasons. *Id.* (citing *Dolan v. U.S.*, 560 U.S. 605, 610 (2010)); *see also* Fed. R. App. P. 26(b)(2) (stating that the court may not extend for good cause the time for filing a petition for review of an order of an administrative agency unless specifically authorized by law).

Accordingly, when filing a petition for review under 29 U.S.C. § 660(a), "[c]ourts of [a]ppeals have no jurisdiction to grant relief from a final [Commission] order unless an appeal is filed within the sixty day period following the date the order becomes final." *Consolidated-Andy, Inc. v. Donovan*, 642 F.2d 778, 779 (5th Cir. Unit A Apr. 1981)[6] (citations omitted).

An ALJ's written decision (or, "report") that has not been directed for discretionary review becomes a final order of the Commission thirty days after it was made. 29 U.S.C. 661(j); 29 C.F.R. § 2200.90(d). The Commission's procedural rules further clarify that "the date of docketing [by the Commission] of the Judge's report is the date that the Judge's report is made for purposes of section 12(j) of the Act, 29 U.S.C. 661(j)." *Id.* § 2200.90(b)(2). In short, when an ALJ's decision is not directed for discretionary review, it becomes a final order of the Commission thirty days after it is docketed by the Commission, and a party's petition for review must be filed with an appropriate court of appeals within sixty days of the date that the decision became a final order.

Here, Peco requested that the case be assigned for adjudication under the Commission's Simplified Proceedings, App.3, the rules for which are articulated in subpart M of part 2200. The Commission assigned the case for Simplified

[6] "Under the ruling in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), Fifth Circuit decisions rendered prior to October 1, 1981, are binding precedent in this court." *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1153 n.2 (11th Cir. 1994).

Proceedings, App.5, and following the October 29, 2015 hearing, the ALJ issued a written decision pursuant to 29 C.F.R. § 2200.209(f). Section 2200.209(g) instructs that an ALJ's written decision "shall be filed simultaneously with the Commission and the parties"; the ALJ therefore transmitted to the parties a Notice of Decision on December 18, 2015, which enclosed a copy of her decision, and explained that she was submitting her report to the Commission that same day. Supp.App. In accordance with 29 C.F.R. § 2200.90(b)(2)'s instruction that he do so "[p]romptly upon receipt," the Executive Secretary docketed the ALJ's report on December 21, 2015, and sent the parties a Notice of Docketing to alert them that the ALJ's decision had been docketed as of that date, and would become a final order of the Commission on January 20, 2016, unless a Commission member directed it for discretionary review. App.12.

Peco filed a timely petition of discretionary review with the Commission on January 11, 2016, App.13, but the Commission did not direct the decision for review within the thirty-day window.[7] The Executive Secretary therefore sent the parties a Notice of Final Order to confirm that the ALJ's decision had become a final order of the Commission, as scheduled, on January 20, 2016. App.14. The Notice of Final Order also reminded the parties that any petition for review of that

[7] Peco protests in its opening brief that the Commission did not provide an explanation for not granting its petition for discretionary review, Br. 2, 8, but there is no requirement in the Commission's rules that it provide such an explanation.

final order needed to be filed with the appropriate court of appeals within sixty days of the final order date. *Id*.

Triggered on January 20, 2016, the statutory time period for filing a petition for review ran until March 20, 2016. However, because March 20, 2016, was a Sunday, Fed R. App. P. 26(a)(1)(c) extended the filing period to the next business day, and Peco's petition for review thus needed to be received by the Clerk of Court no later than March 21, 2016, to be timely filed. *See* Fed. R. App. P. 25(a)(2)(A) (providing that a "filing is not timely unless the clerk receives the papers within the time fixed for filing"). Peco admits, however, that it did not file its petition with the Clerk of Court until after March 21, 2016.[8] Because the petition for review was filed after the sixty-day statutory timeframe expired, the court lacks jurisdiction and must dismiss this appeal. *Consolidated-Andy, Inc.*, 642 F.2d at 779.

Peco does not dispute this timeline of events, but instead argues that, on December 18, 2016, the ALJ "improperly" submitted her decision to the Commission for docketing on the same day that she sent the Notice of Decision to

[8] Peco's opening brief carefully avoids specifying the filing date of its petition for review, *see* Br. 2, 9, but it claimed in its response to the Court's jurisdictional question that it filed its petition for review on March 23, 2016. App.19, 8. The Court's jurisdictional question, however, identified March 22, 2016, as the filing date for the petition for review, App. 16, and the date stamp on the petition for review shows that it was received by the Clerk of Court on March 22, 2016. App.15. Regardless, it is undisputed that the petition for review was filed after the due date of March 21, 2016.

the parties, rather than waiting until "the eleventh day after the transmittal of [her] decision to the parties" to send the decision to the Commission, as provided in 29 C.F.R. 2200.90(b)(2). Br. 2, 8; *see also* App.19, 7-8. Peco's argument plainly fails, however, because the ten-day waiting period in 29 C.F.R. 2200.90(b)(2) does not apply to cases processed under the Commission's rules for Simplified Proceedings in subpart M of 29 C.F.R. part 2200. When Simplified Proceedings are used, the applicable rules unambiguously state that "[w]hen the Judge issues a written decision, it shall be filed *simultaneously* with the Commission and the parties," and that "[o]nce the Judge's order is transmitted to the Executive Secretary, §2200.90(b) applies, *with the exception of the 11-day period provided for in rule §2200.90(b)(2).*" 29 C.F.R. § 2200.209(g) (emphasis added).

Peco requested that the Commission handle this case using its Simplified Proceedings, and the applicable rules intentionally and unambiguously dispense with the ten-day waiting period for submitting an ALJ's decision to the Commission as part of its design to "reduce the time and expense of litigation." 29 C.F.R. § 2200.200. And, despite the quickened docketing of the ALJ's decision, Peco was able to timely file its petition for discretionary review (PDR) with the Commission on January 11, 2016. App. 13; 29 C.F.R. § 2200.91(b) (a PDR may be filed with the Executive Secretary within twenty days after the ALJ's decision is docketed). The ALJ and the Commission followed the rules to the letter, and

because the petition for review was not timely filed, this Court must dismiss the appeal for want of jurisdiction.[9] *Consolidated-Andy, Inc.*, 642 F.2d at 779.

II. Even if This Court Had Jurisdiction To Consider the Petition for Review, the ALJ Correctly Held that Peco Violated 29 C.F.R. § 1910.133(a)(1) by Failing to Provide Employees on the Debone Line with Eye Protection.

To establish a *prima facie* violation of an OSHA standard, the Secretary must prove by a preponderance of the evidence that (1) the standard applied to the cited condition, (2) the terms of the standard were violated, (3) one or more employees had access to the cited condition, and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in*

[9] Even if Peco's argument regarding the Commission's handling of the ALJ's decision had any merit, the company raised its alleged concern for the first time in its response to this Court's jurisdictional question. *See* App.19. Peco could have raised the issue in its timely-filed PDR, App. 13, but chose not to, and Peco's failure to raise the issue during the administrative proceeding renders it unreviewable by this court. *Power Plant Div., Brown & Root, Inc. v. OSHRC*, 659 F.2d 1291, 1294 (5th Cir. Unit B 1981) ("this court may not consider an argument unless the Commission has been 'alerted to the issues,'" because the Commission must "have the opportunity to pass on them before a court begins its review of the administrative process"); *Dresdner Bank AG v. M/V Olympia Voyager*, 446 F.3d 1377, 1381 n.1 (11th Cir. 2006) (the decisions of the Fifth Circuit's Administrative Unit B are binding on the Eleventh Circuit); *see also Modern Continental/Obayashi v. OSHRC*, 196 F.3d 274, 283 (1st Cir. 1999) (explaining that "failure to include an objection in a PDR means that it cannot be presented later to the court of appeals").

pertinent part, 681 F.2d 69 (1st Cir. 1982); *EMCON/OWT, Inc. v. Sec'y of Labor*, 224 Fed. Appx. 875 (11th Cir. 2007) (unpublished).[10]

Peco does not contest that debone line employees had access to the cited condition, Br. 12 n.4, but argues that the Secretary failed to prove the remaining three elements. Peco also claims that the ALJ erred by rejecting its argument that, even if the Secretary proved these *prima facie* elements, the company's non-compliance with the standard should be excused because requiring debone line employees to wear safety glasses would create greater safety hazards. As explained below, Peco's arguments are meritless, and even if the Court had jurisdiction to consider the appeal, the petition for review must be dismissed.

A. The ALJ Correctly Determined that 29 C.F.R. § 1910.133(a)(1) Applies Because the Term "Flying Particles" Encompasses Drops of Liquid Splatter, and Substantial Evidence Supports that Eye Safety Hazards from Liquid Splatter Existed on Peco's Debone Line.

The record evidence establishes both that 29 C.F.R. § 1910.133(a)(1) applied and that Peco violated the standard. The eye and face protection requirements of § 1910.133(a)(1) apply when employees are exposed to one of the sources of eye and face safety hazards listed in the statute – specifically, "flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation." The Court "should give a

[10] *See* Eleventh Circuit Rule 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

standard that is plain on its face its obvious meaning." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000); *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) ("A regulation should be construed to give effect to the natural and plain meaning of its words.").

Here, the ALJ correctly gave the plain language of the statute its obvious meaning by determining that "flying particles" included drops of liquid that splatter during the chicken deboning process. App.11, 8. In support of her plain reading, the ALJ looked to the dictionary definitions of "flying" and "particle" to find that the combined term "flying particles" means "a small portion of something moving in air," and rejected Peco's alternate reading – that the term "particles" should only cover solids – because, as she explained, "[t]o do so, I would have to find [that] a liquid is not *something*." *Id.* (emphasis in original). The ALJ did not, however, find that "flying particles," or any of the other sources of hazards listed in 29 C.F.R. § 1910.133(a)(1), could be "reasonably read to include a knife," and therefore found that the standard did not apply to Peco based on eye hazards that may be created by debone line workers' use of knives. *Id.*

In its opening brief, Peco offers two meritless challenges to the ALJ's interpretation of "flying particles": that a knife is not a "particle," and that the "regulation does not address flying water." Br. 14. The former argument is irrelevant because the ALJ did not affirm the citation on the basis of the hazards

allegedly created by the use of knives. *See* App.11, 8. The latter argument is also groundless, as Peco offers no argument or reasoning to support of its statement that flying drops of water are not "flying particles." To the contrary, the dictionary definition of "particle" that Peco offers in its opening brief matches the definition that the ALJ relied upon in its decision, *compare* Br. 12 *with* App.11, 8 (both defining "particle" as "a relatively small or the smallest discrete portion or amount of something"), and would plainly encompass drops of splattered liquids, be it water or otherwise.[11] Besides, the liquid splatter hazard observed on the debone line consisted not just of water, but also chicken juices, blood, fats, and other fluids. App.6, 20-21, 24.

Additionally, substantial evidence supports the ALJ's finding that liquid splatter actually created an eye safety hazard to Peco's debone line workers. The photographs of the debone line reveal an overtly "messy" process, from which the ALJ was able to observe "visible liquid on the product and in the area" and

[11] Even if the Court found "flying particles" to be ambiguous and "not free from doubt," the Secretary's interpretation of his own standard would be entitled to deference because it "sensibly conforms to the purpose and wording of the regulation." *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144, 150-51 (1991) (citation and internal quotations omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary's interpretation controls unless it is "'plainly erroneous or inconsistent with the regulation") (citations omitted). Interpreting "flying particles" to include drops of liquid furthers the standard's clear purpose of protecting workers from eye injuries, as eye exposure to any foreign material – and particularly, drops of liquid contaminated with raw chicken, fat, blood, or other poultry juices – creates the potential for a serious injury. App.11, 9 (citing *Vanco Constr. Inc.*, 11 BNA OSHC at 1060).

"chicken skin and fat splatter ... throughout the area." App.11, 7; *see* App.7, 16-22 (C-4a-C-4g); App.8, 170-71 (R-7 and R8). The ALJ also expressly credited CSHO Hynes' testimony[12] that "he observed splatter during the deboning process." App.11, 7; *see* App.6, 20 (CSHO Hynes stating that he observed "the splatter of fluids, blood, chicken parts, and skin), 24 (describing the debris from the process as "the juices, the blood, the fluids, the chicken parts, just splatter everywhere"). Furthermore, the work practices that Peco adopted to contain the liquid splatter – including training debone line workers to make cuts away from their body, App.6, 71, 101; App.11, 7, and having "debone line attendants" "wet the area so that things don't fly around," App.6, 100 – also indicate that liquid actually splatters on the debone line.

Moreover, Peco's injury logs confirmed that flying liquid (chicken blood) previously splashed into the eye of a debone line worker, App.8, 167 (R-5), and the results of Ms. Dunkling's safety goggle experiment further confirm that "drops of liquid fly toward the eyes of employees working on the debone line." App.11, 7 (citing App.8, 168-69 (R-6)). Accordingly, the ALJ's finding that a liquid splatter hazard existed on the debone line is soundly supported by "such relevant evidence

[12] Peco attacks CSHO Hynes' testimony as "self-serving and exaggerated," Br. 14, but this Court should defer to the ALJ's sound credibility determinations, as "[t]he credibility of a witness is in the province of the factfinder and this court will not ordinarily review the factfinder's determination of credibility." *Evans v. Books-A-Million*, 762 F.3d 1288, 1299-1300 (11th Cir. 2014).

as a reasonable person would accept as adequate to support a conclusion," and should therefore be upheld. *Quinlan*, 812 F.3d at 837.

To contest this finding, Peco claims that the Secretary did not show that "'flying particles' caused the 'splatter'" that was captured in the photographs of the line and observed during CSHO Hynes' inspection, noting that the Secretary did not adduce video or photographic evidence of the liquid splatter in-flight. Br. 14. The argument borders on the absurd. Peco admitted that the debone line's work results in splatter of "bone and fats and this kind of stuff on the floor or on the line," App.6, 74, and it is common sense that the debris and liquids that splattered on and around the debone line would have been in-flight before reaching the surrounding surfaces. *See Brock v. City Oil Well Serv. Co.*, 795 F.2d 507, 510 (5th Cir. 1986) (a court is not required to "check our common sense at the courthouse door"). Additionally, Ms. Dunkling's safety goggle experiment demonstrated that drops of liquid splatter actually fly through the air and land on workers' faces. App.8, 168 (R-6); App.6, 106-07. Furthermore, the work on the debone line requires workers to periodically reach overhead to sharpen their knives, App.6, 88, which supports the inference that liquid and debris would have splattered at the eye level of the debone line workers. *See P. Gioioso & Sons, Inc.*, 675 F.3d 66, 72 (1st Cir. 2012) (appellate court accepts the Commission's reasonable factual inferences under substantial evidence review).

Peco also erroneously alleges that no hazard existed because CSHO Hynes did not wear safety glasses during his inspection of the debone line area. Br. 14-15; *see also* Br. 7. Even assuming that CSHO Hynes' personal PPE choices are relevant to whether Peco's debone line process creates eye safety hazards from flying particles, the argument is factually incorrect; CSHO Hynes testified that Peco *gave* him "some attire to wear; lab coat, hair net, beard net for myself, overshoes," App.6, 19, but clarified that he *also* wore his own safety glasses and hard hat when he inspected the deboning line. App.6, 60 ("As I indicated, the company provided us with hair nets, beard nets, the gowns, overshoe coverings *and then our safety glasses and hard hats and a gown*.") (emphasis added).

Finally, Peco argues that it "complied with the terms of the standard" because it "made attempts to identify hazards on the debone line," and specifically, by conducting the hazard assessments that allegedly led it to conclude that eye protection was unnecessary. Br. 15-16. While this argument may be germane to whether Peco had knowledge of the hazardous condition created by the splatter on the debone line, *see infra* pp. 32-42, undertaking a hazard assessment does not constitute compliance with the terms of the standard, which require employers to "ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards" from one of the standard's enumerated hazard sources. 29 C.F.R. § 1910.133(a)(1). "It [was] undisputed [that] employees on the

debone line do not use eye protection," App.11, 10, and because the ALJ concluded from substantial evidence that "employees on the debone line are exposed to hazards associated with flying fluids toward their faces and eyes," Peco was not in compliance with the standard. *Id*.

B. Substantial Evidence Supports the ALJ's Determination that Peco Had Constructive Knowledge of the Liquid Splatter Hazards that Necessitated the Use of Eye Protection on the Debone Line.

To prove a serious violation of a PPE standard, the Secretary must show that the employer had either actual or constructive knowledge of the existence of a hazard requiring the use of PPE. *Donovan v. General Motors, GM Parts Div.*, 764 F.2d 32, 35 (1st Cir. 1985); *see also Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199 (No. 90–2304, 1993) (citation omitted) *aff'd*, 26 F.3d 57 (5th Cir. 1994) (the Secretary is not required to show "that the employer was actually aware that it was in violation of an OSHA standard; rather it is established if the record shows that the employer knew or should have known of the conditions constituting a violation"). The knowledge element of the Secretary's *prima facie* case refers to the physical conditions that constitute a violation, *Vanco Constr., Inc.*, 11 BNA OSHC at 1061 n.3, and constructive knowledge can be found where the employer could have known of the violative conditions "with the exercise of reasonable diligence." *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 319 (5th Cir. 1979).

Where the Secretary issues a citation for a violation of 29 C.F.R. § 1910.133(a)(1) but has not proven that the employer had actual knowledge of the hazard for which PPE is required, this Court has stated that the standard "generally requires only those protective measures which the employers' industry would deem appropriate under the circumstances." *Florida Machine & Foundry, Inc. v. OSHRC,* 693 F.2d 119, 120 (11th Cir.1982) (citing *S&H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1275 (5th Cir. Unit B 1981)) (additional citations omitted). Likewise, the Commission has stated in cases appealable to this Court that, unless actual knowledge is proven, "the Secretary must show that the protective equipment sought by the Secretary is what the employer's industry would deem appropriate under the circumstances." *Farrens Tree Surgeons Inc.*, 15 OSHC BNA 1793, 1794 (No. 90-998, 1992); *see also Williams Enterp. of Georgia, Inc.*, 12 BNA OSHC 2097, 2101 (No. 79-4618, 1986), *rev'd on other grounds,* 832 F.2d 567 (11th Cir.1987).

Here, the ALJ correctly determined that Peco "could have known of the need for eye protection with the exercise of reasonable diligence," App.11, 11, including finding that employers in Peco's industry would deem safety glasses to be appropriate PPE for workers on the debone line. *Id.*, 9 (finding that "safety glasses are recognized in the industry as commonly used equipment for employees working on debone lines"), 11 (finding that other industry employers "recognize

the need for eye protection for employees working on a debone line"). The ALJ explained that CSHO Hynes – who the ALJ found to be a credible witness, *id.*, 7 – provided "unrebutted testimony that other chicken processing facilities use protective eye wear on the debone line." App.11, 9; App.6, 29-30, 50-51. Not only should the Court defer to the ALJ's sound credibility finding, *Books-A-Million*, 762 F.3d at 1299-1300, but the ALJ properly afforded his testimony probative weight because Peco offered no evidence regarding industry practices to contradict it. App.11, 9 (stating that "[n]one of Peco's witnesses testified regarding their knowledge of industry practice"); *see Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 226 (1939) (explaining that "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse," and "[s]ilence then becomes evidence of the most convincing character").

In fact, Mr. Bradley's testimony – in which he stated that Peco had determined that food safety concerns outweighed the benefits of allowing safety glasses to be used on the debone line – suggests that Peco recognizes that safety glasses are appropriate PPE for debone line workers, but forbade their use in order to reduce the company's consumer product liability. App.11, 9; App.6, 119. And, though Peco did not permit workers to wear them on the debone line, Onin supplied its temporary workers at Peco with safety glasses, App.11, 9; App.6, 53,

59-60, which further indicates that the industry considers eye protection to be appropriate under the circumstances. Taken altogether, substantial evidence supports the ALJ's finding that using safety glasses on debone lines comports with the poultry processing industry's common practices, and the finding should therefore be upheld.[13] *Quinlan*, 812 F.3d at 837.

The ALJ's industry practice finding alone demonstrates that Peco had constructive knowledge of the violative conditions on the debone line, *Owens–Corning Fiberglass, Corp.*, 659 F.2d 1285, 1288 (5th Cir. Unit B 1981); *see also Peavey Co.*, 16 BNA OSHC 2022, 2024, (No. 89–2836, 1994) (evidence that other employers in the industry actually provide the PPE at issue demonstrates that a

[13] Peco weakly contests the industry practice finding by alleging that CSHO Hynes' testimony was "self-serving," Br. 16, and claiming (without further explanation or support) that his testimony regarding the practices of two other poultry processors is insufficient to prove that using safety glasses on debone lines comports with industry practices. Br. 19. As explained above, not only was CSHO Hynes' testimony credited and not contradicted by any opposite evidence, but the ALJ's finding also relied on Onin's practices and the testimony of Mr. Bradley. App.11, 9. Peco further notes that the Commission in *Wal-Mart Distrib. Ctr. No. 6016*, 25 BNA OSHC 1396 (No. 08-1292, 2015) ("*Wal-Mart*") "rejected" a CSHO's testimony about industry PPE practices to find that constructive knowledge of an eye safety hazard was not proven. Br. 18-19. But, in *Wal-Mart*, the CSHO only testified that "employers in Wal-Mart's industry '[t]ypically ... have a blanket policy of [requiring the use of] safety glasses'" without offering specific facts to support his claim, and his testimony "was contradicted by Wal-Mart's Safety Director, who testified that the company's decision not to require the use of eye/face protection was in line with the rest of its industry." *Wal-Mart*, 25 BNA OSHC at 1404. Here, CSHO Hynes testified about specific poultry processors where safety glasses are used on the debone line, App. 6, 29-30, 50-51, and Peco offered no evidence to contradict that the industry would deem such PPE to be appropriate. App.11, 9.

reasonably prudent employer would recognize the existence of hazardous conditions and provide protection), but additional evidence further demonstrates that Peco could have known about the hazardous conditions on the debone line with the exercise of reasonable diligence. First, the photographs of the debone line reveal that the messiness of the debone line's work is "obvious to any observer." App.11, 11; *see also* 9 (noting the "obvious nature of the hazard"); App.6, 24 (CSHO Hynes explaining that App.7, 21 (C-4f), shows "the juices, the blood, the fluids, the chicken parts, just splatter everywhere"), and the obviousness of a hazard is an appropriate consideration when determining whether an employer should have known about hazardous conditions. *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 589 (D.C. Cir. 1985) (constructive knowledge may be proven where a violation is based on "physical conditions and on practices … which were readily apparent to anyone who looked—and indisputably should have been known to management"); *cf. Tri-State Roofing & Sheet Metal, Inc. v. OSHRC,* 685 F.2d 878, 880–81 (4th Cir. 1982) (if it is "obvious and glaring," the Commission may find that a hazard is recognized for purposes of the general duty clause, 29 U.S.C. § 654(a)(1), without additional evidence of recognition).

Furthermore, the incident where chicken blood splattered into a debone line worker's eye just two years earlier should have alerted Peco that debone line workers required eye protection from flying particles of liquid splatter, App.11, 11;

App.6, 28, 47; App.8, 167 (R-5). Ms. Dunkling's safety goggle experiment – which revealed that a substantial number of liquid drops actually splattered onto debone line workers' goggles, App.11, 8-9, 11; App.6, 103-107; App.8, 168-69 (R-6) – also confirms that Peco could have known that drops of liquid regularly splattered onto debone line workers' eyes and face. Additionally, Peco's efforts to control the splatter – such as "wet[ting] things down so that things don't fly around," App.6, 100 – further indicates that the company knew that work on the debone line produced substantial liquid splatter. App.11, 11. Combined with the fact that safety glasses are commonly worn by debone line workers in the poultry processing industry, the evidence overwhelmingly demonstrates that Peco should have known about the liquid splatter hazards to which its debone line workers' were exposed, which more than satisfies this Court's deferential "substantial evidence" review of the ALJ's constructive knowledge finding. *Quinlan*, 812 F.3d at 837.

Asserting that it had neither actual[14] nor constructive knowledge of the hazardous conditions on the debone line, Peco again cites the hazard assessments

[14] Peco's argument that it had no actual knowledge of the eye safety hazard on the debone line, Br. 17-18, is largely irrelevant because the ALJ determined that Peco had constructive, not actual, knowledge of the hazard. App.11, 11. The Secretary, however, notes that the evidence in the record was sufficient to establish that Peco had actual knowledge of the violative condition on the debone line; Peco's splatter control practices, the positive results from Ms. Dunking's safety goggle experiment, and the 2013 eye injury from splattered chicken blood all indicate that

that it contends led it to conclude that eye protection was unnecessary. Br. 15-16. The ALJ, however, considered Peco's assessments and reasonably determined that they deserved minimal probative weight. Specifically, the ALJ found that the March 2015 assessment – which Ms. Dunkling conducted while OSHA's inspection was still in progress, and at a time when she admits that she was "inexperienced,"[15] App.6, 98 – appeared to be an "after-the-fact justification" for the eye injury that prompted OSHA's inspection, App.11, 8, 11, citing, for example, the unusual note that she included on the assessment form stating that "no goggles are required for this job." App.11, 8 n.7; *see* App.8, 161 (R-2). Moreover, the ALJ reasonably afforded minimal weight to Ms. Dunkling's testimony regarding her safety goggle experiment because she failed to give any explanation for why the experiment's results – which showed that "liquid reached an employee's eye area for more than half the tasks observed for only one hour of the shift" – prompted her to conclude that eye protection was *not* required.

Peco actually knew that debone line employees were exposed to, but not protected from, eye safety hazards. *Vanco Constr., Inc.*, 11 BNA OSHC 1058 at 1061 n.3 (knowledge element refers to whether the employer knew about the physical conditions that constituted the violation). In fact, Mr. Bradley's testimony that food safety concerns outweigh the benefits of safety glasses, App.6, 118-120, suggests that Peco knew about the hazardous condition, but forbade the use of safety glasses to minimize its risk of consumer product liability.

[15] Ms. Dunkling had been with Peco for one year at the time of the October 2015 hearing, and joined the company after working for nine years as a nurse, but had no prior experience working in the chicken processing industry. App.6, 90, 91, 113.

App.11, 8-9. To the contrary, her experiment only further demonstrated to the ALJ that "a careful review of the process would have revealed [that] employees were exposed to an eye hazard, necessitating protection." *Id.*, 11.

The ALJ also gave little weight to Peco's 2013 assessment of the debone line because Peco failed to call either of the employees who conducted the assessment to testify regarding its methodology and conclusions, even though one of those individuals (Mr. Johnston) was listed as a witness and attended the hearing. App.11, 11 n.9; *see* App. 8, 163 (R-4). In sum, the ALJ reasonably afforded minimal probative weight to Peco's assessments, and, in keeping with the substantial evidence standard of review, this Court should defer to the ALJ's well-reasoned analysis of the evidence. *Fields v. U.S. Dept. of Labor Admin. Review Bd.*, 173 F.3d 811, 814 (11th Cir. 1999) (the reviewing court does not reweigh the evidence or substitute its judgment for that of the agency); *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005) (substantial evidence standard precludes the reviewing court from "deciding the facts anew, making credibility determinations, or re-weighing the evidence").

Peco also points to the low rate of prior eye injuries on the debone line to claim that Peco lacked knowledge of the hazardous condition, Br. 16, 17, but the argument is unavailing. The OSH Act is meant to be "forward-looking" and "to prevent the first accident," *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1275 (6th Cir.

1987), and "the presence of past injuries is unnecessary for a finding of noncompliance" with a PPE standard. *Arkansas-Best Freight Sys., Inc. v. OSHRC*, 529 F.2d 649, 655 (8th Cir. 1976). And, while some courts use injury rates as part of their tests for constructive knowledge of a hazard, *see, e.g., Corbesco v. Dole*, 926 F.2d 422, 427 (5th Cir. 1991) (employer's constructive knowledge of an unspecific regulation's requirements is whether the requirements may be derived from other sources such as industry custom and practice; the injury rate for the particular type of work; the obviousness of the hazard; and the Commission's interpretations of the regulation), injury rates are irrelevant where the hazard is obvious and objectively foreseeable. *Corbesco*, 926 F.2d at 427; *Arkansas-Best Freight Sys.*, 529 F.2d at 654-55; *see also Kroehler Mfg.*, 6 BNA OSHC 2045, 2047 (No. 76-2120, 1978) ("The lack of recorded injuries in many years, while having some probative value, does not in our view rebut the objective evidence of exposure to a hazard."). Here, the eye safety hazard created by the liquid splatter on the deboning line was obvious, and should have been foreseen given the common use of safety glasses in the industry, Peco's awareness of the substantial splatter produced on the line, and the previous eye injury caused by liquid splatter. *See supra* pp. 34-38.

The case law to which Peco directs the Court does not further its cause, as neither *Wal-Mart* nor *Dept. of Labor v. OSHRC (Goltra Castings)*, 938 F.2d 1116

(10th Cir. 1991) supports Peco's suggestion that a low rate of prior injuries prohibits a finding of constructive knowledge of a hazard. In fact, after the courts in *Wal-Mart* and *Goltra Castings* established that the rate of prior injuries was low, each went on to analyze whether other evidence – and particularly, industry custom and practice evidence – nonetheless indicated that the employer had constructive knowledge of the hazardous condition. As noted *supra* p. 36 n.13, the Commission in *Wal-Mart* found that the Secretary's industry custom evidence did not establish constructive knowledge because the CSHO's testimony about typical industry practices was outweighed by contradictory testimony offered by the employer. *Wal-Mart*, 25 BNA OSHC at 1404. Similarly, in *Goltra Castings*, the Secretary offered testimony that face shields were commonly worn by workers who pour molten metal, but the court found that the extensive contradictory testimony presented by the employer – which explained how the employer's pouring operations were distinguishable from typical industry processes – outweighed the Secretary's evidence, thus rendering constructive knowledge unestablished. *Goltra Castings*, 938 F.2d at 1119-20. In this case, however, while prior eye injuries on Peco's debone line were infrequent, App.11, 10, the record in this case is devoid of *any* evidence to contradict the ALJ's substantially supported finding that safety glasses are commonly used on debone lines in the poultry industry.

C. Substantial Evidence Supports the ALJ's Finding that Peco Failed to Prove that Using Safety Glasses on the Debone Line Would Pose a Greater Hazard than Non-Compliance With the Standard.

To establish the affirmative defense[16] of "greater hazard, the employer must prove by a preponderance of the evidence that: (1) the hazards of complying with the standard would have been greater than the hazards of non-compliance; (2) alternative means of protecting employees were either used or were not available; and (3) a variance[17] was unavailable or inappropriate." *M.C. Dean, Inc. v. Sec'y of Labor*, 505 Fed.Appx. 929, 937 (11th Cir. 2013) (unpublished) (citing *E & R Erectors, Inc. v. Sec'y of Labor*, 107 F.3d 157, 163 (3d Cir. 1997)). The employer bears the burden to prove this affirmative defense. *Donovan v. Williams Enters.*, 744 F.2d 170, 178 (D.C. Cir. 1984).

Peco argues that two "greater hazards" would be created by using safety glasses on the debone line: (1) the lenses of the safety glasses would fog and

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[16] Affirmative defenses "are derived from the common law" and raise "matters extraneous to the plaintiff's *prima facie* case" to defend against a claim. *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986); *see also U.S. Postal Serv.*, 24 BNA OSHC 2066, 2068 (No. 08-1547, 2014) (rather than negating an element of the plaintiff's *prima facie* case, an affirmative defense "raises arguments or new facts that, if proven, defeat a plaintiff's claim even if the allegations in the complaint are true") (citations omitted).

[17] Any affected employer may apply to the Secretary for a variance from an OSHA standard, which shall be issued if the employer carries its burden of demonstrating that the practices proposed to be used by the employer will provide employment conditions "as safe and healthful as those which would prevail if he complied with the standard." 29 U.S.C. § 655(d).

increase the likelihood of tripping or cutting injuries; and (2) the risk that safety glasses would get into Peco's food products would create a safety hazard to its consumers. Br. 9, 18-20. The ALJ, however, properly rejected this defense, as Peco failed to prove that either of these alleged hazards would occur if safety glasses were worn, *see Roanoke Iron & Bridge Works, Inc.*, 5 BNA OSHC 1391 (No. 10411, 1977) (finding that "the basic element of the defense" was not proven where facts did not establish the existence of the allegedly-greater hazard), nor did it prove that the alleged hazards would be greater than the eye safety hazard to which its unprotected debone line workers were exposed. *See* App.11, 13-15.

First, Peco's argument that safety glasses would fog and create cutting and tripping hazards necessarily fails because the company did not contest CSHO Hynes' testimony that safety glasses with defogging capabilities are available,[18] App.11, 13; App.6, 123, or otherwise show that effective safety glasses are not available. App.11, 14. Although CSHO Hynes speculated that defogging-capable safety glasses might not result in a "100 percent" elimination of fogging, he

[18] During the below proceeding, Peco also raised the affirmative defense that compliance with the standard was infeasible, but the ALJ likewise rejected it, App.11, 12-13, in part because Peco did not contest CSHO Hynes' testimony that safety glasses with defogging capabilities are available. App.11, 13; App.6, 123. Peco did not appeal the ALJ's rejection of its infeasibility defense, and the argument is therefore waived. *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994) ("Issues that clearly are not designated in the initial brief ordinarily are considered abandoned.") (citation omitted).

clarified that such safety glasses are designed to "acclimate to the area." App.6, 124. Ms. Prince claimed that her *prescription* glasses that had "defog protection" would still fog in the debone line area, App.6, 72, 79-80, but her testimony was not relevant to whether *safety* glasses with defogging capabilities would be effective at Peco's facility, and the ALJ thus found that her testimony did not "establish that all safety glasses with defogging capabilities are ineffective."[19] App.11, 13.

Furthermore, in contrast to the multiple prior eye injuries on the debone line, *see* App.6, 28, 47, 82-83, 102-03, 124, Peco offered no evidence that prior recordable injuries had been caused by fogged safety glasses, App.11, 14, other than Ms. Prince's bare statement that a worker once tripped due to fogged glasses. App.6, 73. And, regarding Ms. Dunkling's assertion that using fogged glasses would increase the risk of cutting injuries on the line, App.6, 108, the ALJ noted that Peco's debone line workers already "wear cut resistant gloves to prevent the type of injury [that] Peco speculates might occur." App.11, 14. Accordingly, Peco did not carry its burden of proving that wearing appropriately-designed safety glasses would create a hazard, nor did it prove that the hazard that fogging safety

[19] Peco also notes in its opening brief that, during Ms. Dunkling's safety goggle experiment, one worker refused to wear the goggles due to his concerns about fogging issues, and that tested workers repeatedly touched the goggles with their hands due to fogging. Br. 6; App.6, 107-08. To be clear, however, Ms. Dunkling used safety *goggles*, not safety *glasses*, for this experiment. App.6, 104-105. CSHO Hynes agreed that safety goggles would not be appropriate on the deboning line because of their insufficient ventilation and defogging capabilities. App.6, 122-23.

glasses would allegedly create would be greater than the eye safety hazard to which Peco's unprotected debone line workers were exposed.

Peco's food safety-related argument also fails, as the ALJ explained that there is no existing "Commission precedent upholding the greater hazard defense based on a hazard to the employer's customer or the public created by compliance with a standard." App.11, 14. Peco has not disputed this statement or otherwise offered case law indicating that a "greater hazard" defense can rest on the hypothetical consequences that compliance could have on the consumers of the employer's products. To the contrary, Commission precedent indicates that the hazards of which the defense is concerned do not extend beyond those that endanger the safety and health of the employer's employees. *Indus. Steel Erectors, Inc.*, 1 BNA OSHC 1497, 1499 (No. 703, 1974) ("What is intended [by the greater hazard defense] is permitting the assertion of an affirmative defense by an employer [that] *the safety or health of employees* would be endangered rather than protected by compliance with a standard…."); *Russ Kaller, Inc.*, 4 BNA OSHC 1758, 1759 (No. 11171, 1976) ("The Commission has not read section 5(a)(2) so literally as to require a form of compliance that will diminish rather than enhance *the safety of employees*.") (citations omitted) (emphasis added).

Even if the greater hazard defense could support Peco's theory, Peco failed to prove that using safety glasses would create a "potential hazard to the customer

[that] exceeds the hazard to employees." App.11, 14. Peco did not demonstrate that using safety glasses on the debone would line would be reasonably likely to create a food safety hazard, as it offered only one anecdote of an incident where a fully-intact pair of safety glasses fell off an employee's head and into its food product. App.11, 14; App.6, 77. And, despite the food safety risk that the presence of safety glasses supposedly creates, Peco did not explain why the safety glasses worn by the worker who operated its saw cutter, App.6, 25, 75-76, 99, or the prescription glasses that employees (such as Ms. Prince) wore in the facility, *id*., 72, 79-80, were nonetheless permitted to be worn. App.11, 14. Mr. Bradley testified that using safety glasses on the debone line would create food safety risks that "outweigh the benefit" of using them, App.6, 118, but he did not articulate why the alleged risk to consumers is "greater" than the risk of eye injury that debone line workers face from flying particles of liquid splatter. Accordingly, the ALJ reasonably determined that Peco did not prove that its largely-hypothetical food safety concerns outweigh the eye safety hazards to which it's debone line workers are exposed. App.11, 14.

Substantial evidence thus supports the ALJ's finding that Peco failed to prove the first prong of the greater hazard defense, and the Court should therefore uphold it, *Quinlan*, 812 F.3d at 837, but Peco's defense also fails because the company offered no evidence to satisfy the second and third prongs of the test.

Peco did not produce any evidence that "alternative means of protecting employees were either used or were not available," or that a variance was unavailable. *Donovan v. Williams Enters.*, 744 F.2d at 178-179 n.12 (D.C. Cir. 1984) (quoting *True Drilling Co. v. Donovan*, 703 F.2d 1087, 1091 (9th Cir. 1983) ("An employer is required to seek a variance as a precondition to asserting the greater hazard defense in order to discourage employers from unilaterally and perhaps incorrectly concluding their employees would be better protected by deviating from the prescribed safety standards."). There is no evidence that Peco attempted to obtain a variance from OSHA, nor has it offered any evidence or argument as to why obtaining a variance from 29 C.F.R. § 1910.133(a)(1) would be inappropriate. Accordingly, Peco failed to prove all three prongs of the greater hazard defense, and the ALJ's rejection of the defense should be upheld.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2016, the following counsel of record for Peco Foods, Inc., was served with a copy of the foregoing Brief for the Secretary of Labor through the Court's CM/ECF filing system:

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